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

---

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

E. Anthony Ross, L.S.U.C. # 39912 Q
Kevin J. Scullion, L.S.U.C # 34868 J
Cameron D. Neil, L.S.U.C. # 49383O
2010 Winston Park Drive,
Oakville, Ontario L6H 5R7

Counsel for the Residents of Aazhoodena

1. The triggering event that resulted in the calling of this Commission of Inquiry was the police killing of an unarmed Anishnabek individual engaged in what he genuinely believed to be his right to occupy his ancestral land. The Inquiry was delayed until criminal proceedings had been completed so as not to prejudice the gunman's right to a fair trial. Coincidentally, it was also delayed until the Provincial Government in power at the time of the shooting were voted out of office. Ten years later, this Inquiry offered an opportunity for patient reflection and healing and the further opportunity for the community in particular and the province in general to chart an informed and conscious future. The process was exhaustive and considered the interests of all stakeholders. Those who were not heard are only those who did not want to be heard.

2. Submissions filed with this Inquiry fell into two broad categories: the vast majority accepting that the MNR approach following the incident, the view that the government was prepared for and dealt with the occupation in a positive and professional manner and that there was no need to rewrite the book, just "retune what we already have in place", was inappropriate; but a minority reflecting a blindness and unsupportable devotion to an erroneous mindset in spite of clear evidence and knowledge to the contrary, and an uncompromising and dismissive approach to other views that did not dovetail with their predilection.

3. The submissions are reflective of the focus of the parties and their "spin" on the facts. By their submissions, and not inconsistent with the gang type brutal beating of Cecil Bernard George, almost to his death, and with no one involved able to shed any light whatsoever on the circumstances of the beating is strikingly reflective of the difference in approaches reflected in the submissions on behalf of the OPPA and Marcel Beaubien on the one hand and the remainder of the parties given standing in Part I.

4. Striking is the difference in approaches taken by the OPPA and almost every other party, including the OPP, to assisting the Commissioner meet his mandate for this Inquiry. And disappointment is the feeling for many of the Residents after experiencing what they considered to be a real opportunity for insight and change put at risk through a search for blame and justification pursued by some in this Inquiry.

5. The latter arises from the stubborn refusal by many of the governmental and political parties to focus or, even reference the root cause of the blockades and occupations, the social unrest and entrenched and endemic governmental indifference and mere lip service given to the nation-to-nation treaties upon which this country is founded. To develop meaningful recommendations designed to avoid violence in similar circumstances, an understanding and appreciation of the underlying problems is mandatory. To attempt to address the problem without understanding the circumstances is akin to determining cause in the absence of context. Unfortunately, and notwithstanding a number of excellent papers written on this topic under the Part II umbrella, including those by Michael Coyle, Professor Borrows, Don Clairmont and Jim Potts, Dwayne Nashkawa, Professor Christie and others, the origins to these conflicts continue to be either ignored, or overlooked, by the general populace and many at the Inquiry. This attitude is also reflective of the general celebration of the existence of an independent court but the persistent refusal to be guided by its rulings on aboriginal issues.

6. Correcting that basic failure to address the core issues underlying land issues and treaty rights conflicts is fundamental to any recommendations, both in terms of what may be done to prevent such blockades or occupations from ever occurring and how to fashion an appropriate and peaceful response by the police, government and general public alike to any protest. Recent events at Caledonia have shown that not much has changed since September 1995. Without significant changes to basic attitudes and established government policies, more problems can be expected. The root cause can no longer be brushed aside.

7. Most of the Residents' initial submissions went into tracing the history of interaction between First Nations' peoples and identifying the issues central to understanding how Canadian society came to where it now finds itself, and providing ideas on how to approach dismantling a system that is clearly 'broke'. Those submissions will not be repeated here, other than to reiterate that Aboriginals in Canada, constitutionally, have special rights, they are "citizens plus" as referenced by Don Clairmont and Jim Potts, and to repeat the words of Chief Justice Lamer, as he then was, in the *Van der Peet*[1] decision:

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

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

8. Of primary concern to the Residents in these reply submissions is addressing the approach by the OPPA, among others, to justify as opposed to simply explain their actions and what occurred the night of September 6, 1995. Such an approach raises the questions: Is the system functioning as it is designed in spite of advertisement to the contrary? Is the policing sector related so that groups could only police their own, or can the police be relied upon to be fair, honest and even handed in the execution of their duties?

