In the Matter of the Commission of Inquiry into the Circumstances and Events Surrounding the Death of Anthony O'Brien (Dudley) George

SUBMISSIONS ON BEHALF OF THE RESIDENTS OF AAZHOODENA (ARMY CAMP)

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I. INTRODUCTION

1. In its April, 2004 application for standing and funding before this Inquiry, the Aazhoodena people were presented as "a persistent and cohesive organization that has been in place for the past decade". It housed in excess of seventy residents (the **"Residents**"), twenty-five of whom were called as witnesses. Without backing away from their involvement in the occupation of the range, the takeover of the barracks and/or the takeover of "the park", they gave their evidence and were subjected to extensive and intensive cross-examination. Their evidence, taken as a whole, is reflective of political action and an uprising and not a series of individual or joint enterprise criminal acts. As recognized by Magistrate Judge Janice Stewart in the *United States of America* v. *James Allan Scott Pitawanakwat*[1] extradition decision, and by way of early and singular submission, they seek to focus this Inquiry on the necessary distinction between political action and criminal conduct. They further take the position that absent the testimony of successive federal parliamentarians and senior bureaucrats, the late Inspector Dale Linton, Sergeant Marg Eve and Kenneth Dean (all three deceased), it would be manifestly unfair if, in its findings, this Commission was to cite any of these witnesses as having been involved in any wrongdoing.

2. During the period of their occupation, they neither had staff, equipment, funding nor the capacity to create a *seriatim* documentary record, but their recall of incidents between May 1993 and the date on which they gave testimony can only be classified as remarkable. When contrasted with government witnesses and the police, it is clear that the collective testimony of the Aazhoodena witnesses was devoid of tailoring, was persuasive, and ought to be accepted as

[1] 120 F. Supp. 2d 921 [hereinafter *Pitawanakwat*].

credible. The testimony of many of the government witnesses was generally inconsistent and the testimony of the police witnesses was materially conflicting and appeared to be governed by whether or not they were caught on tape. The Residents submit that the actions of government and police behind closed doors should withstand scrutiny under the light of day.

3. The Residents regard the entire sequence of events culminating in the occupation of Stoney Point lands and the unfortunate death of Dudley George as political, and regretfully categorize the response of the governments of Canada and Ontario (based on the documentary record and testimony) as being driven by a culture of indifference to the concerns of Aboriginal people and disregard for the concept of the Honour of the Crown in addressing grievances that they consider to be of a serious nature. Ontario Government thinking as demonstrated by its conduct, professed to be without communication and linkage, appeared to be shared by a senior officer of the Ontario Provincial Police (the "**Police**"). Whether or not information was exchanged with or directives were handed down from government to the Police hardly matters in that the pervasive prerogative culture at the higher levels of government and the Police, however arrived at, was wrong. As these attitudes filtered down through the ranks, they became further contaminated and translated into caustic and contemptuous disregard for Aboriginal people. The language of the officers caught on tape and the celebrations and memorabilia after the death of Dudley George cannot be exaggerated. The Residents did not (and do not) see themselves as a "**minority group**" entitled to or seeking minority group protection. To the contrary, they adopt the statement of Chief Justice Lamer in the *Van der Peet*[2] decision, to wit:

> . . . when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures,

[2] R. v. Van der Peet, [1961] 2 S.C.R. 507 [hereinafter *Van der Peet*]

> as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

4. The Residents are the descendents of those who or on behalf of whom the Treaty of 1827 was signed with the Crown, a treaty from which substantial benefits have flowed to Canada and which has put Canada, in spite of its comparatively small population, initially among the G5, and now among the G9 countries.

5. In these submissions, the Residents do not see a need to introduce themselves. The record produced at this Inquiry, including the testimony of the twenty-five of their own, speaks for itself.

6. As to "the issue" or "issues" to be addressed in these submissions, the Residents are mindful of the Terms of Reference of this Inquiry, which, when analyzed, require an understanding of the "circumstances" against which "the events surrounding the death of Dudley George" must be assessed so that with respect to future "similar circumstances" recommendations "directed to the avoidance of violence" could be made.

7. Had the occupation by the Residents been an isolated incident for Canada, or indeed Ontario, it *might* have been sufficient to assume that there was no need to look behind the occupation, but only at its consequences, specifically related to perceived government interference and the Police killing of Dudley George. However, as recognized by Magistrate Judge Stewart, based upon facts put before her by Canada seeking extradition of Pitawanakwat and his legal resistance of same:

> Lake Gustafsen was only one of many incidents involving native people during the summer of 1995. That same summer saw other protests, road barricades, and occupations of parks and private property across Canada. . . . In July 1995, about 100 rebel Chippewas occupied a military camp in Ontario and the neighboring reserve. . . . In September 1995 about 40 rebel members of the Kettle and Stony Point tribes occupied the neighboring Ipperwash Provincial Park in Ontario, asserting that it was the site of a sacred burial ground. The Ipperwash incident involved a gun battle which became deadly when police shot and killed one protestor and injured two others.[3]

8. Magistrate Judge Stewart makes further quotes from the Canada criminal trial Judgment where, in imposing the sentences, the court gave the following explanation:

> Briefly stated, this country has a long history of civil protest in support of causes believed to be just. Where the form of protest crosses the line into criminal activity, there are criminal consequences to be borne. This is so regardless of the perceived justice of the causes.
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> This country is grappling with native land claims. The band led by Chief Agnes Snow, for example, is advancing such a claim over the land in question. These claims are being advanced diligently in a responsible and lawful manner, despite the obvious frustrations.
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> There is no question that all accused genuinely believe in the justice of their cause, though some no longer advocate the unlawful use of weapons to further that cause. All felt great frustration at the failure to achieve any success for their cause in the courts or through other lawful channels. Nor did they enjoy the support of local elected bands who, along with the Assembly of First Nations, are dismissed by them as government collaborators.
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> What separates the Gustafsen Lake stand-off from other forms of civil protest and even unlawful civil disobedience was the use of weapons, violence and threats of violence to prevent their removal from the land should their demands not be met.
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> **If police had been prepared to risk almost certain loss of life with an armed entry to effect arrests, the incident would have ended quickly. They wisely chose a course calculated to minimize that risk. This required patience and the costly deployment of hundreds of officers working in shifts to contain this remote and isolated area. It also required the use of armoured personnel carriers designed to deploy and retrieve officers in safety. It required the use of negotiations and intermediaries. Mistakes were certainly made and events**

[3] *Supra* at note 1 926, 927.

> **took unexpected turns, but ultimately the plan proved successful, though the cost to the public was high.**[4] [emphasis added]

9. In further analysis, Magistrate Judge Stewart noted:

> In a very fundamental sense, the Lake Gustafsen incident is analogous to other separatist movements around the world, including the PIRA in Ireland, the Tamils in Sri Lanka, the Basques in Spain, as well as various insurrections in Eastern Europe and Africa. All are violent efforts by indigenous people to overthrow an occupying government in an effort to achieve self-rule. Similarly, the Lake Gustafsen incident involved an organized group of native people rising up in their homeland against the occupation by the government of Canada of their sacred and unceded tribal land. They sought to regain sovereignty by ousting the occupation and control of the Canadian government to those lands. If the Quebec separatist movement in Canada resorted to violence, then it could easily fall into the same category. Quebec separatists do not seek to abolish the government of Canada, but instead seek to displace the Canadian government from controlling Quebec, just as defendant and others involved in the events of the summer of 1995 sought to displace control of the Canadian government over unceded tribal lands.
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> As the government argues, the Lake Gustafsen incident and other incidents during the summer of 1995 were directed against a governmental policy regarding title to unceded aboriginal land. However, to characterize the Ts'peten Defenders as engaged in a mere land dispute or disagreement with government policy is to trivialize the nature of the controversy. Control over land is one of the primary reasons for the existence of a government and often is the cause of wars between nations. Given its substantial economic consequences, the aboriginal land title question in Canada clearly is a highly charged issue for both native and non-native people.[5]

10. In final analysis, and ensuring not to trivialize the nature of the controversy, Magistrate Judge Stewart further stated:

> Crimes committed during the Civil Rights Movement of the 1960's and 1970's in the United States also provide a close, but not precise analogy. African-Americans did not advocate for a separate nation, but worked within the system to enforce existing laws and to pass new legislation guaranteeing their equal rights. Therefore, their crimes would not be protected by the political offense

[4] *Ibid* at 927.
[5] *Ibid* at 937.

> exception. In contrast, defendant and the Ts'peten Defenders were advocating for self-determination over unceded tribal lands.
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> The Lake Gustafsen incident was not an isolated violent incident incited by a mere handful of insurgents, as contended by the government. Instead, according to the evidence submitted by defendant, it was part of a broader protest in 1995 aimed at the Canadian government in support of sovereignty by the native people over their land. The trespassing dispute was an opportunity for the native people to affirm their sovereignty against the Canadian government, which, if successful, could have dramatically altered the political landscape of Canada. As the sentencing judge readily acknowledged, the Lake Gustafsen incident began as a form of civil protest that crossed the line into criminal activity. . . . In fact, it appears that had the judge allowed the "colour of right" defense, then defendant may well have been acquitted. . . . **The "colour of right" defense is available to a person who truly believes that he is acting within the law and was used to acquit many of those charged in the Ipperwash incident.**[6]
> [emphasis added]

This decision was apparently accepted by both parties and was not appealed.

11. It is against these real issues that submissions on behalf of the Residents have attempted a skeletal review of the development of English property law and its “codification” by way of the Statute of Tenures of 1660.[7]

12. In the early 1800’s, the United States of America held the view that title was acquired through conquest (and without addressing the legal question of what title could be obtained by conquest), it is sufficient to note that the situation in Canada is different and involved distinct peoples with different concepts of the use of land entering into treaties. The Treaty of 1827, *inter alia,* allowed Canada to share in First Nations’ specifically identified lands and resources. Not part of these treaty lands were other lands that were left separate for the exclusive use and benefit of the First Nations.

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[6] *Ibid* at 937, 938.
[7] (Imp), C. 24 [hereinafter *Statute of Tenures*].

13. Recommendations on behalf of the Residents will be mindful of the fact that there are now a number of stakeholders with different interests and will relate mainly to course correction so that within reasonable time, the expectation interests embraced by the Treaty of 1827 could have a chance of being fulfilled. In the short term, "band aid" and "quick fix" applications necessary to prevent different views and resulting disagreements from translating once again into open conflict and the opportunity for the use of lethal force will have to suffice.

14. The Residents are of the view that political problems such as those underpinning the circumstances leading to this Inquiry must be dealt with by realistic and even handed political processes rather than being turned into policing problems. With respect to police conduct, focusing specifically on 1993 and after, the Residents still cannot understand, and will make no accommodation for the racist attitudes and poor policing practices as exhibited by the Police throughout the entire term of the occupations. They recognize, however, that the Police were put in a "no win" situation by politicians, both federal and provincial, assisted with misleading information by the Band Government intent on promoting its own agenda.

15. The Residents do not countenance the difference in respect for treaties which they made with the Crown, and the reverence shown by Canada with respect to treaties with other nations, and seek to have their own treaties respected to the same degree. This was the thinking behind the Two Row Wampum and accepted by the Crown at the time of Treaty. In reliance on the Crown at that time, no dispute resolution mechanism was written into the documents. Perhaps it is time that, with recommendation of this Inquiry, a mechanism other than the courts address treaty and Aboriginal land entitlement issues. To quote from the *Delgamuukw* decision and the

encouragement of the Supreme Court of Canada that some disputes are better settled other than in Court:

> As was said in Sparrow, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, supra, at para. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".[8]

The Aazhoodena people agree that “we are all here to stay”.[9]

II HISTORICAL CONTEXT

16. The events surrounding the death of Dudley George, akin to *causation* in law, require examination and an understanding of the circumstances and driving forces informing the police killing of Dudley George on September 6, 1995. This examination cannot be performed in a vacuum, and its scope cannot be restricted to only the events of September 6, 1995, or even the period of September 4 to 6, 1995. Proper context is required, and a thorough appreciation of the historical interaction between Native and non Native communities.

17. Context requires an understanding of the mindset of the men, women and children resident at Aazhoodena current at the time of the coming together of the constellation of events

[8] *Delgamuukw* v. *British Columbia* [1997] S.C.J. No. 108 [hereinafter *Delgamuukw*]
[9] *Ibid*.

that miraculously resulted in only one fatality in spite of the number of rounds of ammunition as discharged at these people by the Police.

18. To its credit, the evidentiary phase of the Inquiry commenced with an educational overview from Professor Darlene Johnston and the research work of Joan Holmes and Associates providing a solid introduction for those unfamiliar with the concepts and the historical connection of Aboriginal people to the land, the history of the Chippewa and Potawatomi peoples and, to some extent, the circumstances and events that resulted in the Treaty of 1827. However, to appreciate the interaction between Natives and non Natives in relation to land and its occupation, one needs to look further into English property law, its development and its adoption by the British settlers in south-western Ontario, and Canada's use of these concepts of property to assert a suffocating domination over Aboriginal peoples that continues to present day.

19. Development of the legal systems and property law specific to France and England had its own history that, for the interests of the Residents, picks up at the battle of Hastings in 1066 and the imposition of French property law on England. Between the eleventh and the sixteenth centuries, warlords of Britain were on the continual quest of domination, the one over the other, internally, and from time to time warring with neighbouring countries. This became the way of life, maturing in the late fifteenth century and resolving itself and bringing an end to the Wars of the Roses in 1485. Unified under a single ruler after centuries of local wars, Britain soon had advanced to the extent that land use planning by Royal Decree had taken root as early as 1561,

and by 1583, the concept of covenants running with land[10] (expanded in 1848 to operate even after alienation[11]) were accepted as part of land administration processes.

20. By 1660, the land tenure system in England had become increasingly complicated and unmanageable. This gave rise to the *Statute of Tenures*[12], which, according to English law was a compromise between the King and his subjects. During this historic period, including from 1492 and thereafter, the North American continent was being explored, by both the British and the French, and the economic benefits from the lands were not lost on either of these expanding nations. By 1763, following British conquest over the French in the North American theatre of the Seven Years War, British efforts to establish settlements along the eastern seaboard of North America were haphazard and threatened by the potential for conflicts between settlers and Aboriginals, and substantial blood letting was averted, in part, by the Royal Proclamation of 1763. Among its consequential implications are the following:

- The Crown interposed itself between settlers and Indians – on the premise that it would prevent exploitation.
- The competing interests of Indian lands and settled lands were created.
- The presumption of good faith and fair dealing by the Crown was introduced, a commitment that was taken seriously by Indians with heavy reliance on the Crown's fair dealing.
- Creation of an absolute Crown monopoly on the acquisition and disposition of Indian lands that sent a message of full and real security supported by "the honour of the Crown".

[10] Spencer's Case (1582) 5 Co. Repllea.
[11] *Tulk* v. *Moxhay* (1848) 41 ER 1143.
[12] (Imp), C. 24 [hereinafter *Statute of Tenures*].

The Crown monopoly worked as planned and there is no evidence of a single non-Crown purchase from Indians within the boundaries of the then or now Ontario.

