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Supplementary Information

Submission from the Saugeen Ojibway Nation

In the Matter of

Bruce Power Inc. – Bruce A and B Nuclear Generating Station

Request for a ten-year renewal of its Nuclear Power Reactor Operating Licence for the Bruce A and B Nuclear Generating Station

Commission Public Hearing – Part 2

May 28-31, 2018

Renseignements supplémentaires

Mémoire de la Nation Saugeen Ojibway

À l'égard de

Bruce Power Inc. - Centrale nucléaire de Bruce A et Bruce B

Demande de renouvellement, pour une période de dix ans, de son permis d'exploitation d'un réacteur nucléaire de puissance à la centrale nucléaire de Bruce A et Bruce B

Audience publique de la Commission – Partie 2

28-31 mai 2018

Canada

Affidavit of Paul Jones

AFFIDAVIT OF PAUL JONES

I, Paul Jones, of the Saugeen Ojibway Nation, **MAKE OATH AND SAY**:

1. I am a member of the Saugeen Ojibway Nation, which is comprised of the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation, known collectively as "the SON" or "SON".

2. This affidavit sets out, for the Joint Review Panel ("the Panel"), the history of our people regarding our fishery including: our connection to it; our historic exclusion from it; its reclamation; and our efforts to preserve and protect, for current and future generations, both our fishery and the lands and waters upon which it depends.

3. The words of my father Fred Jones, a SON Elder who served in World War II, explain our connection to the lands and waters:[1]

> My elders told me that our land is sacred to all the Ojibway. Aishinaabek surround the Great Lakes. I heard stories of how the Ojibway used to have their sacred ceremonies on the Bruce Peninsula. When they had their sacred ceremonies they could hear the heartbeat of the earth – the wave at Lake Huron against the Bruce Peninsula.

4. This affidavit starts with a simple premise: our people have, since the arrival of the European, been under constant threat and encroachment. Our rights, and our connection to the lands and waters, have been ignored to the detriment of our people and our culture. We have been confronted with racism and violence because of our connection to the lands and waters.

5. Fishing is engrained in who we are as a people; it is integral to our culture and our belief systems. Because of its central place to SON, we have fought at every turn to protect the lands and waters that support our fishery. And we have had to fight against many threats. We fought against the encroachment of white settlers, who displaced our people to the detriment of our lands, our waters and who we are as a people. When the land was needed for agriculture by non-SON communities, our people were displaced. When our lands and waters were encroached upon by settlers, we were told that, despite the promises made by Canada, it was unable to intervene. When we protested our exclusion from the fishery, Canada and Ontario ignored us.

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[1] Personal Correspondence with Fred Jones, as cited in "Under Siege: How the People of the Chippewas of Nawash Unceded first Nation Asserted Their Rights and Claims and Dealt with the Backlash" Submissions to the Ipperwash Inquiry (December 2005) at p. 8. ["Ipperwash Submissions"] [Exhibit "A" of this Affidavit].

When we were successful in reclaiming our rights in 1993 in the landmark decision of *R. v. Jones and Nadjiwon*, we faced a backlash of racism and violence.

6. In many respects, and despite many actions of the government, including legislated exclusion of SON from our Traditional waters, which has eroded our commercial fishery over decades, we have persisted. We have fought for our rights. We have made huge efforts to protect the resource and, over the last two decades, we have successfully negotiated three successive fishing agreements with the Ontario government to protect and preserve our fishery, and to provide for a mechanism for the implementation and exercise of our rights.[2] We have also negotiated three other, separate agreements, which speak to and are designed to protect our rights. I discuss those agreements below at Section III "SON's Other Efforts To Protect the Fishery."

7. We are now beginning the daunting task, after 150 years of exclusion from our traditional waters, of rebuilding our commercial fishery to restore its place at the center of our economy and culture.

8. Our goal is to preserve our ability to live off our fishery, as our people always have. The fight for our inherent aboriginal and treaty rights has come at an enormous cost to our communities. But today, for the first time in our recent history, we believe we are on the road to rebuilding

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[2] A copy of the 2013 Substantive Commercial Fishing Agreement is annexed hereto as Exhibit "B". The 2000 and 2005 agreements, by their terms, are confidential.

our fishery because of 150 years of work and a newly signed 2013 Substantive Fishing Agreement that SON negotiated with the Province of Ontario. We are rebuilding our fishery primarily under the terms of that Agreement, while at the same time another arm of the Ontario government is seeking to bury nuclear waste within hundreds of meters from our waters and important spawning grounds.

9. Ontario Power Generation's ("OPG") Deep Geological Repository project ("the DGR") poses a significant new threat to our people, our lands, our waters and who we are as a people. It seeks to use the shore of our Traditional waters for a different purpose: not for agriculture, not for the benefit of non-native fishers, but rather to bury Canada's nuclear waste. The consequences of this Project are not known and, we are told, in many cases not even considered.

10. However, we believe, and have reason to believe, that the DGR could strike a fatal blow to our fishery. Burying nuclear waste at the shore of Lake Huron will stigmatize our fishery, will increase development within our territory, and will ultimately increase stressors on the waters of Lake Huron to the detriment of our commercial fishery and our connection to the lands and waters. Should the Panel approve OPG's plan, and the DGR is built, the decision will be irreversible and will change our territory forever.

11. I would ask that the Panel pay close attention to the history of our people and the documents that are attached to this affidavit. In particular, I would ask that you pay particular attention to the 2013 Substantive Fishing Agreement signed by MNR and SON, attached to this affidavit as Exhibit "B". The DGR, either by its stigma or by its construction and implementation, has the

potential to undo all of the commitments and obligations set out in this agreement by fundamentally undermining the aboriginal and Treaty rights of our people.

I. MY BACK GROUND

12. I am Annishnabec and a member of SON. I was born in 1955, and was raised in and have lived on Cape Croker (Nawash) for most of my life. Cape Croker has always been my home. I served in the Canadian Forces from 1973-1975. My service included a tour in Cyprus on a Peace Keeping mission in 1975.

13. After my time in the Canadian Forces, I became involved in fishing because I saw that my people were under constant threat of charges and exclusion from the fishery for simply exercising our rights.

14. I was elected as a band councilor in 1991 and have served on Nawash Band Council ever since. I am now the longest sitting councilor at Cape. During my time on council I have attended virtually every meeting, both with governments and our people, on issues that affect or touch upon our fishery. Those meetings total well in excess of 300 over the years.