9. But the Residents are neither seeking to correct the numerous inaccuracies and omissions in the various submissions, nor are they trying to balance off the spin or confront the unfounded and unproven allegations made, primarily by the OPPA, but also by others, in their submissions to the Commissioner. That spin has no doubt been developed and honed for over more than a decade, and reflects many of the positions on issues and events articulated before and previously disregarded by the various courts presiding over the criminal trials.

10. As has been echoed numerous times in the course of over two years of testimony, an Inquiry is not a trial, and while it is not limited by the strict evidentiary requirements of a trial, it is also not able to make findings that would impact on criminal or civil liability on the part of any witness. The Inquiry is, for all intents and purposes, a search for the truth, involving an analysis and appreciation of the events leading up to a tragic consequence, and an exploration of options and assessment of alternatives to prevent a recurrence in similar circumstances. And as with most trials, the Commissioner is not bound to accept one parties' version of events over another's in his quest for truth, and unlike with trials, where judicial knowledge is seldom employed, the quest for truth allows more flexibility.

11. This particular Inquiry has also both benefited and been limited in certain respects, through the passage of time and the unfortunate and untimely deaths of a number of key

witnesses, both native and non-native. And while the Inquiry was not privy to the *viva voce* testimony of Kenneth Deane, Dale Linton, Marg Eve, Robert Isaac and others, it did have transcripts from their testimony at a number of criminal proceedings related to these events. It also has the benefit of having before it findings of fact made in various criminal proceedings, some of which have been appealed all the way to the Supreme Court and similar arguments to those made at the Inquiry rejected by the high courts and deemed implausible in the circumstances. It should be noted that these findings of fact have not been shaken by two years of testimony with less rigorous rules of evidence.

12. It is remarkable that over a decade after the only shooting death of an aboriginal protester in 100 years, the organization representing over 5,000 officers and the officer found criminally liable for the death of Dudley George, is unable to provide any insight, any assistance for the Commissioner in determining what went wrong that night and what can be done to prevent violence in similar circumstances in the future. It would be unfortunate, not merely for aboriginals, but for society in general, if those empowered to effect policing were also allowed to be the sole judges of their performance.

13. Even more remarkable, and in itself disturbing, are the efforts by the OPPA to attempt to use this Inquiry to make an end run on the findings of criminal responsibility made by Judge Fraser against Kenneth Deane, findings confirmed on appeal through to the Supreme Court of Canada, and findings that had been accepted by the late Mr. Deane in 2001 in the course of his disciplinary hearing:

> "In the Court's view this is not a situation of honest but mistaken belief. The accused has maintained throughout that Dudley George was armed. And the accused was able to even describe some of the features of the rifle that he saw Dudley George holding.
>
> I find that Anthony O'Brien (Dudley) George did not have any firearms on his person when he was shot. I find that the accused Kenneth Deane knew that Anthony O'Brien Dudley George did not have any firearms on his person when he shot him. That the story of the rifle and the muzzle flash was concocted *ex post facto* in an ill fated attempt to disguise the fact that an unarmed man had been shot. The accused testified that the Court heard

> essentially the same version of events that was given to the Ontario Provincial Police and the Special Investigations Unit in September 1995.
>
> I find sir that you were not honest in presenting this version of events to the Ontario Provincial Police investigators. You were not honest in presenting this version of events to the Special Investigation's unit of the Province of Ontario. You were not honest in maintaining this ruse while testifying before this Court. I have considered all of the evidence presented in this case, and on the basis of the evidence that I have accepted, I find you Kenneth Deane guilty as charged."