21. These canons of honour and fair dealing are to be contrasted with later comments by Lieutenant Governor Sir Francis Bond Head, "it was evident to me that we should reap a very great benefit if we could persuade these Indians, who are now impeding the progress of civilization of Upper Canada, to resort to a place possessing the double advantage of being admirably adapted to them, and yet in no way adapted to the white population"[13] and Duncan Campbell Scott, Deputy Superintendent of Indian Affairs in the 1920's, "I want to get rid of the Indian problem….Our object is to continue until there is not a single Indian in Canada that has not been absorbed in the body politic, and there is no Indian question and there is no Indian department"[14] and more fully detailed in excerpts from Campbell Scott's "The Circle of Affection and Other Pieces in Prose and Verse" as he mocked the process in the following terms:

> In the early days the Indians were a real menace to the colonization of Canada. At that time there was a league between the Indians east and west of the River St. Clair, and a concerted movement upon the new settlements would have obliterated them as easily as a child wipes pictures from his slate. The Indian nature now seems like a fire that is waning, that is smouldering and dying away in ashes; then it was full of force and heat. It was ready to break out at any moment in savage dances, in wild and desperate orgies in which ancient superstitions were involved with European ideas but dimly understood and intensified by cunning imaginations inflamed with rum. So all the Indian diplomacy of that day was exercised to keep the tomahawk on the wall and the scalping knife in the belt. It was a rude diplomacy at best, the gross diplomacy of the rum bottle and the material appeal of gaudy presents, webs of scarlet cloth, silver medals, and armlets.
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> Yet there was the heart of these puerile negotiations, this control that seemed to be founded on debauchery and licence, this alliance that was based on a childish

[13] PAC RG 10 vol. 391 Bond Head to Lord Glenelg, August 20, 1836.
[14] In George Erasmus, "Introduction" in Boyce Richardson, ed. Drum Beat: Anger and Renewal in Indian Country (Toronto: Summerhill Press, 1989) at 11.

> system of presents, a principle that has been carried on without cessation and with increased vigilance to the present day—the principle of the sacredness of treaty promises. Whatever has been written down and signed by king and chief both will be bound by so long as "the sun shines and the water runs." The policy, where we can see its outcome, has not been ineffectual, and where in 1790 stood clustered the wigwams and rude shelters of Brant's people now stretch the opulent fields of the township of Tuscarora; and all down the valley of the Grand River there is no visible line of demarcation between the farms tilled by the ancient allies in foray and ambush who have become confederates throughout a peaceful year in seed-time and harvest.
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> The treaty policy so well established when the confederation of the provinces of British North America took place has since been continued and nearly all civilized Canada is covered with these Indian treaties and surrenders. A map coloured to define their boundaries would show the province of Ontario clouted with them like a patchwork blanket; as far north as the confines of the new provinces of Saskatchewan and Alberta the patches lie edge to edge. Until lately, however, the map would have shown a large portion of the province of Ontario uncovered by the treaty blanket. Extending north of the watershed that divides the streams flowing into Lakes Huron and Superior from those flowing into Hudson Bay, it reached James Bay on the north and the long curled ribbon of the Albany River, and comprised an area of 90,000 square miles, nearly twice as large as the state of New York.
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> This territory contains much arable land, many million feet of pulpwood, untold wealth of minerals, and unharnessed water-powers sufficient to do the work of half the continent. Through the map of this unregarded region Sir Wilfred Laurier, Premier of Canada, had drawn a long line, sweeping up from Quebec and curving down upon Winnipeg, marking the course of the eastern section of the new Transcontinental Railway. The Aboriginal owners of this vast tract, aware of the activity of prospectors for timber and minerals, had asked the Dominion Government to treat for their ancient domain, and the plans for such a huge public work as the new railways made a cession of the territory imperative...

22. As early as 1793, and without evidence of treaty or surrender, townships around the eastern end of Lake Ontario were being laid out for settlement by the United Empire Loyalists. One such town is Cornwall; another is the nation's capital, Ottawa.

23. The Anglo-American war of 1812 not only resulted in substantial losses to the British, but without the assistance of the Chippewa and other tribes of North American Indians, the

British fighting forces would probably have been wiped out. The Chippewa that later signed the Treaty of 1827, at that time, occupied some 2.2 million acres of land fronting on the St. Clair River and Lake Huron.

24. By this time, the American courts in *Fletcher v. Peck*[15] had proposed the following:

> A doubt has been suggested whether this power extends to lands to which the Indian title has not been extinguished.
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> What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. . . . It is a right not to be transferred but extinguished. It a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

25. In stark contrast, we have the comments of Chief Justice McLachlin from our modern era, who wrote in *Haida Nation v. British Columbia*[16] in reference to Aboriginal title:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s.35 of the *Constitution Act*, 1982. The honour of the Crown requires that these rights be determined, recognized and respected.

26. In 1827, the Crown entered into a treaty with the Chippewa as represented by 18 Chippewa Chiefs. Some 2.2 million acres of land were ceded to the Crown on an understanding by the Indians as enshrined in the Treaty that the land and its resources would be shared by the two groups. The Treaty document embraced the concept of co-existence and was symbolized by the Aboriginals in the Two Row Wampum belt.

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[15] [1810] 10 U.S. 87 [hereinafter *Fletcher*]
[16] [2004] S.C.J. No. 70.

27. The Indians, with a history and culture of consensus and speaking from the heart, viewed the treaty as a commitment that both parties would travel in time down two sides of the same road, toward a common and mutually beneficial destiny. The British, with a history of conflict, fuelled by a desire for conquest and driven by a need to dominate in a political system based upon a winner take-all philosophy, shrouded themselves in a facade of fair dealing, and an adherence to the principles in the Royal Proclamation, all on behalf of an honourable Crown.

28. Though the treaty document was never revisited, it was for all intents and purposes disregarded by successive Crown representatives and the Canadian government, who pursued the European concept of "land ownership" and occupation supported by then superior military might.

29. Crown responsibility under the Royal Proclamation, the Treaty of Niagara of 1764, and other treaty documents, involved an obligation to recognize and protect Indian lands, including acreages and boundaries. While 2.2 million acres of land were ceded, the Treaty of 1827 also clearly identified and excluded five areas from the lands covered by the treaty. These lands, including the Stoney Point Reserve and Kettle Point Reserve, remain unceded territory, and in the mind of the Chippewa, required *all* groups occupying those territories (as a collective) to be consulted and to agree on the alienation of any of the lands, not just the occupiers of any one piece of land. Fences and boundaries were as alien to the Chippewa as unrestricted sharing was part of their history and culture.

30. Consistent with the terms of the Treaty of 1827, Canada established pay lists, and respected the internal management of the territories by the group occupying the land. Later, however, rather than recognizing the collective right of the residents and occupiers of the five separate and unceded lands as the group necessary for alienation or ceding of any part of the lands, Canada unilaterally established five separate Band lists and improperly treated the five groups as being individual and autonomous for the purpose of dealing with the unceded lands. In other words, through unilateral action, Canada imposed a structure that discarded the idea of decisions by consensus and accepted an individual group's decision regarding a piece of unceded land without consulting the other members of the collective.

31. If there was any doubt, the true nature of the "newcomers" can be further gleaned from the language employed by noted jurist Beamish Murdoch in his 1832 *Epitome of the Laws of Nova Scotia*, Volume 2 *to wit*:

> A question has often been suggested by theoretical men, as to the right of the European nations to dispossess the aboriginal inhabitants of America, of the territories of the new world. I will not enter into any inquiry as to the justice of the invasion of the agricultural and comparatively civilized countries of the southern continent by the Spanish and Portuguese nations, but confine myself to the case of these Northern regions, where our own nation and that of France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the carriboo, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternately destroying each other or attacking the beasts of the forest. But the course of events has nearly extirpated them from the soil; and the subject of their wrongs, for many they had to complain of, is now matter for the historian, rather than for the jurist. I do not think that they themselves had any idea of property (of an exclusive nature) in the soil, before their intercourse with Europeans. Much injustice however was done to those simple creatures by those who communicated to them the artificial vices of civilized society. This evil communication by accustoming them to intoxication, and its attendant miseries has done more to destroy them entirely than any other cause.* We will assume occupancy as the original foundation of the rights of

property in general, as indeed it may be said that all other kinds of title are either occupancy under some other name or incidental to it. Thus conquest is occupancy attended with force. Accession gives land which is newly formed by any process of nature to those in occupation of the adjacent soil. From this principle many of the rules which govern society with respect to property appear to be derived. The alienation of any part of the territory acquired by a nation, by this means, requires the will of the whole nation expressed through its sovereign authority to render it valid, because the occupation is the occupation of the whole nation, and therefore the owner of a part cannot alienate it to a foreign power or person without a legislative act of his own state.

The death of the father of a family does not cause the land occupied by him to revert back to the state of vacancy in which he found it, but by natural right defined and protected by civil institutions, the occupation is continued by its remaining to his family. See 2 B.C. 10. &. 1 Brown Civ. and Ad. Law, 168. From the same causes delivery and possession become often very important in the transfer of property, and in the proof of a contested ownership.

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[*]Since the above was written I have had the loan of Chancellor Kent's commentaries on American law, from a professional friend, and feel gratified to find that a corresponding view of the nature of Indian rights, is taken by that eminent writer, and has been recognized by the courts of the United States. He enters more fully into the question, see his 3rd volume, p. 307 to 320, and quotes the opinion of Vattel. Droit des gens. 6. 1. Sec. 81, which confirms the principle. The interests of these unhappy races were much protected by the spirit of Christianity and benevolence, which prevailed among the early settlers from Great Britain in these countries as Mr. Kent has shewn, and we find this legislature of Virginia as early as 1662, c. 10—forbidding and annulling all bargains for their lands entered into by private persons. This was done to prevent their being robbed of their hunting grounds under pretence of purchase – and among the ordinances of New England is one which declares their right to all lands on which they had settled and improved to be undoubted.[17]

32. These musings are not inconsistent with the American view of Indian title as given in *Fletcher* and later embraced by the settlers in Zimbabwe and referenced in *The Georgia Journal of International and Comparative Law*[18], and not inconsistent with a widely held view that the lands and resources were obtained through conquest rather than treaties to be respected and honoured in any dealings with Aboriginal people.

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[17]At pp 55 to 58.

[18] O.N. Musamirapamwe, "The Evian Agreements on Algeria and the Lancaster Agreements on Zimbabwe: A Comparative Analysis" 12 G.A. Intl & Comp. L. at 153.

33. In 1840, thirteen (13) years after the treaty was entered into, and without any First Nation input or involvement, the *Union Act* was passed. This itself raises questions in light of the fact that the Royal Proclamation of 1763 remained in force and that, combined with the spirit of the treaty and the honour of the Crown, a number of questions with respect to natural justice and fair dealing are also left to be answered. It will be a hundred years later that the Privy Council would, by *obiter*, comment on the applicability of British land law to lands in Canada.

34. The circumstances of the Chippewa after treaty became increasingly tenuous by 1849 as may be gleaned from the Symbolic Petition of the Chippewa Chiefs and their message sent to Washington. The Symbolic Petition ought not to be lightly dismissed. It supports the history of consensus and that not only was there a general message carrier, but it carried the interests, by consensus, of all of the clans and represented their honest positions.

35. In 1867, the British parliament passed the *British North America Act*, creating the Dominion of Canada. Section 129 thereof confirmed that the Government of Canada was bound by British legislation, including the Royal Proclamation of 1763, and later under s.92 of the Constitution, Canada (as opposed to the provinces) became responsible for Indians and lands reserved for Indians. Certain trusts which affected Indians also became Canada's responsibility.

36. The five parcels of unceded territory, including the Stoney Point Reserve #43, remained as they were from before and after the signing of the Treaty of 1827, individually managed by their respective communities but still subject overall to consensus in the event of any change in their status.

37. Between 1827 and 1867, and beyond, the circumstances of Aboriginals continued to deteriorate. In spite of the spirit of sharing incorporated in the Treaty of 1827, Aboriginals were, for all intents and purposes, excluded from the benefits and the progress taken for granted by the then dominant British society. The five unceded portions of land were neglected along with their Aboriginal occupants.

38. By 1912, the City of Sarnia had grown to the extent that expansion of its land base became necessary. Rather than protect the Aboriginal interests, the Indian agent of the day employed a scheme of deception and non-disclosure in order to secure a "surrender" of part of the unceded lands, an act arguably beyond the jurisdiction and scope of the *Indian Act* of the day and an act that disregarded the Chippewa traditions of consensus. Though without precedent, it would be repeated by the Indian Agent in 1927 and again in 1928. The 1912 "surrender lands" later became a part of the expanded City of Sarnia.

39. The residents and occupiers of the five unceded parcels of land were not consulted, and even among those who occupied the Sarnia Reserve, current as at the date of the "surrender", there is no evidence that the Band and pay lists maintained by Canada (improper as they were) were employed to ensure the integrity of that surrender process in the first instance. Canada then accepted the surrender, so as to crystallize an obviously improvident transaction. This disregard for the protected interests of the Aboriginals was consistent with the British expansion programs of the day. *In re Southern Rhodesia*[19] gives an insight into the "land grab" thinking of the settlers and lip service protection of indigenous interests in spite of the seductive verbiage employed in the name of the honour of the Crown.

[19] 1919 A.C. 211 [hereinafter *In re Southern Rhodesia*].

40. Crown indifference and blatant disregard for Aboriginal interests surfaced again in 1927 when the substantial portion of Kettle Point Reserve # 44 fronting on Lake Huron was "surrendered", again, under circumstances that can only be generously described as suspicious. The courts and Indian Claims Commission, were not so generous when asked to review these circumstances in 1995 and 1997, describing the surrender as technically valid but with an odour of moral failure of an exploitative transaction accepted by Canada and acted upon by Canada to deprive the Chippewa of their lands unceded under the Treaty of 1827 and not subject to consensus of the collective. Repeating the circumstances of the 1912 Sarnia "surrender", there is no evidence of consultation with the successors of the body of Indians that took part in the surrender of the 2.2 million acres, no evidence that the pay lists, flawed as they were, were used to establish the membership or validity of the vote or to ensure that the integrity of the surrender process was beyond reproach.

41. For Canada's administrative convenience, and without consultation of the Aboriginals, Stoney Point, Kettle Point and Sarnia were unilaterally classified by Canada as one "Band" without any rationale for the exclusion of Moore Township and Walpole Island First Nations.

42. In 1928, sixteen (16) years after the Sarnia taking and only one year after the Kettle Point "surrender", a process labelled exploitative and having an odour of moral failure, the Indian Agent was at it again, and the Stoney Point Reserve fell victim to the protections guaranteed by the honour of the Crown. This time, the Indian Agent went a step further and was instrumental in initiating a "surrender" of the entire beach front section of Stoney Point I.R. 43. Again, as with the 1912 Sarnia and 1927 Kettle Point "surrenders", there is no evidence that the pay lists

maintained by Canada, were employed to ensure that the surrender process met the standards necessary to uphold the honour of the Crown. And even if there was such evidence, it is unequivocal that no consideration was given to the involvement of residents of Sarnia, Moore Township and Walpole Island when the surrender of Stoney Point lands was conducted.

43. In spite of Canada's efforts to combine the Kettle Point Community and Stoney Point Community for federal "administrative" purposes, these two communities remained separate, distinct and autonomous, each with its own land base. Each community made land related decisions with respect to their specific land bases, notwithstanding their forced amalgamation and grouping by Canada as the Chippewa of Kettle and Stony Point.