15. As is set out below, I have always fought and advocated for the rights of SON – in particular those rights that relate to the fishery, and the lands and waters that support it. I have always considered it my obligation to protect our cultural values and connection to the fishery. The fishery and the lands are part of who I am. The lands and waters are inseparable from me as an Annishnabe person. My family and our oral histories have shaped me as an Annishnabe person. My family has conducted ceremonies on the waters and the ice when the water is covered. Our belief is that the waters, trees and lands all have spirits, and that these spirits are interconnected.

For example, when our people fish, we share in the catch. Our people watch the harvest. Our children see the fishermen return with their catch and share in the process. We have ceremonies to the creator for the lands and waters of which we are a part. Our feasts celebrate the fishery, and our connections to the waters and the lands that surround it.

II. THE HISTORY OF THE SAUGEEN OJIBWAY FISHERY

16. I have read OPG's description of our fishery. That description tells a stark and sad story – of a small and diminishing fishery. Maybe it is even intended to imply that this fishery is not worth protecting, or that its loss could be compensated easily. It is a typical attempt to understand and quantify a fundamental part of our culture in terms of western science and economy.

17. OPG's understanding of our fishery is impoverished. It fails to describe or understand the central role of our fishery in our culture and our economy. It fails to lay out the historical context that explains the current state of our fishery. It fails to tell the story of the hardships and constant struggles our people have faced to protect our right to fish. And it fails tell the story of the victories we have won in the courts and at the negotiating table, and the new future we have committed to with Ontario to restore our fishery to its central place in our culture and economy.

18. In this affidavit, I will tell the story of the SON fishery, and why the right for any SON member to go to the water to catch a fish to feed his or her family, or to make a living, is a right that cannot be assigned an economic value. Rather, it is fundamental to who we are as a people. That our fishery has survived the many threats made to it, and is now once again growing, is an incredible testament to the strength of our people and the role of the fishery in our lives and

culture. As the late Chief Akiwenzie said "it was only through sheer perseverance" that our right to fish has been recognized and protected for our future generations.

1. From Time Immemorial

19. Our people – the Ojibway (Chippewa) or Annishnabe – have fished, hunted and gathered within our Traditional Territory from time immemorial.[3] A copy of our Traditional Territory map is annexed hereto as Exhibit "C".

20. My father has taught me that we have a right to live on and survive off of the land. Since the arrival of the European, our people have been under threat of being separated from our lands and waters. These lands and waters are part of our belief system; they are not just "rights" which are inalienable to our people. This is engrained in our prayers to the creator in regard to the spirits in the lands and waters.

21. The anthropological evidence of the central importance of the fishery to our economy and culture is undisputed. It was well explained in the historic legal case of *R. v. Jones and Nadjiwon*

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[3] C. E. Cleland, "The Inland Shore Fishery of the North Great Lakes: Its Development and Importance in Pre-history" (1982) 47(4) American Antiquity 761; N. Ferris, Continuity within Change: Settlement Subsistence Strategies and Artifact Patters of the Southwestern Ontario Ojibwa A. D. 1780-1861 (M. A. Thesis, York University, 1989).

(discussed more in detail below). In referring to the anthropological evidence, Justice Fairgrieve observed:[4]

> The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. **The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became essential items.** The trade developed further with the growing population of settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.

2. Early Encroachment by Europeans and the Promises Made

22. For our ancestors and our Chiefs, the preservation of our fishery has always been a constant and singular concern. Commencing in the mid 1830s, the Province of Upper Canada sought the surrender of the Saugeen Territory. Even at this early stage, our people could see the growing threat to our use and reliance on the fishery posed by European encroachment. It was this

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[4] *R. v. Jones and Nadjiwon* (1993), 14 O.R. (3d) 421 (Ont. Prov. Ct.) at p. 14 of version attached to this affidavit [Exhibit "D" of this Affidavit]. See also Royal Commission on Aboriginal Peoples, "Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship" vol. 2 at p. 462.

encroachment and the long series of Crown actions and inactions in response that was the beginning of erosion of our rights and our fishery, notwithstanding promises to the contrary.

23. In 1836, as part of a broader process of assimilation policy, Lieutenant Governor Sir Francis Bond Head devised a plan to relocate our people to Manitoulin Island.[5] The treaty negotiations, our ancestors were told, were to ensure that our people would be "fortified against Encroachment of the Whites."[6]

24. Our people resisted these efforts. Chief Metigowob explained to us that, during the treaty negotiations, when they were asked to relocate to Manitoulin Island, the Saugeen Chiefs had informed Bond Head that our ancestors preferred to remain on the Saugeen peninsula as "there were many fish in that place."[7] Chief Metigwob told us that Bond Head responded as follows:[8]

> The Sahgeeng owned all the islands in the vicinity of that neck or point of land, he was about to reserve from them and that he would remove all the white people who were in the habit of fishing on their grounds.

25. Our people understood that the purpose of the treaty was to recognize and protect our right to continue fishing as we always had: not only for sustenance but to share, barter and trade. This is what we would now characterize as a commercial fishery. Historians who have studied this part

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[5] This issue is explored in great detail by Professor John Burrows in his P.HD thesis "Negotiating the Law: Traditions & Treaties on Manitoulin Island" [Exhibit "E" of this Affidavit]. See also M. Walters, *Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada,* (1998) 23 Queen's Law Journal 301 at para. 6 [Exhibit "F" of this Affidavit].

[6] Walters, *ibid.* at para. 6.

[7] "Statement of Metigwob, one of the Sahgeeng Chiefs, made in a General Council held at the River St. Clair on the 13th September 1836 respecting the surrender of the Sahgeeng Territory to the British Government." Six Nations Land Research Office, cat. No. 836-9-13-1.