14. The argument has been made that the "us vs them" attitude of the officers involved, and the approach employed from the outset by the police was wrong, that it was antagonistic, confrontational and destined if not designed to result in violence of some magnitude, whether it was the night of September 6, 1995, or subsequent. That argument has focused on the racist comments, expletives and confrontational approach caught on tape and involving numerous officers, the explanation offered that it was simply a stressful situation and they were involved in 'police talk' of some kind or other.

15. The approach maintained through today by the OPPA, as opposed to the OPP, shows an organization without remorse or regret, or even the need to appear accountable that sees justification in its actions through the repeated characterization of the Residents as law breakers, and individuals with a propensity for violence. They apparently see the Inquiry as an opportunity to do what they could not do in the criminal courts or in the eyes of the public, to put a gun in the hands of the late Dudley George and to justify his shooting that evening.

16. Lost in all of this is the basic fact that this was a night manoeuvre, a concept not lost on Detective Sergeant Mark Wright, who viewed it as an opportunity to be capitalized upon:

> "WRIGHT: And I got the whole day shift here with Canine.
> CARSON: Okay so what's Dale want to do then?
> WRIGHT: Oh fuck I don't know, waffle, I'll be here till fucking daylight figuring it out and daylight's a wasting."

17. Blackstone, in his famous Commentaries on the Laws of England, wrote that

> ". . . every wanton and causeless restraint of the will of the subject, whether produced by a monarch, a nobility, or a popular assembly is a degree of tyranny."

18. He further wrote that a property owner is protected against physical invasion of his property by the laws of trespass and nuisance, and that

> ". . . a landowner is free to kill any stranger on his property between dusk and dawn, even an agent of the King, since it isn't reasonable to expect him to recognize the King's agents in the dark."

19. This latter comment, or at least the concept of employing force under the cover of darkness, was or ought to have been known to the police when they embarked on the ill-advised and non-urgent night mission.

20. To have an organization that is sworn to uphold and enforce the law, that prides itself in the public's view that it is neutral and respectful of victims of crime as well as sensitive to the pluralistic, multiracial and multicultural character of Ontario society, to be disrespectful, and show such disdain, for both the Crown Attorney and the Judge presiding over the trial of one of the OPPA's members, calls into question exactly how, or even if, any recommendations regarding their actions will be accepted yet long implemented in respect of their policing and handling of any similar situation in the future.

21. Of concern is the apparent disconnect between the OPP and the OPPA, highlighted by the disregard shown by the OPPA members towards its Commissioner and an internal investigation regarding the T-shirts and other memorabilia, in regards to various discipline matters and ultimately, the difference in approaches and submissions made on behalf of each in the course of this Inquiry. In fact, information was withheld for over ten (10) years, in the face of internal inquiries, an investigation, requests by their own Commissioner, and exposure by this Inquiry in its efforts to uncover the extent of the memorabilia produced following September 6, 1995.

22. At the end of the day, where the OPP has implemented broad sweeping and significant changes to its approach to protests, blockades and aboriginal occupations, and made sweeping suggestions on ways to improve the handling of future events, the OPPA has made none.

23. And whereas the OPP has tried to apply these changes to current situations, in particular Caledonia, to bring a neutral, patient and even handed approach to the occupation that is occurring, the OPPA has resisted the changes and publicly criticized its Commissioner and its role as peacekeepers in what it sees as a reactive and ineffective approach to illegal activity. Given this divide, and the disconnect between the OPP policies and the OPPA implementation on the ground, how will this translate into an effective transition from what occurred September 6, 1995, to a peaceful maintenance of law and order in a similar situation? To the same extent that another Inquiry found that the administration of justice had failed Donald Marshall Junior, an Indian, at every step of the way, so is the OPPA membership poised to be again destructive unless meaningfully constrained. They must not be a force unto themselves, or excluded from public review and accountability.