44. Between the time of the Treaty of 1827 and 1940, consistent with the federal approach to Indians across the country, a relationship that began as a partnership with First Nations involving mutual respect, moved to domination, paternalism and attempted assimilation.

45. There are very few cases during this period dealing with the nature of Indian title and/or Indian rights *per se*, though comments by a Quebec Superior Court judge in 1867, affirmed on appeal, disabused the notion that Indian rights were abolished, or even modified through contact with European settlers. The only insight into the application of the British *Statute of Tenures* to land issues in Canada surfaced after oil, in large quantities, was discovered in Alberta, and the haggling for royalties by Canada caused Canadian courts, and ultimately the Judicial Committee of the Privy Council, to look into land rights in Canada and peripherally, through implication, the application of English land law to Canada. By way of *obiter* of Lord Asquith of Bishopstone,

writing on behalf of the Judicial Committee of the Privy Council in *Attorney-General of Alberta et al.* v. *Huggard Assets Ltd. and Attorney-General of Canada et al.*[20] some guidance was given as to the applicability of English law to lands in Canada. He wrote:

> The majority of the Supreme Court, as has been stated, based their decision, in the main, on the Statute of Tenures, 1660. Their reasoning assumes that this statute applied to Canada, or at least to "Rupert's Land".
>
> The Act has no express "extent" clause. An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession. In 1660 there was, of course, no United Kingdom. The Acts of Union of 1706 (with Scotland) and of 1800 (with Ireland) were still in the womb of time. True, it happened that since the accession to the English throne of James I — already then King of Scotland — the same person was the Sovereign of both England and Scotland, just as later, the same person was to occupy the British and the Hanoverian throne. But that coincidence of sovereignties is beside the present purpose.
>
> Their Lordships are unaware that there was, in 1660, any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms were silent on that point. The question whether such an Act applied outside England (which since 1536 has by Act of Parliament included Wales) must depend in such circumstances on the intention of its framers: to be deduced from the nature of its subject-matter and substantive provisions. It would presumably have no such external application if its subject-matter were beyond question of merely insular and domestic import.
>
> Their Lordships, if it were necessary to decided the point, would incline to the view that the Act of 1660 was of purely local application: that it applied to England only. Its main objects were two (i) to abolish certain oppressive incidents of feudal military tenure, "wardships", "marriages", "primer seisin", "ousterlemain" and the like. To effect this it was necessary to abolish the military or knights-service tenures themselves, — the soil from which those incidents sprang. Their sacrifice must involve the King in financial loss, for which he was to be compensated under the terms of the Act (ss. 15 to 27) by certain duties on strong liquors, for instance beer, cider, perry and aqua vitae; some home produced, some imported. It seems to their Lordships strained to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular medieval land tenure, was intended to apply to a vast tract of country

[20] [1951] 2 D.L.R. 305 [hereinafter *Attorney-General of Alberta*]

> thousands of miles away which was only inhabited at the time by a few Indians and half-castes: people who had never smarted under wardships, marriage and primer seisin, and had almost certainly never heard of them. It seems to their Lordships that these and the other provisions of the Act — notwithstanding that it provides that "free and common socage" should prevail in future, and abolishes tenure by "escuage" — were not intended to apply outside England and Wales; to which, along with Berwick-on-Tweed, the machinery for collecting the compensatory duties is expressly confined, (s. 47.)

46. This statement, read along with the *Fletcher* decision, the statements of Beamish Murdoch, Sir Francis Bond Head, and Duncan Campbell Scott, and the arguments advanced by settlers to the Privy Council in *In re Southern Rhodesia*, crystallizes the substantial difference in views between the white man's desire to own the soil and the Aboriginal and indigenous relationships and respect for the land. The question remains however: can these two disparate views be reconciled on the Canadian landscape? Efforts that have included treaties, unilateral legislation, executive proclamations, commissions, segregations, residential schools and other assimilation, litigation, land claims process, expropriation, appropriation, rebellion uprisings, protests, occupations and blockades would seem to suggest it is a far more complex undertaking than simply putting a name on a deed to a piece of property.

47. From the Aboriginal standpoint, they continued to live in the hope that with time, the spirit of the Two Row Wampum would prevail and that both groups would remain notably different while traveling down the same road toward a common destiny and without domination. Canada, on the other hand, employed many efforts to assimilate Aboriginal people, which topic could be the subject of another Inquiry. Suffice to say, all such efforts failed.

48. As at 1940, the Stoney Point people retained their lands subject only to the 1928 "surrender", a dubious and questionable process on its face, and an obviously improvident transaction based on the sales of sections of these "surrendered" lands shortly thereafter, and another example of a system influenced, and controlled, by the local Indian Agent. At the time, such dealings were beyond reproach and the Indians had no recourse, for the *Indian Act* forbade First Nations people from forming political organizations to represent their interests, and punished by summary conviction anyone who represented any Indian in any claim without written consent received from the Superintendent General of Indian Affairs. The *Act* provided that:

> 141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months. 1927, c. 32, s. 6.

49. The "Honour of the Crown" did not protect Aboriginal interests from those inclined to loot, pillage and plunder, but the *Act* limited recourse against such without the consent in writing of the Superintendent General of Indian Affairs, the governing officer in whose name the Indian Agents of the day were acting. Often described as cradle-to-grave legislation, the *Indian Act*, unilaterally imposed by the federal government, controlled every aspect of Aboriginal lives. And, rather than honour the obligations now known to be fiduciary duties, the Crown unnecessarily and knowingly placed itself in an adverse and conflicting position with the people

of Stoney Point, depriving them of their land under false pretences and in dubious circumstances. This action in 1928 was not a conflict between the Crown and its public interest role conflicting with its duties to Aboriginal people. To the contrary, the conduct fits well into what was later known to be the tort of equitable fraud. The people of Stoney Point have to this day not accepted that the surrender of 1928 was either proper or done with informed consent, or that it met the minimal formal requirements of a surrender under the *Indian Act*, or the need for consensus identified earlier. Even if it did qualify as far as the voting process was concerned, it bore all of the hallmarks of an improvident transaction and should never have been pursued or accepted by Canada. The Residents' position is that the 1928 surrender was (and is) bad and cannot be cured; it can only be setaside. Accordingly, any and all individuals taking title based on such surrender, including the Province of Ontario, cannot hold good title to any of the lands fronting on Lake Huron and bounded on the east by Outer Drive, on the south by Highway 21, and on the west by Army Camp Road.

50. With the federal Crown having involved itself in an improper and improvident surrender, and the Crown in the right of Ontario having purchased a portion of the 1928 "surrendered lands" for the purpose of establishing Ipperwash Provincial Park, the Residents continue to hold the view that the land remained under a cloud of questionable surrender that could not extinguish Indian title. The fact the land remained in Provincial possession is not important to the Residents in that both Canada and the Province owe them fiduciary obligations. They hold that the Crown was under a fiduciary duty to protect and preserve the unceded Indian lands. It was aware of the burial grounds and the historical and cultural significance to the Aboriginal people and it was

aware through historical interaction that the lands and resources are and always have been central to their survival as communities. As stated by the Supreme Court in *Delgamuukw*:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

51. The bad situation continued to deteriorate rather than improve, with no sign of turnaround. By way of a recap, the 1928 situation as seen by the Residents could be summarized as follows:

- Pre 1492, their ancestors continued to roam and used the lands as they had done from time immemorial.

- In 1812, the ancestors of the Aazhoodena residents fought alongside the British in its war with the Americans.

- In 1818, negotiations began for the surrender of land by the Chippewa in south-western Ontario.

- In 1827, the Chippewa and the British signed the Treaty. The Indians understand that it means no domination of one group by the other then bound and traveling on separate paths in the same direction toward a common long-term destiny.

However, the wording of the treaty involves a surrender of three times as much land as was discussed, 2.2 million acres as opposed to 712,000 acres; the areas not ceded are recorded as 25% less than what was discussed, and less than 1% of their traditional lands; and compensation was arbitrarily reduced by 20%, along with other promised benefits.

- European ideas of absolute ownership of the soil at the exclusion of others conflicted with the Chippewa way of life and their relationship with their lands.

- In 1849, Chippewa Chiefs petitioned Washington with respect to the unacceptable departures from the promises embraced in the Two Row Wampum and the Treaty of 1827.

- Between 1912 and 1928, portions of the approximately 17,000 acres set aside in four parcels, constituting less than one half of one per cent of the Chippewa traditional areas, were whittled away and grabbed by Canada under the umbrella, and with the assistance of, the supposed honour of the Crown.

52. In spite of the above, the ancestors of the Residents continued to hope that things would improve despite having lost over 99.5% of their traditional lands to British colonization.

53. In an effort to meet Canada's world expectations, Aboriginal people from across the country enlisted for military service. Among these were people from the Kettle Point and Stoney

Point reserves, including the late Clifford George, who testified at the Inquiry. Their efforts on the battlefront brought them recognition and praise but they still remained disrespected outsiders by the communities around their reserves. The Indian Agent of the day, with unfettered and unchallengeable authority and control, saw the war circumstances as an opportunity to remove "the few straggling Indians" from Stoney Point to the lands at Kettle Point. Though a very substantial portion of the 2.2 million plus acres of land that was subject to the Treaty of 1827 remained unoccupied and accessible, the government of Canada, through collusion as between its Departments of National Defence and Indian Affairs, each with its own ulterior motives, sought the surrender of the Stoney Point lands for military purposes. Suitable land was available in the immediate area and as such, the Stoney Pointers should not have been forcibly removed and their homes destroyed.

54. The surrender vote was defeated by those in attendance 59 to 13. Yet, despite the substantial amounts of comparable land available in the immediate area, Canada still took the extraordinary measure of appropriating 2,240 acres of the Stoney Point Reserve lands and forcibly removed the entire Stoney Point community from their lands. There was nothing that the Indians could have done to prevent them.

55. The reserve however, was 2,273 acres, and the 2,240 acres to be appropriated were never specifically identified, and there was no indication of what (if any) stewardship would be provided by Canada for the then remaining 33 acres of Stoney Point I.R. 43. Canada's appropriation initiatives through the Departments of National Defence and Indian Affairs were met with serious protest and objection, ultimately to no avail. The mood and concerns of the

Stoney Pointers on the one hand are generally embraced in the Greenburg letter of April 24, 1942. Canada's position is captured in the Crerar response of May 4, 1942, dismissive of all concerns raised. With might on its side, Canada disregarded its obligations to the Stoney Point Chippewa pursuant to the terms of the Treaty of 1827 and, indifferent to the honour of the Crown, appropriated the 2,240 acres of the Stoney Point Reserve pursuant to the provisions of Order-In-Council PC 2913 dated April 14, 1942.

56. The positions of the American courts in the *Fletcher* decision, and the Privy Council in the *Attorney-General of Alberta* decision, cast doubt on whether the laws relating to the principles of eminent domain could be employed to appropriate or expropriate unceded lands. Further, the appropriation Order-in-Council was site and purpose specific, for a term that, though not specifically determined, was determinable. The necessity was also put in question given the initiative of B.J. Spencer Pitt, a lawyer acting for the Stoney Point people (though without the consent of the Superintendent General expressed in writing) who advanced the proposition of a consensual lease rather than an outright taking of the Stoney Point lands. The lease suggestion was rejected and the Stoney Pointers were again without recourse. Peripherally, the concept of the lawyer for Stoney Point seeking approval in 1942 from the Superintendent General of Indian Affairs to litigate the treaty rights of the Stoney Point people as against Canada had no chance of being granted. The spirit is captured in the Inquiry documents as follows:

> It [appeared] that regardless of what the people of Stoney Point did to stop the appropriation action by DND, once this federal "machine" was in motion, it was not to be stopped.
>
> The appropriation was approved on June 1, 1942 and the residents of Stoney Point were moved to Kettle Point. This move created a severe social "rift" between the people of Stoney Point and Kettle Point, which still remains today. Kettle Point

> residents refer to the Stoney Point people as “refugees”. Stoney Point residents at the time felt they were located onto the poorest land on the reserve, the sand.

57. This Inquiry has heard testimony of the internal strife that resulted from the relocation. That one group was treated as refugees, and the other group complained of the new burdens resulting from the transfers without any increase in land base, resources or support, is part of the record. This disturbing situation continued through the war years and could not have been better told than by the late Clifford George, a decorated World War II veteran who, upon his return from active duty to this community including time as a prisoner of war, learned that not only had his community been razed to the ground, but by having married an Englishwoman, he was no longer even entitled to be a Band member. He was enfranchised and did not know it. As he put it “…it was bad for us, coming home from overseas after thinking that we helped the war out, and I always say to myself, I found all my enemies when I get home.”

58. The questionable taking of the first 377 acres of Stoney Point I.R. 43 followed by the appropriation by Canada of a further 2,240 acres for the specific purposes and duration as given in the Order-In-Council, mandated that in the absence of an amending Order-In-Council, the lands should have, by operation of law, reverted automatically to the Band and the interests appropriated as part of the war effort immediately reversed so that the individuals, families and general population could once again be made whole. But this was not to be in spite of the fact that, “Camp Ipperwash began operation in late 1942 and closed its war effort operations on May 31, 1946”.

59. Between 1945 and 1993, in spite of unyielding efforts by "Stoney Pointers" to have Canada uphold its promise to the return of the lands, nothing was done. A questionable taking, followed by an offensive refusal to return the lands over a 50 year period. Questions of the honour of the Crown and the accountability of government would echo for decades, but would not be challengeable in court until the Supreme Court of Canada changed the political landscape with its decision in *Guerin v. R.*[21] In the interim, and from time to time, Canada engaged in spreading around small amounts of appeasement money, with the transparent objective of buying breathing space with the leadership of the then Chippewa of Kettle and Stony Point Band. But the lands were not returned although quite clearly, they were no longer being used for the purpose for which the appropriation was undertaken. World War II was long over, and this blatant and festering *status quo* continued until direct action was taken by the Residents in the spring of 1993. By this time, the Stoney Point elders who were uprooted from the lands that they called home had, by and large, all passed on. Their stories, however, lived on and in Anishnabek fashion were passed on to the younger generations, a people exposed to much more information than their predecessors. They continued their demands for the return of their lands. Protests were staged and were ignored by Canada. Negotiations, commenced by the band in the early 1980s had languished for years. The Stoney Pointers had had enough, and by way of an advertised and measured peaceful response, they moved to occupy a section of the lands set out as a shooting range, an area which had not, for a period in excess of forty-five (45) years, been used as a shooting range as intended at the time of the 1942 appropriation. To repeat, "Camp Ipperwash began operation in late 1942 and closed its war effort operations on May 31, 1946".

[21] [1984] 2 S.C.R. 335.

60. This move onto the range, although at that time seen as merely symbolic, was broadly supported by the Stoney Pointers and much to the chagrin of the elected Chief and Council of the Chippewa of Kettle and Stony Point. These re-elected officials appeared to embrace Canada's domination policies even when they conflicted with its Treaty obligations.

61. Chief and Council, after forty-five (45) years of unfulfilled promises to return the lands now seized upon every opportunity to distance themselves from the courageous individuals who, in the absence of assistance from Canada, Ontario, or indeed from them as Chief and Council, had moved to employ self-help remedies to occupy what they knew to be their own lands. From time to time, Chief and Council would threaten to become involved in the occupation but only briefly, and only when it served their purposes to do so.