[8] See Walters, *supra* note 5 at para. 12.

of our history have come to the same conclusion. Professor Mark Walters of Queen's University, Faculty of Law, explains:[9]

> Thus, Bond Head's oral statements about the Saugeen reserve were consistent with what he had written in relation to the Manitoulin reserve: native fishing rights were exclusive and non-native encroachment would be prevented. The significance of this promise arises from the larger context within which it was made. In the years preceding the treaty, non-native use of the Saugeen fisheries had increased and some confusion had arisen about the terms under which a non-native commercial fishing company operated from the fishing islands: the company had obtained both a licence of occupation from the Lieutenant Governor in council and a lease from the Saugeen chiefs in 1834 for use of islands. In light of this, treaty recognition of their exclusive rights to the islands and fisheries was important to the Saugeen chiefs. Furthermore, in the 1836 treaty no provision was made for payment for the surrender of the Saugeen territory. It may therefore be argued that the Crown's consideration was, in part, its promise -- conveyed orally by Bond Head -- to protect exclusive Saugeen possession of unsurrendered Ojibway fisheries. In short, very strong reasons exist to conclude that the 1836 treaty recognized exclusive rights of fishing.

3. Broken Promises & Exclusion

26. Many of the promises made to our people by the Crown at the time of the treaty were broken, including the promise that our fishing rights would be protected from encroachment. Our people could not tolerate this and took action early on. As Professor Walters notes:[10]

> In an effort to protect their territories, the Saugeen Ojibway sought further written confirmation of their rights, and in 1847 the imperial Crown issued a proclamation in the form of letters patent under the great seal of the province of Canada defining the Saugeen territory and confirming Ojibway title to it. This 1847 deed defined the boundaries of the Saugeen territory as:
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> > all that tract of land lying on the shore of Lake Huron, and which is butted and bounded or otherwise known as follows: commencing at the mouth of the River Saugeen, thence . . . [a southern boundary line along the base of

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[9] *Ibid.* at para. 13.
[10] *Ibid.* at para. 14 [citations omitted].

> the Saugeen peninsula is described], bounded on the east, north, and west by Lake Huron, including any islands in Lake Huron within seven miles of that part of the main land comprised within the hereinbefore described tract of land

27. The Deed went on to declare that the Saugeen Ojibway:[11]

> ...forever shall possess and enjoy" the tract and its "rents, issues, and profits....without any hinderance whatever on our part, or on the part of our heirs and successors, or of our or their servants or officers.

28. Professor Walters and Justice Fairgrieve in *R. v. Jones and Nadjiwon*,[12] a landmark decision that I discuss in more detail below, both conclude what the SON has always known and maintained: reserves on the shores of Lake Huron, as well as the fishing islands and the lake bed under the waters, remained unceded. Indeed, the anthropologic evidence establishes that our people lived on the water as much as we lived on the land. However, despite treaty and letters patent, our exclusive fishing rights were disregarded and Ontario began leasing our lands and waters without our consent.[13] These represent specific actions by the Government of Ontario that would have the effect of eroding our rights and fishery.

29. In *Jones and Nadjiwon*, Justice Fairgrieve stated:[14]

> During the 1830s, the Saugeen continued to enter into arrangements directly with third parties for the leasing of their fishing islands by directors of the Huron Fishing Company, which were then affirmed by licences of occupation by the Crown. No licences of occupation were issued to confirm the arrangement in 1845 that the Saugeen chiefs made with one Cayley, whose name figured prominently in the documents from that period. Mr. Lytwyn, an historical

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[11] *Ibid.* at para. 15 citing Declaration by Her Majesty in favor of the Ojibway Indians respecting certain lands on Lake Huron (29 June 1847) NAC RG68, vol. LIBER AG. SPECIAL GRANTS 1841-1854, C-4158.
[12] *Supra* note 4.
[13] Walters, *supra* note 5 at para. 16.
[14] *Jones and Nadjiwon*, *supra* note 4 at p. 16.

> geographer called by the defence, gave his opinion that the colonial government could issue such licences in respect of Crown lands, but could not do so in relation to the Saugeen's fisheries because they had not been surrendered.

30. The historical evidence supports the conclusion that, from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area. When the Chief Superintendent of Indian Affairs visited the settlement the next year, he wrote:[15]

> The fishing is bountifully supplied and has attracted the notice of white people who annoy the Indians by encroaching on what they consider their exclusive right and on which they rely much for provisions.

31. The historical evidence also confirms the most basic and fundamental understanding of our people – that the 1836 treaty confirms and recognizes our exclusive right to the fisheries in our Traditional waters.[16]

4. Legislated Exclusion

32. Irrespective of the validity of the 1836 Treaty, one thing is certain: the promise that our fishing rights would be protected from encroachment was broken. As Professor Walters notes:[17]

> Notwithstanding the 1836 treaty, non-native use of Saugeen fisheries increased. A commission of inquiry on Indian affairs in 1844 observed in relation to the Saugeen fisheries that the "fishing is very productive, and has attracted the notice of the white people, who annoy the Indians by encroaching on what they consider their exclusive right…"

33. In 1857, ten years before confederation, the provincial legislature enacted the first statute regulating fishing in Upper Canada. No mention was made of our rights. Since confederation,

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[15] As quoted by Justice Fairgrieve in *Jones and Nadjiwon, ibid.* at p. 16.
[16] *Jones and Nadjiwon, ibid.* at p. 16.
[17] Walters, *supra* note 5 at para. 16, citing Canada, Legislative Assembly of Canada, Report on the Affairs of the Indians in Canada (22 January 1844) in Journals of the Legislative Assembly of Canada (1845), Appendix EEE, s. 2, II.15 at 43.

Canada has enacted successive fisheries legislation. None of this legislation mentions our rights and, as history demonstrates, the legislation was in fact used to exclude our people from the fishery to the benefit of others.

34. The effect of this legislative history upon our people was profound. In *Jones and Nadjiwon*, Justice Fairgreive noted:[18]

> What the evidence disclosed was a relentless, incremental restriction and regulation of the admitted aboriginal right, despite continuing protests, petitions, objections and resistance by the defendants' band. Much of the conflict appeared to have its source in the apparently inadvertent failure of the first Fishery Act to make any special provision for the treatment of native fisheries or existing treaty rights. The evidence documented as well a protracted intragovernmental policy clash between Fisheries and Indian Affairs. The former generally prevailed, and the fisheries came under increasingly stricter controls.

35. The legislation and enforcement efforts of Ontario (MNR) had real impact on our people. SON elder Donald Keeshig is quoted as saying:[19]

> I've been threated over hunting and fishing. The Conservation Officers and RCMP were always after us. There was no work here when I was young. You couldn't rely on fishing, because we weren't allowed to go very far from our reserve to fish. If we went beyond the "lines" set up by the MNR, they were ready to charge us and take our equipment from us. I remember our grandfathers used to sleep on the shore to watch over their seining nets. The MNR said it was against the law to use a seine net on our reserve. I always felt the MNR and the RCMP were our enemies…they were always after us.