24. An easy explanation for this disconnect from the progressive approach undertaken by the OPP and its officers, and the reactions by the OPPA and its members to that approach and aboriginal occupations and protests in general, is termed systemic discrimination. It exists even where individuals involved in the discriminatory behaviour do not directly intend that their actions have an adverse effect on the individuals or groups so harmed, and is the basis for recognizing remedies against discrimination, in a variety of legal contexts. As stated by the Supreme Court of Canada, per Dickson, C.J. (as he then was):

> "Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . it is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative

> way, it is a signal that the practices which led to this adverse impact may be discriminatory."[2]

25. Section 15 (1) of the Charter provides, in part: "Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination". It is designed to prevent and prohibit discriminatory practices which purport to have the force of law. McIntyre, J. stated:

> ". . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[3]

26. Various papers presented under the Part II umbrella examine the discriminatory effect of modern day legislation and practices on aboriginal peoples. It is submitted that in the same tradition, while the policies of the OPP and legislation governing the activities of the OPPA may make no overt distinctions based on race or personal characteristics, and be "neutral on its face", they are still subject to, and dependent upon, application by the members of the OPPA that is non discriminatory, and perceived to be non discriminatory, by aboriginal peoples.

27. It also means that, like all government policies, they must be implemented with the knowledge, and with full appreciation of aboriginal rights, the meaning and effect of a two row wampum belt, and the protections guaranteed by Section 35 of the Charter.

---

[2] Canadian National Railway Co. v. Canada (Canadian Human Rights Commission, [1987] 1 S.C.R. 1114 (known as the "action travail des femmes case") at pp. 1138 and 1139. See also: Re Bhinder and C.N.R. Co., [1985] 2 S.C.R. 561; Re Ontario Human Rights Commission

[3] Andrews v. The Law Society of British Columbia, [1989], I S.C.R. 143, in which provisions restricting admission to the legal profession in British Columbia to Canadian citizens were struck down as contrary to Charter section 15. McIntyre, J. dissented as to the result, but the other justices adopted his approach to the interpretation and application of Charter section 15.

28. One cannot help but recognize certain similarities between the march by the police in the middle of the night on unarmed protesters at Ipperwash and findings made by a Commission of Inquiry into the actions of South African police during apartheid:

> *"The Commission finds that the police deliberately opened fire on an unarmed crowd that had gathered peacefully at **Sharpville on 21 March 1960** to protest against **the pass laws**. The Commission finds further that the **SAP (South African Police)** failed to give the crowd an order to disperse before they began firing and that they continued to fire upon the fleeing crowd, resulting in **hundreds of people being shot in the back**. As a result of the excessive force used, **69 people were killed and more than 300 injured**. The Commission finds further that the police failed to facilitate access to medical and/or other assistance to those who were wounded immediately after the **march**.*
>
> *"The Commission finds that many of the participants in the **march** were apolitical, women and unarmed, and had attended the **march** because they were opposed to the **pass laws**. The Commission finds, therefore, that many of the people fired upon and injured in the **march** were not politicised members of any **political party**, but merely persons opposed to **carrying a pass**.*
>
> *"The Commission finds that many of those injured in the **march** were placed under police guard in hospital as if they were convicted criminals and, upon release from hospital, were detained for **long** periods in prison before being formally charged. In the majority of instances when persons so detained appeared in court, the charges were withdrawn.*
>
> *"The Commission finds the **former state** and the minister of police directly responsible for the commission of gross human rights violations in that excessive force was unnecessarily used to stop a gathering of unarmed people. Police failed to give an order to disperse and/or adequate time to disperse, relied on live ammunition rather than alternative methods of crowd dispersal and fired in a sustained manner into the back of the crowd, resulting in the death of **sixty-nine people** and the injury of **more than 300**."* [emphasis added]

The emphasized words, when substituted for the Ipperwash situation presents a frightening prospect as to what can take place when policing breaks down.

While reasonable people will argue that the magnitude of the Sharpville situation, with 69 deaths and over 300 injured, removes it as a suitable analogy, it would be and remains difficult to

explain to the friends and relatives of Dudley George, and the aboriginal population as a whole, why Ipperwash was any more appropriate in terms of policing and accountability.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto, Ontario this 16th day of August, 2006

E. Anthony Ross

Kevin J. Scullion

Cameron D. Neil