62. Over and above the question of "colour of right", the legal defence available to those who honestly, even if mistakenly, believe they have a right to be present on the lands, is the fact that through probable mismanagement and bureaucratic bungling, the Indian Agent who triggered the 1928 "surrender" along with the Department of National Defence and Indian Affairs officials who engineered the 1942 appropriation, failed to take the remaining land base from the Stoney Pointers. It is therefore clearly arguable that in law, the traditional residents of I.R. 43 had and continue to have rights akin to a tenancy in common, to a minimum with the Department of National Defence and probably with the occupiers of the 377 acres of shoreline property that formed part of I.R. 43.

63. The reaction to the occupation of the range met with mixed reviews, but the view of Canada and the then Chief and Council of the Chippewa of Kettle and Stony Point coincided and was against the occupation. Chief Tom Bressette, in written communication to Indian Affairs, denounced his people and in his own terms, sought the assistance of Indian Affairs to find some land far from this area to send "the Georges".[22] The NDP provincial government of the day tried to be understanding, but at the very best, Canada was cold to the actions of the Stoney Pointers who were now classified as dissidents and occupiers, rebels and militants, with more pejorative terms to be employed in due course. While the representatives of the Department of National Defence commenced "discussions" with the Stoney Pointers these discussions were, for all intents and purposes, one sided. National Defence listened but never offered anything which could lead to a resolution of the conflict. Local labour movements and the Mennonite community assisted the Stoney Pointers to the extent that they could in face of the expressed thinking at National Defence as well as Indian Affairs that a winter out in the open would solve the problem, and the Stoney Pointers would be forced to abandon the occupation.

64. The Stoney Pointers resolve, rivalling the powers of nature, accommodated the high winds, low temperatures, snow, slush and rain through the winters of 1994 and 1995. They provided a textbook example of an attachment to the land that Professor John Borrows noted in his paper was a result of resistance "to other's occupation of lands without their consent because it threatens their political, economic and cultural survival".

65. In 1991, representations were also made to the Senate Standing Committee on Aboriginal Peoples. At that time Robert Nault, sitting as an opposition member, was generally supportive of

[22] Exhibit P-258.

the efforts of the Stoney Pointers. He became Minister of Indian Affairs from 1999 to 2003 and the situation remained uncorrected.

66. The Honourable Kim Campbell, when she was Defence Minister on a visit to the area, promised to look into the Camp Ipperwash dispute. She was never heard from again. To highlight and publicize its legitimate causes, the Stoney Pointers organized a peace march from the range on Stoney Point I.R. 43 to the Department of Indian Affairs in Hull, Quebec, for the purpose of delivering a petition to the Minister of Indian Affairs and speaking with then Prime Minister, Kim Campbell. Supported and encouraged along the way, the marchers arrived at Ottawa and went on to Hull, tired, hungry and sore, only to find that all doors were locked and no one would present themselves, to receive their petition. Undaunted, they returned to their homelands, the range at Stoney Point I.R. 43.

67. There was a federal government change shortly after the march. The Honourable Jean Chrétien, former Minister of Indian Affairs and who in 1972 predicted trouble and violence if the land matters were not settled, was now Prime Minister. A “peace offering” was soon made by the Honourable Tom Siddon as Minister of National Defence, to Chief Tom Bressette. He offered that a plot of land measuring 200 meters by 200 meters could be used by the Stoney Pointers while discussions continued between the various departments of Canada and the elected officials of the Chippewa of Kettle and Stony Point. This authorization by the Minister of National Defence to Chief Tom Bresette to allow occupation of the lands improperly under the control of the Department of National Defence clearly establishes the level of accommodation available to both Indian Affairs and National Defence if it suited their purposes. The complaints

of the Stoney Pointers were never responded to but the occupation led to an opportunity for accommodation.

68. In 1972, Jean Chrétien, then Minister of Indian Affairs wrote as follows:

> It seems to me that the Indian people involved have a legitimate grievance. They did not agree to surrender in the first place, but it was appropriated in the national interest prevailing in 1942. It is now 1972, and they have not got it back. Yet they desperately need it to improve the Bands social and economic position. In addition, there is deeply rooted reverence for land and their tribal attachment to it…. They have waited patiently for action. There are signs, however, that they will soon run out of patience. There is bound to be adverse publicity about our seeming apathy and reluctance to make a just settlement. They may well resort to the same tactics as those employed by the St. Regis Indians at Loon and Stanley Islands in 1970 – to occupy the lands they consider to be theirs.[23]

69. During the time of this occupation of the range, from 1993 through 2003, Jean Chrétien as Prime Minister, did nothing about the Camp Ipperwash dispute.

70. There were, in the first summer of the occupation, reports that a military helicopter at the base was fired upon. After full police investigation, there was only suspicion that a helicopter while operating in the general area of the range had taken one round of gun fire. The type of round was never confirmed and neither was the calibre nor type of weapon, the location from which it was fired, nor the general direction or trajectory of the projectile. There was no focus on the weapons in the hands of members of the Department of National Defence, the Police or others, and as such, these could not have been ruled out as the originating source of the striking round. Nonetheless, it was always the belief of the Police, National Defence personnel and Chief and Council of the Band that the helicopter was fired upon by one of the Stoney Pointers. This

[23] Inquiry Doc. No. 3000715.

Inquiry heard some thirteen (13) years after the event second, third or fourth hand testimony through Carl Tolsma as to who *might* have fired the suspect round, testimony given substantially after the deaths of both the suspected shooter and the only other person who could repeat the hearsay information as given to this Inquiry. In addition, given his new position with the Kettle Point and Stony Point Band, there is good reason to doubt the accuracy, and veracity, of any of his musings on the subject. Between 1993 and 1995, Carl Tolsma was Chief of the Stoney Point group and in direct opposition to the Kettle Point Chief and Council.

71. An uneasy peace, continued between the occupiers and the military as they cohabitated on the base throughout the latter part of 1993 and through to the middle of 1995, a peace broken only when face to face encounters occurred between members of the two groups. There are numerous incident reports, referred to by counsel for the OPPA time and time again over the course of the Inquiry, but in the words of the occupiers, military, Indian Affairs and officers of the Police, nothing of significance occurred. There were no 'spikes' in activity according to Sergeant Bell and it was relatively uneventful. Indeed, there was an unwritten protocol followed by the Police, the military and the occupiers that worked relatively well, both before and after the events of September 4 to 6, 1995. Over the entire period of the occupation, the elected Chief and Council of the Chippewa of Kettle and Stony Point made every effort to frustrate the efforts of the Stoney Pointers. They denounced the occupation, encouraged the Police to take a proactive approach and arrest various individuals on the base and from an administrative standpoint, where their effect was most pronounced, they officially interfered with the ability of the Stoney Pointers to benefit from social programs otherwise available to all other members of the Chippewa of Kettle and Stony Point on the basis that these people were not "on reserve"

resident. The occupiers received no financial assistance from the Band and although some had menial employment within the Camp Ipperwash complex, the little that they earned somehow attracted the interest of Canada Revenue Agency.

72. Their cause not meeting with any positive response (or any response at all) from any level of government, the Residents ratcheted-up their protest with advance notice that they would be taking over and occupying the barracks and ejecting "the few straggling" remaining military personnel. The ejection occurred on July 29, 1995, and advance notice was given that the Provincial Park would be occupied following the Labour Day weekend, it being closed for the season. Around this time, with a new provincial government in office, elected and standing on law and order as one of the main planks of its platform, there would be no longer a waiting game with opportunity for negotiation. Systems were set in motion by the Police to take drastic and decisive action if an opportunity presented itself and this proposed and ill thought out initiative of using an "in your face" confrontational approach was branded: Project Maple.

73. Concurrent with the occupation of the base in July 1995, the government of Canada dispatched Brad Morse and Ron French of the Department of Indian Affairs to attend at the sites and hold discussions with the elected Chief and Council of the Chippewa Kettle and Stony Point Band. Their attendance at Stoney Point I.R. 43 was merely to observe, and no actions of any note were ever taken in respect of the Stoney Pointers. They were left on their own, on unceded land appropriated and not yet returned, without support of the neighbouring reserve, the federal or provincial governments and with a Police Incident Commander and ground level MNR

employees making preparations to confront them immediately if they strayed into the park after it closed for the season.

74. As would later be noted by Magistrate Judge Janice M. Stewart based on documents placed before her, including documents provided by Canada, 1995 was a summer of native uprisings against Canada. Her decision in the *Pitawanakwat* expropriation matter noted that:

> "Lake Gustafsen was only one of many incidents involving native people during the summer of 1995. That same summer saw other protests, road barricades, and occupations of parks and private property across Canada. . . . In July 1995, about 100 rebel Chippewas occupied a military camp in Ontario and the neighboring reserve. . . . In September 1995 about 40 rebel members of the Kettle and Stony Point tribes occupied the neighboring Ipperwash Provincial Park in Ontario, asserting that it was the site of a sacred burial ground. . . . The Ipperwash incident involved a gun battle which became deadly when police shot and killed one protestor and injured two others."[24]

75. The following are a number of events that are reviewed in depth in papers prepared by Professor John Borrows and Don Clairmont and Jim Potts for Part II:

- Camp Ipperwash
- Oka
- Akwasasne
- Kahnawake
- Gustafsen Lake

[24] *Supra* note 3.

76. To quote Clairmont and Potts:

> "By 1990 some Aboriginal groups were becoming increasingly impatient. Court decisions in the late 1980's increased the feelings of empowerment…The rest of Canada was still not understanding the gravity of what was going on and things boiled over in many different places like Red Squirrel Road, Oka, Gustafson Lake, Ipperwash and Burnt Church. These incidents are all examples of Aboriginal rights issues that were brought to a head after negotiations broke down. **Sadly, in many ways, it has been the most effective way to bring change in government policy.** Lives have been lost in the effort on occasion. At the same time, the court processes have been expanded and the Supreme Court has more clearly defined certain Aboriginal rights and entitlements". Glenn Trivett, Inspector, OPP, unpublished paper 2003.
> [emphasis added]

77. In all of the noted "uprisings" the common thread was claims to lands and in some cases burial sites.

78. There was substantial communication between Incident Commander John Carson as leader of Project Maple and then Inspector Hutchinson who was in attendance as an observer at Gustafsen Lake. The Inquiry database lists 32 "Gustafsen Lake" documents and it appears in 40 sections of the testimony transcripts with 225 hits. The common thread in terms of timing and the nature of that occupation is parallel with Ipperwash. Unfortunately, Inspector Carson did not also seek counsel from those involved in the peaceful resolution of Serpent Mounds, nor did anyone else, but we will discuss that later in these submissions.

79. The month of August, 1995 was without incident at Camp Ipperwash, reclaimed as Aazhoodena by the Stoney Pointers wishing to return to their traditional homelands and under its Chippewa name. Indeed, as a result of a motor vehicle fatality on Matheson Drive, there was an

unprecedented level of cooperation between the Police, MNR and the Residents ensuring public safety on that road. By this time, the Residents had moved from occupying a section of the range, which had successfully triggered "discussion" with the Department of National Defence and statements about the lands being returned "shortly", to having taken over the barracks formerly used as Camp Ipperwash, which triggered visits from senior Indian Affairs officials. They also made no secret of the fact that on Labour Day, September 4, 1995, after the close of the "Ipperwash Provincial Park" it would be occupied by the Residents. Statements of the takeover were communicated to the Police, MNR and local politicians.

80. Unknown to these individuals, the Police as well as the Ministry of Natural Resources were perfecting their own plans to deal with any such occupation of the park; plans that called for confrontation, an "in your face" approach and other elements antithetical to the public position on group protests and civil disobedience. Although the Residents genuinely believed that they had the right to exclusively occupy all areas of the original Stoney Point Indian Reserve No. 43, they had no intention to interfere with individuals occupying cottages in the area. The Police were, unfortunately, being fed by and were relying on unreliable informants with their own agendas. The misinformation included supposed weaponry in the hands of the Residents. With correct information things might have taken a different course. Further, the political rift that had developed in 1993 between the elected Chief and Council of the Chippewa of Kettle and Stony Point and "the Georges" had escalated substantially. With the Residents now in possession of Stoney Point I.R. 43 (excluding the cottage lands in the northeast corner) hard lines were taken by Chief and Council to the extent that they sided with the provincial government and the Police against the Residents even though the Residents were still listed as members of their

Band. For all intents and purposes, the stage was set for a confrontation of some kind, but not with any specific end result or objective in view, a situation similar to that at Gustafsen Lake as reported in the decision of Magistrate Judge Stewart.

81. Throughout the period covering the different levels of occupation, Dudley George was a central figure. From all descriptions, he was, like Goldsmith's Man in Black, "good natured with little or no harm in him". He never passed up an opportunity to taunt the police and from all evidence, it appears that the police never passed up an opportunity to be taunted by him. Along with a number of other Residents, including Elder Clifford George, reasonable efforts were made to maintain order on the lands. Some of the senior Residents who took on leadership responsibilities made it clear that drugs and drug dealers were not welcomed on their lands and that firearms would not be used. Further, there were engagements with the Police in August 1995 with respect to *Highway Traffic Act* incidents that occurred on the occupied lands, and by and large, it appeared as though some form of dialogue with the authorities could be developed that would contain the situation until longer term solutions were found.

82. On Monday, September 4, 1995, shortly after 6:00 p.m. when the Ipperwash Provincial Park was officially closed, the Residents cut through a low level security fence and entered and occupied what was Ipperwash Provincial Park thereby taking it back as part of their homelands. With this takeover, they controlled all of historic Stoney Point I.R. 43 expect for some cottages constructed on lots in the northeast corner. The level of occupation and control of the lands of Stoney Point I.R. 43 today, as these submissions are filed, is no different than what it was at 6:00

p.m. on September 4, 1995. The cottagers are still there and they have never been threatened by the Residents.

83. The Residents view the preceding information as reflective of the circumstances as then existed as at September 4, 1995, circumstances that could have been addressed without confrontation, by negotiation or resolved by the courts or as things turned out, the subject of unnecessary, overwhelming and lethal force. With the benefit of hindsight, comparisons could be and will be made to the Serpent Mounds takeover prior to the involvement of the police, the Gustafson Lake occupation prior to the arrival of the RCMP, the Oka situation prior to the arrival of the military, and many other First Nations uprisings, some involving violent confrontation and others being resolved through negotiations. Ipperwash stands out as the only political uprising resulting in death within 60 hours of any occupation or re-occupation of land by First Nations members. And, with thanks for the bad shooting by the Police officers and pure luck on the part of Residents such as Warren George, Nicholas Cottrelle, Roderick George, David George, Marlin Simon, Stewart George, Elwood George, Dale Plain, Mike Cloud, Glen Bressette, Clayton George, Wesley George, Leland White and others there may have been dozens more injured or killed at Ipperwash. The unwarranted and contagious shooting spree by officers armed with submachine guns, armoured personnel carriers, rifles, night vision, semi automatic pistols, helicopters, and patrol boats was the natural outcome of an aggressive approach to a potentially explosive situation, but was far from that expected from the police in Canada. As with other protests, the Residents expected the Police to adopt a non-partisan role and show a respect for civil liberties and an appreciation of the constitutionally protected rights of Aboriginals in Canada.