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[18] *Jones and Nadjiwon, supra* note 4 at p. 18.

[19] Ipperwash Submisssions, *supra* note 1 at p. 34. The chronology of the assertion and protection of our rights is set out at pp. 38-45 [Exhibit "A" to this Affidavit].

36. Elder Keeshig, like many SON members, relied on fishing to make a living and to provide for his family. His ability to continue to do so was constantly under threat by the collective effect of the many government actions that separated our people from our fishery.

5. Reclaiming the Right: R. v. Jones and Nadjiwon

37. I have made much reference to the *Jones and Nadjiwon* decision for its summary of the SON's history. However, it is also important for the Panel to understand the circumstances that led the Chippewas of Nawash Unceded First Nation to challenge the MNR licensing system and the reasons for why *Jones and Nadjiwon* was decided as it was.

38. Prior to becoming a Nawash Band Councilor, I was part of the community-based movement to challenge our exclusion from the fishery. For years, our people were denied access to the fishery by a government that sought to protect the interests of recreational fishermen and the commercial interests of non-SON members. For example, while Ontario was setting quotas and putting in regulatory restrictions on SON members, it was issuing lucrative commercial licenses to non-native commercial fishermen.

39. Despite these efforts at excluding our people, we continued to fish as our people had done from time immemorial. As a result of our actions, criminal and regulatory charges were frequently laid against our people. Sometimes the charges were resolved or withdrawn. In some instances, our people were imprisoned. This cycle continued for decades.

40. By the end of the 1980s, our communities' frustration was palpable. We were facing exclusion from our waters and we were being prosecuted when we exercised our rights. For example, on October 13, 1989, Ross Forgrave, a Wiarton Justice of the Peace forced eleven Nawash fishermen, of the them the Chief of the First Nation, some of them elderly, to stand for 45 minutes as he lectured them about fishing over MNR quota. He portrayed them as thieves, greedily taking too many fish. He imposed fines totaling $ 32,000.00 plus jail time ($200 and 30 days for one fisherman, who caught 9 fish).

41. I recall being in court when the presiding Justice called our people "rapers and pillagers" for simply seeking to survive from our traditional territory and waters. To make matters worse, the quota allocated by MNR was not enough to feed members of our community, let alone support a commercial fishery, as was promised to us. I kept telling Joint Council, our governmental structure where the Chiefs of Nawash and Saugeen, as well as elected councilors, sit, that we had to fight for more fish and not accept the quota being imposed by MNR.

42. Eventually, the community had enough. A group of fisherman approached Joint Council urging that, rather than being under the constant threat of charge and imprisonment, we resolve our rights once and for all. We knew we would have to fight for our rights in a Canadian court. Although it was a long process to change the thought process of our people regarding the Canadian court system – which was considered simply an extension of our exclusion from our traditional waters – eventually there was community support for fighting to resolve our rights once and for all in a Canadian court.

A. The Charges against Howard Jones and Francis Nadjiwon: Settling Our Rights

43. The opportunity to do so arose in 1989, five years after the passage of Section 35 of the *Constitution Act*, 1982, when Chief Howard Jones and Francis Nadjiwon were charged with fishing without a license and the sale of lake trout in excess of that which was allocated to SON.

44. Upon learning of these charges, our Band Council made the brave and difficult decision to divert resources out of our community to assist Chief Howard Jones and Mr. Nadjiwon in their defence. The cost of the defending Chief Jones and Francis Nadjiwon was almost $500,000.00. Unfortunately, the Band Council could not afford to spend money to defend the fishery without diverting funds from health, education and infrastructure. The funds were diverted and, rather than go those areas, they were spent on litigation.

45. The trial was heard in Orangeville. I attended every day of it. Many fishermen and community members were also present.

46. I remember that on the eve of trial, Ontario made an offer to settle the matter. The offer was a marginal increase in the allocated quota. However, to our community, a marginal increase in quota was not the issue. We needed to have our rights to a fishery recognized and our people needed to be free to exercise those rights on a priority basis over all other considerations, save for conservation. The Band Council had already expended hundreds of thousands of dollars and the community had made it clear: we have an aboriginal and treaty right to a commercial fishery and those rights, if they were to be protected, needed to be affirmed under section 35 of the *Constitution Act*. The Government's offer was rejected and the trial proceeded

47. The trial was significant moment in the history of our people. It lasted some ten days and was based on thousands of hours of historical research. Both expert and community members testimony was given. It was as full a review of the history of our fishery as had ever been done.

48. On April 26, 1993, Mr. Justice Fairgrieve issued his decision recognizing what the SON community and our people always knew: we had both an aboriginal and treaty right to commercially fish within our traditional territory and that we had been excluded from our fishery for the benefit of others.[20]

49. In reaching his decision, Justice Fairgreive reviewed the extensive evidence presented at trial and emphasized the place our fishery held at the center of our economy and culture. He concluded that government actions which failed to recognize this reality were unconstitutional. His Honour stated:[21]

> When the lake trout quota was allocated in 1984, the evidence suggests that despite the fact that the band was the only commercial licence-holder covering an entire community, and despite the fact that the band's fishery was the only one in the area dependent on lake trout for its livelihood, the band was simply given an incidental quota, not a production quota, in the same way and of a similar magnitude as other individual commercial licence-holders. The evidence does not support a finding that any special regard was given to the nature of the band's fishery operation, quite apart from the question of any constitutional priority over other users.
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> .....
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> What should be stated, however, is that a high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an

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[20] See *Jones and Nadjiwon*, *supra* note 4 [Exhibit "D" to this Affidavit].
[21] *Ibid.* at pp. 26-27.

> enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s. 35(1) of the Constitution Act, 1982, particularly after the judgment of the Supreme Court of Canada in Sparrow, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.
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> .....
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> As a practical matter, the court cannot compel good faith or recognition of changed constitutional realities. All that can be done here is to state the conclusion that the quota restrictions do not meet current constitutional standards and are, accordingly, unenforceable against the defendants. The imposition of a prohibition against the purchase of lake trout from band members pending negotiations and a new arrangement which recognizes the priority of their aboriginal and treaty rights would, in my view, also be unconstitutional. It would also fail to reflect the high standard of honourable dealing which the public expects its government to take in respect of the rights of aboriginal people.
>
> Howard Jones and Francis Nadjiwon are found not guilty, and the charges are dismissed.

50. We won the case. Howard Jones and Francis Nadjiwon were found not guilty and SON's rights were recognized and affirmed under s. 35 of the *Constitution Act, 1982*. Ontario did not appeal the decision. It would, however, take SON another 7 years to come to conclude our first fishing agreement with Government to provide for a mechanism by which these rights could just begin to be implemented.

B. The Backlash to *Jones and Nadjiwon*: Violence and Racism

51. The legal victory was an instrumental step in putting an end to over 150 years of exclusion of our people from our fishery. However, the backlash from the non-SON public was swift and strong:[22]

- In the summer of 1995 a Nawash fishermen's boat was sabotaged and defaced with graffiti that read: "splake thief."

- Later in the summer, another fishermen, who had lost 2,000 yards of nets to someone who had them lifted them or cut free, reported his losses to the OPP. No one was apprehended. He was on the verge of bankruptcy but *he* was charged by the OPP for booby-trapping his nets in an effort to protect them.

- On August 5, 1995, about 75-100 angry anglers from the Grey-Bruce area marched on Yolanda Jones, a Nawash Band member who was selling fish at the Owen Sound open market with her daughters. The sportsmen and recreational fishermen were, at the time, protesting against our fishing in Owen Sound. The protest was led by Grey MPP Bill Murdoch and Parliamentary Assistant to MNR Minister Chris Hodgson. A scuffle broke out and Nawash supporters linked arms to bar the sportsmen from attacking the stall. One of the protestors threw a plastic bag with a rotting salmon onto the fish onto Yolanda's stall.

52. These are but a few of the many examples of the violence our people faced after Jones and Nadjiwon was decided. I lived these times, when our community members faced overt acts racism and violence. A complete description of the violence we faced is available in our submissions to Mr. Justice Linden in the Ipperwash Inquiry, which are excerpted in Exhibit "A" of this affidavit.

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[22] The backlash from the decision are fully detailed in SON's Ipperwash Submissions, *supra note* 1 at pp. 40-45 [Exhibit "A" to this Affidavit].

6. Protecting our People and our Rights: Negotiations with the Crown for a Fishing Agreement

53. While our people faced racism and violence following *Jones and Nadjiwon*, we also faced another obstacle: negotiating a fair and honourable agreement with the Crown that would provide a mechanism for the implementation of our rights, protect the resource and begin to reverse the effects of our fishery's historical decimation.

54. Over the last twenty years, I have attended hundreds of meetings to arrive at such an agreement. Indeed, looking back over the years, it is difficult to convey how difficult these negotiations were. We travelled far, we met with government officials, we wrote letters and we consulted with our people. We fought to obtain data to assess the fishery in Lake Huron, and we retained staff biologists in partnership with the University of Guelph to ensure that the fishery would be protected based on sound science. Most importantly, we sought to establish that which was promised: an exclusive commercial fishery of which we were the primary stewards.

A. The Initial Years After *Jones and Nadjiwon*

55. Following *Jones and Nadjiwon*, we continued to seek a peaceful solution to the acrimonious relationship between SON, the government and public by tabling a comprehensive strategy to develop public support, assess the impact of the stocking of non-indigenous species in our waters, and develop a co-management agreement with Ontario.

56. On August 15, 1995, MNR Minister Chris Hodgson met with SON. The Minister advised that the new government (elected in June 1995) was not interested in negotiating and concluding a co-management agreement and discussions came to an end. A new license was inevitable.

57. On June 24, 1996, Ontario issued an Aboriginal Communal fishing license to SON. It was rejected and our people continued to fish, once again exposing themselves to charges, and the seizure of their nets, fish and boats.

58. Sure enough, on June 24, 1997, MNR issued new charges against two SON fishermen. SON was forced back into court to expend resources to challenge the licenses, notwithstanding Justice Fairgreive's findings in *Jones and Nadjiwon.*

B. Initial Negotiations and the 2000 Agreement

59. SON continued to try to negotiate an agreement with Ontario while, at the same time, defending the new charges under the 1996 fishing license.

60. On July 30, 1997, SON secured a commitment from both the Federal and Provincial Governments to negotiate. The Honourable Mr. Justice Stephen Hunter acted as mediator in those discussions. This was a very difficult time. Charges were still pending against two SON fishermen. Our people questioned how we could negotiate with the very government that charged our fishermen and had imprisoned them in the past.

61. Our position was simple: while we did not need an agreement to fish, an agreement would stabilize our relationship with the Crown and bring some peace to our communities. It would also help us rebuild our fishery, reversing years of damage.

62. I personally attended, along with Chief Akiwenzie and other councilors from 1997-2000, well over two hundred meetings. During this three year period, the promise of *Jones and Nadjiwon* seemed to be slipping from our grasp. Nevertheless, through sheer determination and perseverance, we held on to the hope that we could conclude an agreement that would protect our people on the land and on the waters, and implement the right that was won in *Jones and Nadjiwon*.

63. On June 22, 2000, over 7 years after *Jones and Nadjiwon* was decided, SON signed our first agreement with MNR and Indian Northern Affairs Canada. While the agreement is confidential, it had the following key components:

- It more broadly defined the waters for SON fishing within our traditional territory, allowing for a broader SON commercial fishery than what had been allocated under the previous licensing scheme employed by MNR;

- It ensured that the fishery would be protected by the application of sound science to the setting of safe harvest limits in which SON was an active participant, and not a "stake-holder," in determining the quota that was allocated;

- It provided for a mechanism by which SON could better assess the fishery by providing for the exchange of data between SON and MNR, and by securing a funding mechanism for this exchange of data.

64. From SON's perspective, the protection of the resource was the continuing and primary obligation of the parties under the agreement. The secondary obligation under the agreement was to ensure that our people would benefit from the commercial fishery on a priority basis.

65. Although this agreement was an important first step, it was just a beginning. The 2000 agreement did not go far enough in protecting our rights and the resource and it did not provide the basis for us to rebuild our commercial fishery. To attain this, our people had to fight again, and endure more cost, insult and attack.