84. Because of the historic relationship, treaties, promises and the many court decisions dealing with the scope of the honour of the Crown, the Residents defend their actions as politically motivated, and not criminal. It was common knowledge within and outside the perimeter of Stoney Point I.R. 43 that they were not using and had no intention to resort to firearms. The Police knew this, and harboured no fear or misconception that any firearms would be used on them. Practically, the Residents knew that they were outnumbered, and tactically they recognized that the weaponry available to the Police far exceeded any and all capabilities they could muster *if* they were so inclined, both in numbers and type of firearms. They also took the position that it was not in their history, and it would have been ludicrous and in fact suicidal to attempt an armed confrontation with the police over closed Provincial Park land. Specifically, they did not see the occupation of their homeland as a police matter, but to the contrary, viewed it entirely as a political matter, one that needed a jump start if anything positive was ever going to take place. It was a peaceful political act when they entered upon and occupied a part of the range in May of 1993. This did not trigger police involvement but led to discussions with the Department of National Defence and the allocation of 40,000 square meters of land (with conditions) for their use and occupation. There was also further discussions with the Department of National Defence and the involvement and assistance of labour organizations and other socially conscious groups. Though harassed from time to time by individuals occupying the base, the "situation" stabilized and became "liveable" through 1993 and into the summer of 1995. By that time, if it was not already eminently clear, it became apparent that there was little use being made of Stoney Point I.R. 43 for military purposes, and there were a number of suggestions that the land would be de-contaminated by the Department of National Defence and returned as promised. These promises had been made repeatedly since at least 1972, and were

re-stated at least in 1981, 1985 and 1994, but never acted upon. The difficulty was, that at the time of the taking, these were community lands occupied by a specific group, with some individuals holding location certificates. The clear understanding was that at the end of the war, the lands would be "returned". As the return was delayed, over generations, the specific group that had been expelled from Stoney Point had naturally spread out somewhat into the neighbouring reserve. The community power had become centralized and controlled by Chief and Council of the Kettle Point Reserve, and the specific group, a minority by nature, was left without land, without a home and without support. This situation could all have been avoided had Canada taken the lease option advanced at the outset by legal counsel for the Stoney Point residents.

85. The occupation of the barracks and the ejecting of the military was once again a political move intended to give meaning to the promise of return of the lands as stated repeatedly by the government of Canada. The Residents were now in occupation of their lands, but remained a minority (in the literal sense) and without support from the Band Council and/or Canada. Among the many options open to these rightful occupiers of the lands was that of forcible entry, a landowner's remedy known or ought to have been known to the Department of National Defence, the Police, the Province of Ontario and the various legal departments advising on Crown rights and responsibilities. Forcible entry has long been a common law right of a landowner in response to trespass and nuisance. This option was exercised on July 29, 1995. The result - that Canada dispatched senior bureaucrats to the area.

86. By September 4, 1995, the Residents again had a number of options available to them regarding their claim to the Park. Some less drastic options, such as community protests and notice of burial grounds had been exercised but to no avail. They chose, again, the common law option of forcible entry and physical occupation of the Park, circumstances known to the Police and the Provincial government as indicated by their planning meetings leading up to the event.

87. The choice made by the Residents, to move back on to the Provincial Park lands following its closure for the season on September 4, 1995, was an act borne of frustration with a federal government that had given lip service to the complaints raised by them and the Kettle and Stony Point Band, for over 50 years. Provincial Government officials, though aware of the festering situation and, but for a brief period in 1993, had no involvement of any kind, were suddenly called on to react to a protest in one of "their" parks. The Police, who had, over time, employed a wait and see approach while the Residents occupied the range and later the Army base, again had the role of policing an occupation, albeit an increased area from that policed from 1993 to 1995.

88. Although the occupation of the Provincial Park came as no surprise to the government, the Police or the public at large, the response by all three was very surprising. By many accounts, the responses were out of character and grossly out of proportion to any threat, real, apparent or perceived.

89. The next 60 hours, and its deadly repercussions, will for a long time, stain Canada, Ontario, the Ontario Provincial Police and the Chief and Council of the Chippewa of Kettle and

Stony Point and should, at a minimum, lead to a necessary rethinking about how to manage similar circumstances in the future.

90. An examination of these responses follows and their role in the police killing of Dudley George, but the Residents submit that it is impossible to fully assess these responses and underlying motivations, conscious or subconscious, or examine ways to change these responses in the future, without a full appreciation of the history outlined in the previous pages, and the role of this history in shaping the motivations underlying the actions of the Province, public and the Police when faced with outstanding Aboriginal grievances.

III THE NEXT 60 HOURS

September 4, 1995 – OPP activity

91. Project Maple was designed to prevent people from occupying the Park, "the problem is to keep the people out, rather then trying to get them out." Its primary goal was to manage the area to keep the people out. Inspector Carson instructed his leaders at their September 1, 1995 briefing, "to maintain security of the fence line around the Park and control of vehicular traffic down Army Camp Road and down the Township road". He also contemplated using "ERT and TRU to secure the fence and the Park" and employing an investigative team with video running all the time to identify every person in the area.

92. Preventing entry to the Park would likely require the use of force. Arresting people for attempting to enter the Park would require the use of force, and further, reflected a predetermination of ownership as well as a disregard for the legal defence of colour of right. The

idea to use video to accurately record events as they transpired, while commendable, was either not seriously entertained, or considered low in priority.

93. The fall back plan under Project Maple was also outlined at the September 1, 1995 briefing. To an extent, it became merged in the planning process. It involved police officers remaining in the Park alongside the residents, a concept later dubbed 'cohabitation' by the OPP for the benefit of the Inquiry. It involved a much more aggressive 'cohabitation' than previously employed unsuccessfully by the military from May 1993 through July 1995. Taking nothing from the military's experience, and the confrontations that occurred only when the military and occupiers were in close contact, it required ERT members to be "in the faces" of the Residents and to "not be 100 yards away with binoculars". They were instructed to be up close and personal, on the assumption that "the more in the face you are, the less risk you are". Mark Wright, the second in command to Carson and Acting Detective Staff Sergeant, No. 1 District, Area Crime Supervisor, further held the view that "when people come into the Park, we will see them and will arrest them". Sergeant Huntley, leader of No. 6 District ERT, expressed reservations about planning for both preventing entry, and establishing cohabitation, but this issue is not expressly addressed in the meeting.

94. Cohabitation and an in-your-face approach ran contrary to the OPP's protocol for policing the Army Camp situation, contrary to its established mandate of negotiating in an effort to avoid the use of physical force, if at all possible, and the focus on effecting arrests for trespass on Park land was reflective of a pre-determination of the very ownership issues in question, issues that formed part of what Deputy Solicitor General Elaine Todres referred to as one of the

most complex situations the Solicitor General had to deal with. Project Maple moved the OPP away from an established position, both before and after Ipperwash, of a neutral agency tasked with respecting the special rights and issues of native peoples and managing a situation with a minimal use of confrontation and force, to a police operation effecting the wishes of the state, having been designed firstly, to prevent any occupation of disputed lands and secondly, with a view to effecting arrests for trespass to disputed lands. This position becomes even more ironic, given one of the first suggestions made to the OPP in the first few hours of the protest, was that the OPP ought to be arrested for trespassing on First Nation lands.

95. More alarming, however, was the absolute dearth of planning for the option that eventually came to be, that of the First Nations occupiers being within, and the OPP being outside, the four corners of the Park. This was either never contemplated, or wholly discounted. It certainly was not planned for, as there was no plan in place in the event the OPP lost its containment and no longer controlled the inside of the Park. There was no common understanding as to how such a situation would be managed. It is not contained in Project Maple, there is no other contingency plan that addresses the situation, and as candidly admitted by the leadership, Project Maple, as drafted, no longer applied hours after it began.

96. As it turned out, Project Maple was an abject failure within hours of its commencement, leaving the OPP with no organized plan for its operations, and Inspector Carson was left to his own devices to deal with the issues as they unfolded and a government and local public critical of the OPP's performance. The OPP then fell back to a form of crisis management, where issues were dealt with individually through shift briefings, and a laudable but not very credible

observance to the stated objective of “contain and negotiate”. Containment of the park was already lost, and a 107 acre Park abutting the 2000 plus acre Army Camp, was well beyond the resources of any police force; any negotiations to effect arrests or departures from the area became much more difficult in the circumstances, certainly on an expedited basis as demanded by the Provincial government.

97. From the outset, and informed by the events in British Columbia in consultation with Inspector Hutchinson, Inspector Carson began amassing an arsenal and weapons package, including TRU, ERT, helicopters, patrol boats and even armoured personnel carriers that belied the expressed, peaceful nature of the protest. The OPP response was disproportionate to the circumstances and truly amazing given their experience with the Army Camp situation and an incident with Darrell George in February 1995. It was equally surprising considering the successful and peaceful handling of crises, or potential crises, in both the Cape Croker fishing dispute and Serpent Mounds Provincial Park occupation, the latter resolved just hours before movement occurred into the Ipperwash Provincial Park.

98. Once that level of resources was gathered, it became only a matter of time before it was used to quell this particular aboriginal uprising. In light of these measures, the level of force used was not surprising; only the timing, quantum and level of injuries to those that were part of the protest. It is a wonder more people were not killed by police bullets that evening, a view shared by both police and occupiers alike.

99. When the first signs of activity occurred at the Park, Project Maple was put into operation. A "nose to nose" confrontation developed at the end of Matheson Drive between Sergeant Korosec and Roderick George, Stewart George and others. Sgt. Korosec argued with Roderick George over the ownership of the road, and is told in turn, among other things that more than likely tested his resolve, that in addition to the road, the Park also belongs to the Stoney Pointers.

Reference: Exhibit P1306
Roderick George November 23, 2004 at p110
Stan Korosec April 5, 2006 at pp 301, 310-311

100. There was testimony during the Inquiry by Officer Neil Whelan, who claimed that during this incident, a native was observed reaching for the butt of a gun from the trunk of a vehicle. He further claimed that although he said nothing at the time, he successfully dissuaded the person through non-verbal cues, that "Well, we -- we sort of just stared at each other, the -- the Native male and myself. I guess if you believe in telepathy I was telling him to leave it in the trunk." No other officer saw this event, the occupiers deny it ever occurred, and Officer Whelan's partner, Officer Japp, said he "had no idea what was in the trunk".

101. Recognizing the emphasis the OPPA has now placed on this recollection of Officer Whelan, it is important for the Commission to recognize that no one else shared Officer Whelan's observation, at the time Officer Whelan followed none of the OPP's established protocol where any threat to officer safety is perceived, and Officer Whelan's commanding

officer, Sgt. Korosec, had this to say the next morning, comments that are particularly telling not only of the minimal importance placed on Officer Whelan's observations, if in fact they occurred, but also the approach by the police to any arms in the hands of the occupiers:

> In fact, we've never been, in this whole month we've been doing this thing, and even yesterday when it hit the fan, been confronted by a native holding a gun. And he'd probably be a dead native by now.

Reference: Exhibit P1330

102. The only conclusion that can be reasonably reached is that if Whelan observed anything at all, it is very unlikely that it transpired as described and more likely, was a mistaken assumption by Officer Whelan, an assumption that was not taken seriously by any of his fellow officers, at least not until years after the shooting of Dudley George.

103. Steps were then taken by the OPP to clear the Park of any remaining day-users and MNR staff. Consistent with their approach to Serpent Mounds, the MNR had already followed their own contingency plan, and removed most, if not all, of their assets and equipment and, for all intents and purposes, closed the Park. It is at this time, as widely broadcast and expected by the OPP, that the residents exercised their self-help remedy, cut the lock to the fence and moved into the Park area.

Reference: Exhibit P782

Les Kobayashi October 26, 2005 at pp 169, 193

104. Inexplicably, given the prime directive of Project Maple, the OPP sat by and watched, taking no measures to prevent the movement of people into the Park but instead, went directly to their alternative option, of employing an "in your face" approach as officers and occupiers "co-habited" the park together over the course of the next few hours. This 'prevention' and 'co-habitation' approach may be contrasted with the OPP approach to the Hiawatha First Nation occupation at Serpent Mounds that ended hours earlier, wherein OPP Superintendent Buxton personally attended the area, and had all non-native police officers leave the Park and standby in the nearby village of Keene, and from that point on, the only police presence at the Park was three native band constables who positioned themselves at the blockade site and liaised with the natives and MNR staff throughout the process. Though given the opportunity at the Inquiry, no OPP officer was able to explain why there was never any consultation or exchange of information between any members of the OPP involved in these situations, even though the occupations of Serpent Mounds and Ipperwash Provincial Parks were the only parks occupied that summer, or any other time in recent memory.

Reference: Exhibit P963

105. Contrary to the presumption employed by the OPP in their planning of a co-habitation scenario, the occupiers grew increasingly restless with the police presence in their midst, and repeatedly requested the police to leave. Tensions gradually escalated over the course of the next hour to an hour and a half, as it became increasingly clear that the 'in your face' approach was increasing anxiety, not reducing it. Yet, Inspector Carson ordered the officers to hold their

ground and keep control of the park's maintenance shed, presumably because they had no other option at the moment.

Reference: Exhibit P426 at p 1

Exhibit P901

John Carson May 16, 2005 at p 165

Larry Parks March 29, 2006 at pp 54-59

106. By 9:30 p.m., the Park visitors had left without incident, leaving only the OPP and occupiers in the Park. The issue finally came to a head, words were exchanged, and Roderick George gave the OPP an ultimatum, best described by Les Kobayashi, Park Superintendent who was also still at the Park:

Q: I then turn to page 2, first paragraph, the bottom of that paragraph says:
"We left the Park at approximately 9:30 p.m."
Do you see that?
A: First paragraph?
Q: Page 2 first paragraph.
A: Oh, yes, sorry. Yes.
Q: That's accurate?
A: I believe so.
Q: All right. So, you were there for approximately an hour and ten (10) minutes?
A: Correct.
Q: Were you in the same spot for an hour and ten (10) minutes at that area?
A: In the -- yes, that's right.
Q: Okay. And there were natives there and there were police there?
A: Correct.
Q: Was it a confrontation for an hour and ten (10) minutes or were people getting along?
A: Initially people were getting along,

then it escalated to a confrontational situation I guess.
Q: Right. So, there was -- there was discussions for much of that hour and ten (10) minutes that ended in a confrontation?
A: Yes.
Q: I suggest to you that much of the discussion revolved around the Stoney Point Group asking everybody to leave the Park; is that fair?
A: I believe they were talking to Sergeant Korosec. I was back significantly, but that would be fair; that would be fair.
Q: You were back but you were listening to the conversation.
A: I was -- yeah, that's right, some of it, yes.
Q: All right. It's not only fair, but it's accurate isn't it?
A: Yes. No, it's fairly fair.
Q: They were asking people to leave including the police and MNR staff?
A: They were asking people to leave, yes.
Q: Right.
A: Yeah.
Q: And they were asking you, Mr. Matheson, and the OPP officers to leave?
A: They weren't --
Q: Right.
A: -- asking me directly. I think they were asking all of us, that in a sense that it was -- there was a crowd of people around -- around us at that time and people were hollering and talking and screaming and so forth and I would say yes, the -- the intent was for us to leave, yes.
Q: You were under no misunderstanding that you --
A: I was not.
Q: -- you were being asked to leave?
A: I was not. Yes, that's correct.
Q: All right. For an hour --
A: That was correct.
Q: For an hour and ten (10) minutes you didn't leave?
A: That's correct.
Q: At some point in time Roderick George, who's also known as Judas --

A: Yes.
Q: -- yelled at people to leave the Park?
A: That's accurate.
Q: And he gave a timeframe for leaving the Park?
A: That's correct.
Q: He said, Get out, the countdown begins?
A: Exactly.
Q: And he started to count down?
A: Exactly.
Q: He got to the end of his count down and nobody had left?
A: I believe that's correct, yes.
Q: All right. I heard from you that you thought that he had a staff?
A: Yes.
Q: Roderick George has testified at the Inquiry and he testified that he counted down, nobody had left and he went to his car and pulled out part of a crutch and smashed the back window of the OPP cruiser.
A: I don't know if that is the case or not. I -- it appeared to me to be a stick.
Q: You were there.
A: Yes.
Q: Did you see him go get something from the back of his car?
A: I don't recall that.
Q: You don't recall him getting it?
A: I do not.
Q: You don't know where he got it from?
A: I do not.
Q: At that point everybody left, didn't they?
A: We did so. Yes.

Reference: Kobayashi October 26, 2005 at pp 198 - 202

107. Inspector Carson then ordered his officers to retreat, motivated more than anything by the fact that the police are "outnumbered" by the occupiers. In another candid moment caught on tape, Sgt. Korosec stated:

> So, um, now I got the 12 ERT there and I can't be, you know, it's dark, they're all in the bushes, I can't… ones I could I see, 12 of them – yeah, I mean you want two to one. So, uh, then all of a sudden Judas shows up. He's about six four, gotta be close to 300 lbs and he's the one that was nose to nose with on the beach… in that little operation there. He just… He came outta' fuckin' nowhere. "What the fuck is going on here?" Ker-rash with his walking stick smashed the back window of the cruiser. Don't cha' think we all wanted to jump him, but… Boy, it woulda' been, the fight woulda', woulda' been on and I don't know if we woulda' come out on top. I didn't want to take that chance…

Reference: Exhibit 1306

John Carson May 19, 2005 at p 92

Exhibit P444A at tab 6

108. As it turned out, the police only needed to wait another 48 hours to put together enough officers to hold their preferred "two to one" advantage in manpower over the occupiers.

109. Recognizing the "contain and negotiate" directive was already obsolete, the OPP leadership next turned their attention to the task of taking back the park. Though vigorously denied in testimony at the Inquiry, the testimony from Park Warden Les Kobayashi, pressed into service in the middle of the night to serve a trespass notice that could easily have waited until the morning, along with the notes from Dan Elliott, MNR Native Liaison Officer that "OPP well prepared and plan to take maintenance area as a holding location", testimony from Mark Wright and the fact that eight ERT officers were dispatched to provide cover while service was

attempted well within the confines of the Park fence, denote otherwise. The evidence clearly shows the OPP continuously viewed the retaking of part of the Park as a priority, though it waned in importance as it became clear on September 5, 1995 that the MNR was not as committed to obtaining an injunction as first thought.

Reference: Mark Wright February 21, 2006 at pp 225, 226

Exhibit P426 at p 3

110. According to a variety of sources, including the residents, police, media reports and MNR observations, the residents moved peacefully back and forth between the Park and the Army Camp, enjoying their first few hours of having moved into the Park with bonfires and gatherings. Little time was wasted in making it clear to anyone who would listen that the people of Stoney Point were overjoyed at having reclaimed their land, though it was expected to be short lived, as acknowledged in testimony by Stewart George:

16. Q: All right. Was there any feeling
17 among the people in the Park as to what was going to
18 happen? Did you have a sense, Mr. George, as to what the
19 outcome of this was going to be?
20 A: No, I figured I'd probably end up in
21 jail for -- for a little while.
22 Q: And what do you think you would end
23 up in jail for a little while for?
24 A: Trespassing or something like --
25 something like that.

Government Action – September 4, 1995

111. In the planning stages for the eventual takeover of Ipperwash Provincial Park, representatives from MNR met in August with Inspector Carson to discuss how the OPP would be proceeding. Peter Sturdy, Regional Manager for MNR, reproduced this plan of action in a memorandum to his boss, Barry Jones, which outlined three basic courses of action, wherein if an occupation by a small group of protestors occurred, or a blockade of the Park entrance developed, the OPP would arrest those involved and remove them from the area. If a larger group entered the Park, the OPP would still make arrests, but looked to the MNR for an injunction to assist them in this regard, to provide them, according to later testimony, with an additional "tool in their toolkit", by way of Criminal Code offences. Project Maple was fashioned on the assumption that MNR would be in a position to obtain an injunction "on a moment's notice", even though it had never actually been confirmed by the MNR, nor could it be considering the role ONAS was to play.

112. This reflected a fundamental misunderstanding by Inspector Carson, and the ground level MNR employees, and a key operational error in the planning and deployment of Project Maple. For there was already an internal process set up to respond to an aboriginal blockade or occupation, namely the Blockade Committee managed by the Ontario Native Affairs Secretariat. Decisions about what the provincial government's response to any blockade or occupation would not be developed by those on the ground, but instead, by representatives of the Attorney General, ONAS, MNR and the Solicitor General with the ultimate decision on whether to proceed with legal actions to be made upon recommendation to the Attorney General or Cabinet.

113. As a result, the OPP's Project Maple proceeded on certain assumptions that were not true. Whereas Inspector Carson firmly believed MNR would be in the courts promptly to obtain an injunction and authorize his use of force in removing the protestors from the Park, in actuality, the provincial government didn't even take notice of the park occupation on September 4, 1995, other than to reconvene the Blockade Committee continued from August. And in reality, the approach to the issue was far more complicated than simply researching title as had been done by the MNR and Inspector Carson; it involved consideration of the issues in dispute, potential involvement of First Nations leaders, the Indian Claims Commission and other third party negotiators, all items contained in guidelines set up by the previous government that recognized, to an extent, the issues and historical relationship between First Nations and the government. It is submitted that but for the intervention by the Premier's office, and the aggressive approach employed by the OPP leadership and OPPA membership, the issues would have most likely played out differently, and a different result achieved through negotiation.

September 5, 1995
OPP Activity - Morning

114. By 1:10 a.m., Constable Vince George, Les Kobayashi and members of No. 1 ERT had returned from their attempts to effect a midnight service under cover of darkness, an unconventional act at best and, in any event, a clear indication of the sense of urgency held by both the OPP, and Les Kobayashi who had effectively taken up residence in the Command Post. All steps appeared to be in place for an urgent injunction application and some form of court order in respect of the occupation.

115. Area Crime Supervisor and 2IC, Mark Wright, remained preoccupied with getting back into the Park and making arrests, asking Carson, “Access points are open, do we go?” Carson decided to hold tight for the night and Wright asserts that they can go about getting warrants and effecting arrests in the morning, which becomes an important focal point for the OPP over the course of the next two days as containment had been lost and they are forced to communicate with the occupiers in a way entirely determined by the occupiers.

Reference: Exhibit P426 at pp 13, 21, 24, 26, 39, 40, 41, 42, 58, 66, 67, 68

Exhibit P1311

Exhibit P1365

Exhibit P1315

Exhibit P1316

Exhibit P1156

116. The OPP leadership is reminded through a phone call from Chief Tom Bressette, that the recognized Band does not support the actions of the occupiers; rather they should be “dealt with”. For reasons known only to him, Chief Bressette demands swift, forceful action by the OPP against “members” of his Band who don’t agree with his non aggressive recourse to dealing with the return of the lands; and as opposed to simplifying issues for Inspector Carson, he complicates them significantly by raising jurisdictional issues and telling the commanding Officer that:

- He is on board and thinks they are criminals.
- There is absolutely no support from the elected community.

- He has a concern about the cottages and feels that the Pinery is next.
- He has called to give his support, the rumour is that the occupiers may try to take the cottages east of army camp and the Pinery is next.
- The OPP can't be hiding behind the army.
- The OPP should be kicking their asses out of there.
- Treating them with kid gloves is not something they understand.
- There's a bunch of whackos running around loose.
- You're going to continue to have problems with that group until someone enforces the law against them.
- He wants something done.

Reference: Exhibit P249
Exhibit P426 at pp 19, 24, 41, 45, 49
Exhibit P444A at tab 6

117. To his credit, Inspector Carson discounted such comments but unfortunately, took some comfort in having the support of the local Chief and Council, and further related these views to his junior officers, views that remained an important component behind both the government and OPP response during these crucial 60 hours.

118. Regrettably, the OPP also decided to have a representative of MNR, in effect the complainant as it were, to attend its hourly meetings and be involved in its operational decisions. Second in command Wright and Inspector Carson both conceded in testimony at the Inquiry that

it was problematic to have an MNR employee, Les Kobayashi, present in the Command Post, and in retrospect, it should have been done differently. The reality is that having the MNR present was entirely consistent with the OPP having abandoned their role as neutral peacekeeper and proceeding as if the injunction were a foregone conclusion, that it was simply a matter of time and they would be acting on it shortly.

119. What has by all accounts been characterized as a civil matter, one of civil disobedience or civil protest as coined by the MNR in their review of the Ipperwash and Serpent Mounds occupations, was wrongly seen at the time by the OPP leadership and various parts of the government alike, as an illegal trespass that needed to be concluded quickly. And it overlooked the independence of the court, simply assuming that the court would rubber stamp an injunction application without appreciating the underlying issues in this complicated matter.

Reference: Exhibit P426 at p 27

Exhibit P1098

Mark Wright February 22, 2006 at p 84

Chris Hodgson January 18, 2006 at pp 23, 24

Tony Parkin February 9, 2006 at pp 261, 271

Sturdy October 20, 2005 at p 145

Les Kobayashi October 26, 2005 at p 166

Exhibit P444A tab 16 at p122

120. At the same time, the OPP was also not content to be seen as anything other than in control of the situation, and factored into its newly configured approach to the situation, a need to maintain a constant and highly visible presence. By 10:00 a.m. on September 5, 1995, road checks were established, and an OPP officer was directed by Sgt. Korosec to engage in "some random patrols once in a while to show the colours, keep some area people happy". Showing the "colours", a disturbing analogy to gang mentality, was still consistent with both the "in your face" approach and unfortunately, a certain "us vs. them" mentality that had begun to permeate the operation while confrontations and incidents with the occupiers increased. It also illustrated the efforts by the OPP to appease the larger community, recognizing that the land issues were lost on the local people who were beginning to criticize the OPP's handling of the situation.

Reference: Exhibit P1312

Tony Parkin February 9, 2006 at pp 272, 276

121. Also consistent with the "in your face" approach, Carson weighed sending in 10 to 12 officers to walk the beach to see how the occupiers "react". In the interim, he sent Intelligence Officers Bell and Dyke to look around the Park, but they reported back nothing of note.

Reference: Exhibit P444A tab 11 at p 68

Exhibit P426 at p 30

Government Action – September 5, 1995

122. For the Deputy Minister of Natural Resources, Ron Vrancart, the matter was and remained one that was not urgent and with time, would hopefully resolve itself. MNR did not see it as an MNR issue, nor one requiring urgent court application. MNR political staff viewed the occupation as an OPP and ONAS issue, not an MNR issue, and advised Minister Hodgson to distance himself from the issue. However, for the MNR employees on the ground, it already was a matter of some significance, and by attending in the OPP Command Post, they became privy to OPP operational details that quickly made their way back through the MNR offices and out to those at the IMC meetings.

Reference: Ron Vrancart October 31, 2005 at p 32, 33

Les Kobayashi October 26, 2005 at pp 171, 237

123. A second Blockade Committee Meeting, or Inter Ministerial Committee (IMC) meeting regarding Ipperwash took place on September 5, 1995. The first, which took place August 2, 1995 was an uninspired affair, and no steps were taken by ONAS to potentially avert the emergency situation presented at Ipperwash, despite guidelines developed specifically for such purpose, and a directive from the Attorney General and Solicitor General to act in advance wherever possible. An update was provided, and the meeting adjourned until something further occurred. Of note, the Premier's aide, Deb Hutton, was not in attendance in August, and the political staff in attendance simply took notes and information back to their Ministers, a role

expected of them by their Deputy Ministers and Ministers. There are no First Nations representatives present at the August or September IMC meetings.

124. In contrast, the second IMC meeting called for September 5, 1995 was far from mundane. Contrary to convention, the attending political staff took an active role, led by Deb Hutton for the Premier's office. Her actions and comments at these meetings, along with those of other political staffers, later flagged concern for the Deputy Ministers Elaine Todres and Larry Taman such that their roles were eliminated at such meetings following September 6, 1995.

Reference: Elaine Todres November 30, 2005 at pp 41-43
Elizabeth Christie September 26, 2005, pp. 63,64, 87

125. While Ms Hutton testified at the Inquiry that she could not recall her comments made at these meetings, or for that matter any discussions she ever had with the Premier regarding Ipperwash, she left a sufficiently strong impression on the senior bureaucrats in attendance who recorded her comments in their notes in terms resoundingly similar, in language, tone and sentiment:

- Premier is hawkish on this issue, feels we're being tested
- Will set the tone for how we deal with these issues over the next 4 years
- wants an emergency injunction, doesn't want to wait 2 weeks
- clear cut issue, clear ownership of property, maybe we should act

- what is the tolerance level of this government? link with Serpent Mounds in terms of perception

- this government treats aboriginal and non-aboriginal people the same

- Premier wants to deal with this group as if they were non-aboriginals

- strategic imperative: This government treats aboriginals and non-aboriginals the same

- time and place to move decisively

- if ever we need to act it is now

Reference: Deb Hutton November 22, 2005 at pp 47, 76

Exhibits P444A tab16, P509, P510, P536, P649, P730, P742

126. Ms Hutton's activist and confrontational approach to the more conservative views expressed by more senior staff clearly became the focus as she, along with other political aides, dominated the meeting. While the purpose of the meetings was to source options and assess the situation in order to determine how best to proceed, the Premier's view on the subject, expressed in clear and unapologetic terms by Ms Hutton, quickly carried the day. There was a tension felt by many in the room, and legitimate options, developed over years of handling similar events, quickly gave way to the new government's platform, and the only issues seriously reviewed are legal options and the use of the courts to resolve the issue, quickly dubbed one of 'law and order' and rejected as any kind of Native issue.

Reference: Eileen Hipfner September 15, 2005 at pp 51, 96
Anna Prodanou September 20, 2005 pp 156-158
Elizabeth Christie September 27, 2005 at p 275

127. The meeting, and comments by Ms Hutton on behalf of the Premier's office, were reflective of governments of old, outlined earlier in these submissions. It is the kind of attitude that existed throughout government and the general populace, born of ignorance and misunderstanding of aboriginal issues and specifically, land related issues that have been around for centuries. It is the kind of attitude and opinion that must be addressed directly and on which the recommendations of this Commission must focus. Displaying insensitivity to the issues being discussed, one of Premier Harris' aides likened the situation to that of having the Hell's Angels show up on one's front lawn. Perhaps even worse, Inspector Carson and Superintendent Parkin later discussed this sentiment, and instead of discarding it, felt there may be some truth to it.