66. This SON experience was captured by Mr. Justice Linden, Commissioner of the Ipperwash Inquiry, in his final report:[23]

> Both before and after Jones and Nadjiwon the Saugeen Ojibway Nation approached the province to try to reach a co-management agreement concerning the commercial fishery in the waters around the Bruce Peninsula. In 1994, Ontario agreed to discuss co-management.
>
> Despite the concerted efforts of the Saugeen Ojibway Nation to educate the public about their treaty and Aboriginal rights, the summer and early fall of 1995 was marked by protests, violence, and vocal opposition from some members of the non-Aboriginal community to the commercial fishing rights of the Saugeen Ojibway Nation. The protests and violence included a march by nearly 100 people on an Aboriginal woman who was selling fish in the Owen Sound market. Aboriginal fishing boats and nets were vandalized, a First Nation-owned fishing tug was burned, and several members of the Saugeen Objibway Nation were assaulted in Owen Sound.

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[23] Report of the Ipperwash Inquiry, vol. 2 at 118-19, online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_Full.pdf.>

> In August of 1995, the new provincial government informed the Saugeen Ojibway Nation that it would not continue with the co-management discussions. Later, the government tried to unilaterally impose a new regulatory scheme under The Aboriginal Communal Fishing Licence Regulations, which the Saugeen Ojibway Nation resisted. The MNR continued to lay charges against Saugeen Ojibway Nation fishers for not adhering to the communal licenses.
>
> In 1997, the federal government appointed a judge to mediate the dispute between MNR and the Saugeen Ojibway Nation. In June 2000, seven years after the Jones and Nadjiwon decision recognized the Saugeen Ojibway right to fish commercially, the provincial and federal governments and the Saugeen Ojibway Nation signed the first Fishery Agreement to manage the commercial fishery in Lake Huron and Georgian Bay around the Bruce Peninsula. In July 2005, the Agreement was renewed for a further five years, including a protocol for how the parties will work together to ensure compliance and to exchange information about the commercial fishery.
>
> A First Nation should not have to experience what the Saugeen Ojibway Nation went through to reach a co-operative management agreement with Ontario. I recommend that the provincial government continue to work with First Nations and Aboriginal organizations in Ontario to develop co-management arrangements and resource-sharing initiatives.

67. The 2000 agreement was for a term of 5 years. It was the first step in repairing a badly damaged relationship and its main purpose was to create a peaceful environment in which SON could begin to implement its vision of our fishery and overcome 150 years of exclusion from it. In many ways, the 2000 agreement was both and end and a beginning: it ended the violence of the past, and it began to define SON's vision of the fishery for our people and the generations to come.

68. However, the 2000 agreement was not without compromise. In the interests of moving towards a better relationship with Ontario (with the ultimate goal of securing our rights for our people), SON agreed to refrain from exercising our rights within Owen Sound and Colpoys Bays ("our Bays" or "the Bays"), a contentious issue that I will return to further in this affidavit.

C. Negotiations Continue: The 2005 Agreement

69. Two years before the 2000 agreement was set to expire, SON and MNR began negotiating the next agreement. After lengthy negotiations, a second agreement was concluded on July 12, 2005. The 2005 agreement provided further stability and peace within our traditional territory, and increased the amount of safe harvest limits within our waters. It also confirmed and recognized an SON exclusive commercial fishery in the waters surrounding the Bruce Peninsula.

70. While the violence of the past subsided over the life of the 2000 and 2005 agreements, our fishermen continued to be excluded from our Bays and the agreement provided little in the way of economic development opportunities so that our people could earn a moderate livelihood. As the end of the 2005 agreement approached, SON Joint Counsel provided a renewed mandate to the SON negotiating team to remedy these deficiencies in a new, substantive, agreement that would provide a mechanism to implement the right for both the present and future generations.

71. In preparation for the re-negotiation of a new agreement, SON set out some fundamental principles that would guide its position:

- SON would exercise its aboriginal and treaty rights throughout its Traditional waters, including in Owen Sound and Colpoy Bays;
- The issue of the stocking of exotic species which are predators of the indigenous species we catch would be studied and addressed;
- Our people would derive greater economic benefit from the waters in order to sustain our connection to them and to invest in and protect our fishery and its historical place in our economy and culture;

- The agreement would be based on a Government-to-Government relationship based on mutual trust and respect;

- The agreement would contain binding commitments and obligations on both Government and SON to ensure that our fishery would regain its central importance to our economy and culture.

D. Renegotiation – The Initial Discussions: May 2010 – November 2010

72. In anticipation of the expiry of the 2005 agreement, SON and MNR agreed to extend the 2005 agreement to December 31, 2010 to allow for negotiations of a new agreement to commence. When the 2005 agreement expired on December 31 2009, it was extended by a Memorandum of Understanding to allow for negotiations of a new fishing agreement that would embody a new relationship with Ontario but also implement SON's vision for its fishery for generations to come.

73. The initial discussions were mediated by Professor Michael Coyle. While initial progress seemed positive, the talks broke down in November of 2010.

74. After the breakdown, SON had discussions with the very highest levels of the government of Ontario, including the Minister of Aboriginal Affairs, The Honourable Chris Bentley, and the Minister of Natural Resources, the Honourable Linda Jeffrey. During the meeting with Minister Jeffrey, she and our Chiefs made a renewed commitment to re-commence the negotiations with a new mandate. A Deputy Minister was given the lead on the negotiations and the Honourable Frank Iacobucci, a retired Supreme Court of Canada Justice, was retained to facilitate the renewed discussions.

E. The Framework Agreement Recognizing the Right and a Mechanism for Implementation

75. Following SON's meeting with Minister Jeffry, negotiations with MNR re-commenced in April 2011. They continued through to August 2011.

76. On August 27, 2011, SON and MNR executed a foundational Framework Agreement to assist the parties in negotiating a long-term substantive fishing agreement. A copy of the Framework Agreement is annexed hereto as Exhibit "G". I ask that The Panel review this document closely, paying particular attention to the mutual commitments and obligations relating to the SON fishery.

77. The Framework Agreement was a milestone in setting forward the vision for the SON fishery and our relationship with Ontario for generations to come. It contains several important principles:

- The agreement is based on a Government to Government relationship in which SON decision makers would sit directly with MNR decision makers;
- It created a Governance Committee comprised of SON and Ontario leadership to implement the objectives, commitments and responsibilities set out in the framework agreement; and
- It made commitments to deal with specific key issues including:
    i. Mutual economic benefits;
    ii. Capacity for SON to allow for reconciliation to continue;
    iii. The mutual setting of safe harvest limits based on sound science and not the unilateral allocation of quota under a licensing regime;
    iv. A commitment to study and address the impacts of MNR stocking programs in the waters of Lake Huron;

v. The sustainability of the fishery and the waters that support it; and

vi. The engagement of the Federal Crown.