Reference: Anna Prodanou September 20, 2005 p 148
Exhibit P444A tab21 at p 169

128. The comments are viewed by one senior member of the Attorney General's office as an unnerving illustration of ignorance of Constitutional law and the laws of Canada, however, her mere observation did little if anything to change the course of the meeting. Ms Hutton and her aides "arguably had authority" to direct the IMC and were acting on that authority. In reality, their role was to listen and provide a conduit to the Ministers, but when faced with inaction on

the part of the ONAS group, they seized the opportunity and manipulated a recommendation consistent with the expressed views of the Premier.

Reference: Elizabeth Christie September 26, 2005 at p 110; September 27, 2005 at p 271

Elaine Todres November 30, 2005 at p 41

129. Hutton further questioned why the IMC did not meet to discuss Serpent Mounds and following the meeting Jeff Bangs took "flak" from her for failing to advise the Premier's Office of Serpent Mounds. This is particularly ironic, considering the Premier's office was neither advised nor did they participate in any decisions related to Serpent Mounds or the Cape Croker matter, both matters involving Native issues that were addressed peacefully and without bloodshed.

Reference: Jeff Bangs November 3, 2005 at pp 44, 45, 55, 56

Chris Hodgson January 18, 2006 pp13, 66

130. There is no doubt that Ms Hutton, on behalf of the Premier, was of the view that the occupation was illegal, and that a message must be sent stating that the occupation is illegal, will not be condoned by the government and that the goal will be the removal of the trespassers ASAP. Minister Hodgson was appointed as spokesperson, a role he accepted for exactly one press conference and a role that he spent the next 24 hours striving to avoid.

Reference: Deb Hutton November 22, 2005 at pp 207, 222

131. Despite the denials in the House and in testimony at the Inquiry, the Premier's office obviously took an active interest in the Ipperwash issue and it was a priority for Ms Hutton. Two methodologies to deal with the issue emerged: the cautious go-slow approach advocated by Inspector Ron Fox along with the Attorney General's Office, the Solicitor General's Office and the Ministry of Natural Resources; and the contrasting approach advocated by Hutton and the Premier's office. In the circumstances, and given the source of the directive to proceed on an urgent basis, the "do nothing" approach was dismissed and Ms Hutton's views eventually adopted by the rest of the bureaucrats in attendance.

132. Of course, unbeknownst to the IMC meeting attendees and the political staff for MNR, this ministry was already proceeding with the preparation of injunction materials as if the directive had already been given.

Reference: Exhibit P782
Peter Sturdy October 19, 2005 at pp 69-78
Chris Hodgson January 18, 2006 at p 65

OPP – September 5, 1995 (p.m.)

133. By mid afternoon, Mark Wright had returned from meeting with Bert Manning and had made it clear that the occupiers are trespassing, a predetermination by the OPP that discarded the

colour of right defence and presupposed the right of the MNR to the injunction. Manning had made it equally clear that they were not going anywhere, that it was (and is) a peaceful occupation and that the blockades (checkpoints) should be removed. He went on to say that his people were happy to have their ancestral lands back, and contrary to a view held by some that the occupiers were organized and influenced by outside warriors, the OPP's lead negotiator, Brad Seltzer, observes that they are very disorganized and nervous.

Reference: Exhibit P426 at p35, 36

Mark Wright February 22, 2006 at p151

134. Also by mid afternoon, the OPP had put a helicopter in the air and while conducting routine surveillance on the ground, OPP officers Dyke and Whitehead were recorded making blatantly racist statements. Dyke and Whitehead obviously felt comfortable enough to make such statements among their membership ("The camera's rolling") without any apparent remorse or fear of discipline action. Indeed, it is not until 2003 that any discipline action was taken, however nominal.

Reference: Exhibit P452

135. At 14:47, Inspector Fox called Inspector Carson to report on the IMC meeting. Outside of the assembly of handwritten notes from various participants in the meeting, the tape recording of this conversation represents the closet account in time to what took place at the meeting and the reactions of members of the OPP to the 'hawkish' views expressed. The details from this call are

summarized in the submissions by the Chiefs of Ontario, and others, and recorded in P.444A at tab 16. From the Residents' perspective, it was clear that the bottom line was that Premier Harris wanted them out of the Park they, were are not to be treated any different than non-natives, akin to bikers occupying someone's front lawn, and that they saw their handling of this protest as a means to an end, an example to be set for other First Nations who may be contemplating a similar approach to their long running land and rights issues. Fox projected that the government, which was on a "testosterone high", will likely get its hands dirty.

Reference: Exhibit P444A tab 16

136. Consistent with his instructions to "show the colours" Sgt. Korosec called the OPP vessel HH Graham and advised that they were to let the occupiers know the OPP was there, will not be going away, and to make that presence felt. To his credit however, he appeared to acknowledge that the "intelligence" he is passing along was not confirmed at all, but he still indicated there was some word that the occupiers have AK47s and other weapons, weapons that have never been seen by anyone, in the hands of any occupier, at any time prior to or following the death of Dudley George.

Reference: Exhibit P1330

137. Inspector Carson further advised Chief Superintendent Chris Coles that local MPP, Marcel Beaubien, had contacted the Premier, that there was to be a press release from the

Solicitor General that this was not an Indian issue, but rather an MNR and provincial issue, in effect the message decided on earlier by the IMC as led by Deb Hutton.

Reference: Exhibit P426 at p 40

138. All of the scripted messaging provided to Minister Hodgson appeared on the local news as his comments from earlier in the afternoon were reported. He stressed that the occupation was illegal and an act of trespass with no regard or at least appreciation for how his comments may inflame the situation or fuel the anger of not only the occupiers, but of the local non-native community with little understanding of the history of the situation. In his testimony at the Inquiry, he explained that while he was reluctant to hold the conference and the message was not his message in the circumstances, he saw the messages as helpful to "draw clear lines" of the government's position, a recurring theme and perhaps an acknowledgement that he wasn't going to influence how this government was going to respond to this particular situation regardless of his position as Minister responsible for the park in question, and the Minister who involved himself previously in the peaceful resolution in August of the Cape Croker fishing issue and Serpent Mounds park occupation.

Reference: Exhibit P1057

Chris Hodgson January 18, 2006 at p 62

139. The messaging made its way to the OPP, who acknowledged throughout the Inquiry that there was political pressure overshadowing their performance of their duties, but insisted that it

did not affect how they performed those duties. However, aware that the Minister had said they wouldn't tolerate this, and consistent with the "in your face" approach established from the outset, Inspector Carson, while giving orders before he goes off duty, directed, "if the occupiers get lippy, don't take too much, if they become pushy arrest them and get them out of there". At the same time, the Scribe recorded: "Heat from political side, strong comments in the house", although the political reference appears only in the handwritten notes and no one takes credit for it in their testimony.

140. At about 10:30 at night, an incident occurs that has been described throughout the Inquiry as the picnic table incident. Over a dozen individuals testified in respect of this incident, and the accounts of the event and its timing vary. But what is clear throughout is that the OPP engaged the residents in a second physical and verbal confrontation, one that was entirely unnecessary except to the extent that it continued to fuel the growing "us vs them" mentality and fostered the efforts by the OPP to assert dominion over the Residents. Again, Officer Whelan was involved and his testimony regarding this event bordered on the absurd.

141. He recalled picnic tables stacked upon his arrival at the entrance to the parking lot, but the height he placed on the tables was as high as fifteen feet, testimony referred to by other officers as 'not credible'. The fact is, he used his patrol vehicle as a plough, and moved picnic tables while they had people on them. Whether Officer Whelan meant to injure anyone is irrelevant; the use of a vehicle for this purpose was inherently dangerous, and showed either a certain level of frustration, a desire to make a show of force, or both. It also offers a telling glimpse into the thinking of the Police as this occupation progressed. But the fact that he testified

that the tables were 3 to 4 high, and later 4 to 5, that he drove his car ‘very’ slowly, implying he took care, and that one of the tables fell on his vehicle whereas his notes confirm testimony by the Residents, that the table was thrown on to his car, shows an effort to create a plausible story, one that could justify his use of his cruiser as he did.

142. It is submitted that Officer Whelan’s evidence on this issue is not credible, and must be viewed as an attempt to minimize what must have happened next, which was an aggressive response involving comments by the police, recounted by those in attendance as “Welcome to Canada” and “Dudley you’re first”, following which sand was thrown at police and pepper spray deployed. No OPP were injured, but the cruisers were damaged from rocks being thrown and the incident was reported back to Inspector Carson and others as one of ambush by the Indians, leading to comments later made that night by Sergeant Korosec to Sergeant Jacklyn, referring to the occupiers as:

> “Little fuckers”
>
> “their day will fucking come”
>
> “I was talking to Mark Wright. We want to amass a fucking army. A real fucking army and do these fuckers big time. But I don’t want to talk about it because I’ll get all hyped up and won’t be able to sleep.”

Reference: Exhibit P1154

143. Regardless of the efforts by officers during their testimony to downplay their responses to this situation, it is readily apparent that the interaction between the occupiers and the Police was beginning to wear on the Police, and to some extent, becoming personal. It was equally apparent that the Police were becoming frustrated and restless with their role as peacemakers where they were faced with people they believed were breaking the law. While there was some effort to say that the situation was handled peacefully, and directions were simply provided to go back into the Park, it is hard to believe this limited type of action took place when arrest warrants were outstanding for at least four of the occupiers, and arrests directed by Inspector Carson for anyone who 'gets lippy' or 'pushy'. No arrests were made, again, and this no doubt was discussed upon the return to the Command Post with more patrol cars damaged by rocks and sticks.

144. Later in the evening, Constable Parks reported hearing automatic gunfire way back in the Camp, but regardless of whether it was heard or not, by the time it reached the Command Post and MNR representatives reported it back through the office, the sounds became automatic gunfire, from "within Ipperwash Park". In its review of the situation after the fact, the MNR highlighted problems in the control of information and its inability to "correct the record". This was not a problem unique to the MNR, and was a problem that was a "cause for frustration" for many involved in this incident. It plagued the entire event.

Reference: Exhibit P429 at p 47
Inq. Doc. 1002173
Exhibit P613
Exhibit P802

145. At some point earlier in the day, MPP Marcel Beaubien received a copy of a letter copied to the Premier, the Attorney General and Solicitor General. The letter contained sentiments almost identical to those expressed by Hutton over the course of her two IMC attendances and comments made by the Premier at his Dining Room meeting. The letter serves as an illustration of the views held by those in the broader "white" community, as well as those exhibited in the highest levels of the Ontario government. It is views like the ones expressed in the letter, which are still held by members of the government, of the press* and public alike, that must be the focus of many of the recommendations considered by the Commissioner.

Reference: Inq. Doc 3000829

*Geoff Matthews, *Our Home and Native Land*, Ottawa Sun, July 27, 2006

September 6, 1995 – OPP Actions (a.m.)

146. Inspector Carson meets early with the Mayor, who reports that the community is pleased with the visibility of officers, and gives its full support in light of the "reign of terror" being experienced. Far from acting as peacemaker, or otherwise defusing the situation, Inspector Carson saw fit to advise the Mayor the police have been "ambushed" by the occupiers.

Reference: Exhibit P426 at p 52

147. Following up his meeting with the Mayor, again consistent with the "in your face" approach, Inspector Carson wanted the occupiers to know that the Police are there and directs his

team to keep pressing them. At the same time, the Police accomplish operation "picnic table removal" to "rescue" what is left of the park's remaining few assets. Dudley George and one other person were encountered in the parking lot, waking from a tent and fled into the Park. No arrests were made but, in his subsequent phone call with Inspector Hutchinson, he explains that the operation in essence drew a "line in the sand". Again, no message was provided to the occupiers, no intelligent discussion took place and no messages were transmitted through known sources at Kettle Point or otherwise, to stay in the Park, that it is safe back in the Park and arrests will only be made if anyone goes into the public parking lot.

Reference: Exhibit P426 at pp. 54, 56

Exhibit P444A Tab 30 at p. 231

148. Nothing else of significance occured during the day other than the occupiers continue to enjoy peaceful occupation of the Park lands and men, women and children travel freely between the Park and camp. OPP intelligence continues to gather information, but no reports of weapons or information on outsiders or warriors received.

Reference: Exhibit P426 at p 56

P426 at pp 54, 56

Exhibit P444A tab 30 at p 231

September 6, 1995 – Government Actions

149. By 9:30 a.m., the third IMC meeting regarding Ipperwash was under way and the tension continueed as Deb Hutton insisted on swift affirmative action, and others, including Inspector Fox, discussed occupiers' claims that the "park is their land" and "there is a burial site there", and going slow in the circumstances. Again, Deb Hutton was recorded as saying:

- we want to be seen as having control over this so Ministers can't duck if scrummed
- Premier not averse to this being a provincial government action
- Premier feels the longer they occupy it, the more support they'll get – he wants them out in a day or two
- Premier is firm that only MNR and the OPP are to be involved in discussions despite any offers that might come in (Chief, etc) because they would get into negotiations and we don't want that
- feels MNR as property owner can ask OPP to remove people, has this been done? this could be a communication message
- Premier's office doesn't want to be seen to be working with Indians at all
- the Premier is prepared to speak on this
- want to be seen as actioning
- Premier's office wants to be seen as having control, moving expeditiously
- not adverse to having this be seen as a political issue suspect the Premier will be pleased to take the lead

Reference: Exhibits P513, P536, P635, P636, P637, P653, P513, P536

150. And in response, Inspector Fox continueed to say that:

- its still a dispute over land – in a closed provincial park
- its mischief, not a heavy duty charge
- need to look at long term solution
- its improvident to rush in

ONAS representatives were conspicuously silent throughout the conversation and were clearly intimidated by the Premier's aide. Their refusal or fear to participate is embarrassing and a disappointment to anyone who wants to see ONAS operate as anything more than a research department. There was tension in the room from the outset, a carryover from the previous meeting. Again, the position of the Premier was that the occupiers were to be treated like everyone else and the occupation was to be treated as a law enforcement rather than an aboriginal issue.

Reference: Eileen Hipfner September 15, 2005 at p100

Deb Hutton November 22, 2005 at p 47

151. The ultimate goal was to remove the occupiers from the park ASAP by way of an ex parte injunction. There would be no negotiation. This government was taking a hard line approach to a matter it viewed in very simplistic terms, notwithstanding the fact that it was

viewed by Dr. Todres as one of the most complicated matters the Solicitor General would have to deal with. While the purpose of the Blockade Committee was to be government's representative body in these situations, its response to this issue was extremely disappointing, and its reshuffling following September 6 hardly surprising.

152. Following the meeting, Hutton commented that the meeting "was the most useless meeting I have ever attended. It was a complete waste of my time".

Reference: Eileen Hipfner September 15, 2005 p 102

Anna Prodanou September 20, 2005 at pp 44, 168, 185

153. Following the IMC meeting, a meeting was called by the Premier's office following the Cabinet meeting, which ended around 1pm. The meeting was called to review the Ipperwash situation. Though various descriptions for the meeting are provided by the participants, the purpose is transparent: Deb Hutton met with resistance from the Police, the Solicitor General and the Attorney General despite carrying the Premier's message to two separate IMC meetings. The dining room meeting was called to bring all those involved in line, including Ron Fox and Scott Patrick, members of the Police.