78. The Framework Agreement committed the parties (SON and MNR) to a number of principles to guide the conclusion of a long term substantive fishing agreement. These principles include:

- A new relationship with a willingness to build a more positive and better future for the parties;
- Mutual respect created through a willingness to act in good faith and in a manner respectful of each other;
- Mutual participation in implementing mechanisms that achieve further participation by both parties in decisions about commercial fishing in the waters.

79. The Framework Agreement also contained important mutual commitments, paramount of which was the protection, conservation and sustainability of the resource.

80. Mutual trust and respect was to be established through meaningful negotiating processes, and through goals and principles that would be included in a long term agreement including:

- mutual economic benefits for the parties;
- capacity for SON;
- the setting of safe harvest limits (TAC); and
- SON fishing in Owen Sound and Colpoys Bays.

81. These commitments, obligations, responsibilities and principles set the stage for SON and MNR to negotiate a new agreement – one that built upon past agreements but would move far beyond them in order to provide for a better future for our people.

F. Negotiation of and Execution of the Long Term Substantive Fishing Agreement

82. After signing the Framework Agreement, SON and MNR re-commenced the negotiations to conclude a lasting and flexible substantive fishing agreement. These negotiations began in September of 2011. Over 50 meetings were held and, by June 2012, the parties had come to an agreement that was recommended for approval by SON leadership and the Ontario Government (referred to in the remainder of my affidavit as either "the 2013 Agreement", or "the Substantive Fishing Agreement" or "the Agreement").

83. On January 24, 2013, the Agreement was signed by The Honourable Minister Gravelle on behalf of Her Majesty The Queen in the Right of Ontario (MNR) and by Chief Randall Kahgee on behalf of the Saugeen First Nation. On February 21, 2013, the Agreement was signed by Chief Scott Lee on behalf of the Chippewas of Nawash First Nation.

84. The changes in the 2013 Agreement – notably that SON fisherman could now exercise their treaty and aboriginal rights to fish throughout our Traditional waters, including the Bays of Georgian Bay – became effective on April 26, 2013. As noted above, the 2013 Agreement is set out at as Exhibit "B" to my affidavit.

7. THE 2013 SUBSTANTIVE FISHING AGREEMENT – A VISION FOR A BETTER FUTURE

85. The Substantive Fishing Agreement is 40 pages in length. It incorporates and implements the commitments and obligations contained in the August 2011 Framework Agreement. It contains Schedules relating to:

- Incorporation of the Framework Agreement (Schedule "A")

- The waters covered by the agreement (Schedule "B");
- Fishing within the waters (Schedule "C");
- Total allowable catch and data exchange (Schedule "D");
- A compliance protocol for SON and non-aboriginal fishers (Schedule "E");
- Terms of reference for:
    - The Capacity and Economic Development Working Group
    - Expert facilitation for TAC Determination Working Group
    - Expert Facilitation Regarding Fish Stocking Working Group

A. The Contents and Purpose of the Agreement: Restoring the Commercial Fishery

86. The 2013 Agreement re-affirms the binding goals, principles, objectives and commitments contained in the Framework Agreement, the primary concern of which is the sustainability of the resource. Within the waters defined under the Agreement, SON has maintained an exclusive commercial fishery.

87. There are several key components to the 2013 Agreement:

(i) **Purpose**: The purpose of the agreement is to implement the commitments made by the parties in the Framework Agreement, which is based on a Government-to-Government structure.

(ii) **Scope**: Its scope is intended to provide for the sustainability of fish, the support of the SON commercial fishery and safety on the waters for all;

(iii) **The Waters**: The waters that are the subject matter of the 2013 Agreement surround the Bruce Peninsula, to the international border on the West Side and to Meaford on the South East Side. A copy of the map defining the waters is contained at page 23 of the

2013 Agreement. As the panel will see the proposed DGR sits in the middle of the waters defined by the agreement and within SON Traditional Territory.

(iv) **Governance Committee:** The Governance Committee oversees implementation of the agreement and ensures that the mutual commitments and obligations under it are kept and implemented. One mechanism through which this is accomplished is by the establishment of working groups with terms of reference.

(v) **Total Allowable Catch:** "TAC" is to be set based on sound science by consensus decision making of the Governance Committee based on a consideration of the biological status of the fish populations in Lake Huron prior to the establishment of TAC.

88. Below, I will address the work being done under the 2013 Agreement, and then I will discuss the aftermath and community backlash that came from its negotiation and execution.

B. The Work Being Done Pursuant to the 2013 Agreement

i. The Capacity and Economic Development Working Group

89. On July 5, 2011, the Governance Committee established the Capacity and Economic Development Working Group by terms of reference. The purpose of this working group, a collaborative effort between SON and Ontario, is to develop detailed proposals for a business development plan so that SON can derive greater economic benefits from the fishery through a vertically integrated fishery. This will be done through a Request for Proposal that will include identification of the following:

i. Equipment requirements of SON;

ii. Cold storage needs;

iii. Processing of fish;

iv. Marketing of fish;

v. Distribution of fish to the market;

vi. Enhancement of revenue for SON processed fish;

vii. Employment and training;

viii. Costs necessary to address the capacity needs of SON in an economically viable and self-sustaining commercial fishery.

90. In addition, the terms of reference required identification of the necessary agencies (governmental and non-governmental) to support and implement the terms of reference, and the necessary capital required for implementation of the business plan by the Governance Committee.

91. Two points need to be made about these terms of reference.

92. First, properly implemented over the long term, this economic working group can restore our fishery, undoing the effects of our historical exclusion, and make it a center piece of our economy, as it once was. Indeed, the historical decimation of our fishery continues to be felt today (and is reported by Ontario Power Generation ("OPG") in its Environmental Impact Statement, in terms of the current size of our fishery) and is reflected in the overall health of our on-reserve economies. Our fishing agreements with Ontario set out the foundation for SON, working with Ontario, to rebuild our fishery from the decades' long history of destruction caused by encroachment by European settlers and government actions. This long process of rebuilding is now beginning. Under the 2013 Agreement, for the first time, we can and will restore the fishery to its rightful place within our economy so that it will no longer be the case that only a few fishermen can survive from fishing, but rather that many SON members will be supported by our fishery, whether through catch, assessment, processing, marketing or distribution.