154. Ipperwash was not on Cabinet's agenda, which was set days earlier, nor was it a high priority for Cabinet. It was obviously a higher priority for the Premier's office.

Reference: Runicman January 11, 2006 at p 202

155. Summonsing Ron Fox and Scott Patrick to the meeting, behind the back of the Deputy Minister, Elaine Todres, breached protocol and circumvented buffers established for the express purpose of filtering information and communications between elected officials and government workers. Premier Harris testified it must have been a mistake, because he had no idea that there were police officers in the room, but the message delivered to them by the Premier was loud and clear: "I want the fucking Indians out of the Park"

Reference: Harnick November 28, 2005 at p10

156. The divergence in testimony regarding the dining room meeting between those in attendance and that provided by the Premier in his examination in chief is striking. Ministers Hodgson, Runciman and Harnick testified they said little, if anything at the meeting. If believed, then the only source of any dispute, tension and anxiety was as a result of comments by the Premier, and his interactions with senior Deputy Ministers, who tried, in vain, to influence a different course of action.

157. However, in answer to questions posed by counsel for the OPP in cross, Premier Harris conceded that, but for the expletive attributed to him by the former Attorney General, the testimony by others, including Ministers Hodgson, Runciman and Harnick, Ron Fox, Scott Patrick, Elaine Todres and Larry Taman was accurate, and reflected the sentiments expressed by the Premier in the course of the meeting. Those sentiments included criticism of the Police's handling of the situation, a position that the occupiers were to be treated no different from

anyone else, and as illegal trespassers on government land. Though he attempted to downplay his involvement in the meeting in his testimony, portraying himself as simply 'concurring' in decisions and recommendations made by others, the comments from others reveal that direction was indeed given to those in attendance to get "the Indians out of the Park" and to do it as quickly as possible. The decision was dictated, to move ex parte with the application, and the meeting adjourned when the Premier leaves the room.

158. From a Premier that built a reputation as a decision maker, with a common sense revolution platform designed to cut through the waste and inefficiencies of government, to think that he was anything but forceful in expressing his view to people assembled in his dining room in a command performance as required by his office, is amusing, and perhaps designed to divert attention from his role, as Premier, in this tragedy.

159. Equally disappointing, however is the failure by Minister Hodgson, already uncomfortable being the spokesperson for the government's approach to the situation, in remaining silent and not speaking up at the meeting about Serpent Mounds, Cape Croker or other issues resolved peacefully by a government being respectful of Native rights and Native views.

Reference: Hodgson January 18, 2006 at p 72

September 6, 1995 - OPP Actions (p.m.)

160. By coincidence, perhaps, Inspector Carson received a visit from his superiors and a two hour closed door session ensued, which was not recorded in any way. During that meeting, an update was received from Ron Fox following the IMC meeting and the dining room meeting, and while his discussion with Inspector Carson was caught in tape, his subsequent discussion with Chief Superintendent Coles was not, having been transferred in mid conversation to an unrecorded line. While all participants to these secret meetings and telephone calls denied any impact from the obvious political pressure, the fact remains there is no contemporaneous record of what is discussed or what issues are addressed at that time.

161. By 5:30 that afternoon an angry and fearful mob of citizens with picket signs had congregated at the MNR parking lot down East Parkway Rd, with a design to confront the occupiers and force police action. To his credit, the rally was properly addressed by Mark Wright, who convinced them todisperse. But he then drove down East Parkway Dr. to the bend outside the parking lot area, and took part in an exchange with an occupier that seems altogether incomplete, and led to further miscommunications.

Reference: George Hebblethwaite May 11, 2006 at p 106-115

Mark Wright February 22, 2006 at p 256-260

162. In essence, Mark Wright, in plain clothes and in an unmarked police car, communicated with an occupier but failed to advise that the police were concerned about activity at the Park,

failed to advise that the police remained very concerned about the occupiers physical presence in the parking lot, and the new, official position that so long as the occupiers remained within the confines of the Park no one would be arrested, and the police would take no steps to remove them. Although presented with a perfect opportunity to do so, none of this is communicated by Mark Wright, but instead the impression he took away from that conversation was that the occupiers were up to something that required police intervention.

163. By 6:45 p.m., Inspector Carson received another visit from Marcel Beaubien, who kept up the political pressure and left the impression on Inspectors Carson and Linton that the Premier was in constant touch and there was good communication. This political pressure was later relayed by Inspector Carson to his team, although it is presumed that it will have no impact on their performance.

164. At about the same time, an incident occurred between Gerald George, a Band Councillor, and Stewart George, outside the gate to the Park. The incident involved an exchange of words between two members of the Band who were severely critical of each other's actions, and a stone thrown that caused minimal damage to Gerald George's car. What followed, when Gerald George reported the incident to the ERT officers manning the next checkpoint on the road, was a series of miscommunications, failures in intelligence, errors in judgment and a wholly disproportionate and unprecedented mobilization of force in the middle of the night that eventually resulted in the shooting death of Dudley George, injuries to Nicolas Cottrelle and others in a confrontation with Police, and a Police administered beating to Cecil Bernard George that remains unaccounted for, and unexplained even today.

164. Though those involved in the decision making process attempted to justify the mobilization of force that occurred, the evidence from the testimony, audiotapes and OPP documentation shows the following occurred.

165. Gerald George reported the damage to his vehicle and a field report was prepared. This report was not reviewed by Wright, Carson or Linton before operational decisions were made. Gerald George was interrogated by intelligence officers and, in a break with Carson's expressed intention of not allowing intelligence information to affect operational decisions, the information about alleged AK47s, and other heavy weaponry, was widely broadcast and factored into operations decisions.

166. Mark Wright's information from the parking lot was combined with verbal information received from Gerald George to form an incomprehensible collage such that Inspector Linton was under the mistaken impression that it was a woman, returning from a neighbourhood meeting, that had her vehicle attacked outside the parking lot by 8 to 10 Natives armed with baseball bats, none of which was true.

167. Mark Wright instructed Sgt. Korosec to hold down the dayshift ERT teams in anticipation of using the Crowd Management Unit against the occupiers.

168. Information was transmitted by Officers Spencer and Weverink, after they drove their marked police cruiser from the beach area through the parking lot in question, and noted nothing of any real consequence as at 8:00 p.m. that evening. This information would have easily

justified standing down the ERT teams, but it was either lost, or ignored, as the “troops” were called out and suited up in their hard TAC.

169. All of this mobilization of forces occurred right after Inspector Carson left for the evening, leaving Inspector Linton in charge for an escalating event without any real background or current information at his disposal. At the same time, his efforts to understand the situation, to review the Gerald George incident report and to obtain further and better information regarding what, if anything, was occurring in the parking lot, were questioned, and undermined by Mark Wright, who referred to it as “waffling”, as he called Inspector Carson back to the Command Post.

170. A sense of urgency, and anticipation, took hold as the TRU team was mobilized, then called off, and mobilized again, and their role debated between Inspectors Carson and Linton. For the first time, the CMU was also mobilized along with the TRU team, and information shared with some, but not all team members, of a threat of firearms. The potential threat in the parking lot remained unknown until the CMU arrived at the bend in the road.

171. In testimony, it was revealed that TRU, under the direction of Sgt. Skinner, believed the CMU was mobilized to provide a distraction to allow TRU to achieve “eyes” for the commanding officer. CMU, under Staff Sgt. Lacroix’s direction, believed the CMU was mobilized to go clear the parking lot, and TRU was there to back him up, an obvious miscommunication between two senior officers.

172. Communications recorded between Inspectors Carson and Linton, as well as Mark Wright, reflect an operational plan created on the fly, with passing reference to local cottager safety, the use of TRU and CMU, and misinformation from a variety of sources.

173. In addition, the Police continueed to neglect fundamental lessons learned from the Daryl George incident of February 1995, namely the need for Native officer involvement, and basic First Nations awareness, the benefits to negotiation and a wait and see approach to a volatile situation, the merits to the use of a bullhorn or other broadcast system, the risks that are inherent in any operation when the “target” may “react” to actions by the police.

174. More than anything else, the approach misunderstood the general reaction by Native populations to threats to their people and their lands, and as summarized by Staff Sgt. Lacroix in a candid admission on his cross examination, the CMU employed tactics more appropriate for a British soccer riot, than against First Nations members defending their land.

175. Consistent with the level of frustration building in the OPP, and the aggressive approach followed over the previous two days, comments from Mark Wright and Sgt. Korosec, comments for which apologies were made at the Inquiry, are recorded over the airwaves and reflect a show and use of force mentality out of all proportion to what is taking place in or even around the parking lot.

176. The concept of drawing back, or of simply evacuating people from the area, is dismissed, and following a brief moment, where an occupation on the road holding a stick in the dark is mistakenly believed to have a firearm, the CMU advances to clear the parking lot.

177. A bullhorn would have been effective at communicating the police message, from a vehicle or from a negotiator positioned close to the parking lot. Loud speech from a commanding officer, from ERT, CMU or TRU, would have been effective as it was widely acknowledged that a Native's voice was heard clearly above the din in the parking lot. Or the exercise of patience, of allowing efforts by intelligence officers Dew and Bell, of negotiators Seltzer and others, to take shape over the course of the occupation. All of these options would have been more effective than that employed the night of September 6, 1995. But none of those options would have necessarily played well in the press, where the government's message was that the occupiers were to be removed ASAP.

178. What took place in the sandy parking lot and East Parkway Drive has been the subject of finding by the courts in three separate trials, and the subject of review at the Court of Appeal and the Supreme Court of Canada. The findings were clear: Anthony (Dudley) George was unarmed, and shot by Sergeant Deane in the course of a violent confrontation between Police and the occupiers. The police have led no evidence to show that any of the occupiers had firearms, in the parking lot, on the bus or in the car, and the Commission must so find.

179. The shooting occurred as a result of a series of events in the 60 hours after the people moved into the Park. But those 60 hours, and the actions by the Residents/occupiers, the Police,

the government and general public, were the result themselves of decades of frustration with the federal government and centuries of frustration and domination by Canadian Society over First Nations peoples.

180. By coincidence or design, the actions of the OPP the night of September 6, 1995, were consistent with the message broadcast by the government. The only surprise, although its occurrence could easily have been anticipated when all the circumstances are reviewed, was the death of Anthony (Dudley) George.

IV. RECOMMENDATIONS

181. The Residents will seek to have this Commission make recommendations that fall into two categories, viz:

Group 1 – Recommendations of prior Inquiries and long term Aboriginal objectives.

Group 2 – Interim measures.

Prior Inquiries and Long Term Aboriginal Objectives

182. The Residents have caused the review of the circumstances which triggered the Royal Commission on Donald Marshall Jr. prosecution and the recommendations made by the Commissioners to the government of Nova Scotia in December, 1989. They have also caused the review of the terms of reference and the circumstances triggering the Royal Commission on Aboriginal Peoples together with the recommendations submitted in October, 1996. Finally, they have caused a review of the circumstances leading to the Commission of Inquiry into matters related to the death of Neil Stonechild and the recommendations of October, 2004.

183. Consistent with the approach of the Residents that Ipperwash was not an isolated incident but part of a pattern, the envelope of which has expanded substantially since 1995 to include the most recent occurrences at Caledonia, they have also reviewed and determined that, by and large, they are very few, if any, recommendations resulting from the above noted three Inquiries which do not apply, in one form or another, to the Residents.

184. They believe that focusing too narrowly "on the events surrounding the death of Dudley George" will only address police and government conduct in a specific set of circumstances although such circumstances have been shown to be repeating themselves over the years, and, left to their own accord, will probably result in more blockades, protests, occupations and the like. The causes are systemic and not specific.

185. The Residents stress that these are the "circumstances" against which the major recommendations are to be made, and, in that regard, they adopt, in full, all recommendations of the Royal Commission on Aboriginal Peoples (October, 1996) and emphasize its recommendations with respect to historical treaties, governance and lands and resources.

186. The Residents seek:

- That this Inquiry recommend that the government of Ontario employ best efforts in partnering with Canada where applicable for full implementation of the recommendations with emphasis on renewing the relationship between Aboriginal and non-Aboriginal people, including and recognizing the appropriate place of Aboriginal peoples in Canadian history.

- That a Section 35 Canadian Charter tribunal be established employing Aboriginal Cultural guidelines aimed at addressing and resolving within a reasonable time long-standing disputes concerning Aboriginal and Treaty rights.

- The establishment of an office to review and report on the legality and fairness of the sales, leases and appropriations of Indian lands where there are claims of unfairness or improvident bargains.

- With respect to lands and resources and, in particular reserve or community lands that were expropriated or surrendered for a public purpose and the original purpose no longer exists, the lands should be fully rehabilitated and returned to the First Nations communities in question.

- That the government of Ontario seek the Federal government to rehabilitate the land appropriated in 1942 and to the extent possible, re-establish the Stoney Point community to its pre-appropriation condition.

187. The Residents are of the view that by adapting the recommendations of the Royal Commission on Aboriginal Peoples and the 5 recommendations above, policing of Aboriginals and government attitudes towards them would change sufficiently that there will be a sense of the inclusiveness with non-Aboriginal society and while at the same time maintaining the special position of Aboriginal Peoples in this country.

188. With these recommendations, the Residents take note of the number of Supreme Court of Canada decisions; not only recognizing the special place of First Nations within the Canadian mosaic, but also strongly suggesting to governments that Aboriginal rights and treaty issues be resolved in a forum other than the courts. In that regard, the Residents of Aazhoodena

specifically recommend that this Inquiry recommend to the government of Ontario that best efforts be employed to establish a tri-partite permanent and funded body made up of Aboriginal People, Provincial Government representatives and Federal Government representatives to draft terms of reference for this new body, specifically aimed at dealing with outstanding First Nations grievances within the limits of the various Supreme Court of Canada decisions to date, and as they are updated from time to time.

189. The Residents believe that if the above recommendations are put in place, the question of policing and government interference, real or apparent, can be addressed by employing the recommendations from the Marshall and the Stonechild Inquiries which have not yet been employed. In this regard, the Residents recognize that meaningful steps have been made by the Police to improve the standard of policing of First Nations people and that, rather than attempting to "re-invent the wheel", they recommend that a subcommittee of the special adjudicating body referred to above be established to compile the recommendations with respect to policing as laid out in the Marshall and Stonechild Reports and compare these with what has been done on municipal, provincial and federal policing, and where the recommendations have not been met, to set appropriate timelines for the full implementation of same.

190. With respect to government interference in policing matters, again these issues have been addressed in the report and recommendations of the Marshall Inquiry. It is therefore the request of the Residents that this Commission recommend to the government of Ontario that a full Ministry be created to deal with Aboriginal affairs on a consultative basis with Aboriginal Peoples and with the aim of meeting the legitimate expectations and the objects and spirits of the

treaties while avoiding all government interference in policing matters involving Aboriginal peoples.

Interim measures

191. Until the above noted recommendations are in place, the Residents recommend that:

- The government of Ontario work with the Residents to ensure that their existence in their traditional homeland is not interrupted.

- The government of Ontario re-visit the 1928 surrender with Canada with a view to relinquishing any claims to land that constituted Stoney Point Reserve.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto, Ontario this 28th day of July, 2006

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E. Anthony Ross

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Kevin J. Scullion

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Cameron D. Neil