93. Second, it takes time to build and establish a fishery. The non-aboriginal fishery had 150 years to mature into a self-sustaining commercial fishery. SON did not enjoy that same advantage. We were excluded from our fishery. We are only now, under the 2013 Agreement, beginning to take the steps necessary to overcome the effects of this exclusion. As with the non-aboriginal fishery, this takes time, commitment and capital.

94. The Capacity and Economic Development Working Group has begun its work to develop detailed proposals for a business development plan aimed at building a strong, economical and vertically integrated fishery. As it stands, our fishermen mostly sell their catch "in round" – that is, without any processing or value added. This is the lowest value form of a fishery. The goal of the working group is to build up our fishery so that it can be the basis of a real economy and our people can make a real living from the fishery.

95. The Working Group has established an Request for Proposal for the development of the key components of new and vertically integrated fishery including: equipment needs for cold storage and processing; marketing; distribution; revenue enhancement models for processed fish; employment and training; and the development of business models to address capacity needs of SON to build an economically viable and self-sustaining commercial fishery.

96. We have already begun the work necessary to rebuild and modernize our commercial fishery. This has started from the bottom up. We began with the fishermen in both Saugeen and Nawash. We have held numerous "Community Fishing Meetings" in both Saugeen and Nawash, we have passed Joint Council motions to establish Foundation Principles for Territorial Economic

Development, and we have established a SON fishery committee and hired local youth to assist the committee in its work.

97. Efforts have already begun to acquire necessary equipment, from fishing nets purchased directly from Chinese and Taiwanese suppliers to new boats. We have begun work to price and plan for the construction of new fish processing plants, and we have and conducted research and modeling into the power, transportation and logistics needed to support this. We have considered business models that divide our fishery into four components: (1) whole fish, (2) smoked fish, (3) surimi (processed fish cake) and (4) vacuum packed. Our fishing committee has led planning on an inter-ministerial conference to bring all parties to the 2013 Agreement together in a broader forum to discuss issues related to business and economic development which could inform the development of an integrated SON commercial fishery vision and plan. We have taken advantage of programs such as the Business Retention & Expansion Program offered by the Ontario Ministry of Agriculture, Food, and Rural Affairs, and we have begun work to develop SON-specific marketing materials and strategies.

98. There are already concrete examples of how our efforts are starting to pay off. I will relay a personal example. Over the last year, I have built and made significant investments in a fish smoking facility at Cape Croker. I built a commercial grade smoke house, and purchased an industrial grade smoker and packaging equipment. In the last six months, I have been catching fish, or purchasing fish from our local fishermen, to smoke and sell. I am already processing and selling significant amounts of my smoked fish to local Nawash business people who resell it in their retail shops. In the short time I have been in operation, my business has grown tremendously and there is every indication that it will continue to do so.

99. I fear that the mere possibility of the DGR poses a threat to these positive developments, and to the efforts of SON and government to rebuild our commercial fishery. There is a danger that government, our people and others will not make the investment of time, effort and capital that has been committed to under the Agreement, and is necessary to rebuild our fishery. I worry that nobody will be willing to make these investments if they fear there will be no market at the end of the day for "fish from the nuclear waste dump." They will all see it as a bad investment, a waste of money. I fear that all our efforts will be wasted and our fishery will die out, rather than be rejuvenated.

ii. The TAC Working Group and Data Exchange

100. Other aspects of the agreement establish mechanisms that ensure that the resources will be protected and maintained so that it will continue to be able to support the SON fishery far into the future.

101. Of central importance to our people is the sustainability of the lands and waters that support our fishery. At one time, we were "allocated" a quota without consultation or regard to either our history, our aboriginal right or our treaty relationship with the Crown.

102. The TAC working group provides the mechanism by which safe harvest limits can be set through the establishment, by consensus of the Governance Committee, of total allowable catch in any given year. SON and MNR have differed over the process by which safe harvest limits can be set after annual harvest data is exchanged. Accordingly, the process is now facilitated to ensure that the best science is applied to the setting of safe harvest limits for consideration by the

Governance Committee. This is a crucial element of the Agreement as it assists our people in ensuring the sustainability of the resource.

103. Complementing the TAC working group is Schedule D of the Agreement, which provides for the process by which data will be exchanged for the purposes of establishing TAC. This includes a detailed protocol relating to commercial harvests within Lake Huron, index netting data and recreational harvest. In addition, Schedule D requires TAC to be determined based on key uncertainties, including the status of biological fish populations and their distribution in the waters. In this regard especially the DGR creates enormous uncertainty for TAC: What effect will construction have on the waters? On habitat? On aquifers during construction? On increased urbanization and the resulting increase in effluent and pollution? How is SON to address these uncertainties in setting safe harvest limits if the DGR is built?

iii. Fish Stocking Working Group

104. Over the objection of SON, Ontario has and continues to stock non-indigenous fish in our traditional waters. The purpose of this stocking is to support the non-native recreational fishery. The reason that SON has objected to the stocking of these species (such as salmon) is that they are not only predators of our preferred species (lake whitefish) but they consume many of the nutrients that lake whitefish require for their natural reproduction. In short, the stocking of non-indigenous species, in SON's view, has an adverse impact on the waters that sustain our fishery. The Fish Stocking Working Group, for the first time in history, will examine and address long standing SON concerns with respect to these stocking programs.

C. Public Reaction to the Substantive Fishing Agreement

105. The 2013 Substantive Fishing Agreement is the first one that has been made public. Properly implemented, it will restore our fishery to the center piece of our culture by protecting, by ensuring more SON members will participate in it and ultimately ensure that our connection to the waters for generations to come will be preserved. In the face of this agreement however, and its public release, we have faced yet another hurdle: another backlash to SON's exercise of its aboriginal and treaty rights.

i. The Aftermath of the 2013 Agreement

106. As I noted above, the 2013 Agreement was the first agreement to be made public: it was released on March 12, 2013. Public reaction was immediate. There was outcry and outrage over the Agreement in the local media, and by both federal and provincial politicians. On March 13, 2013, the Owen Sound Sun Times reported that Member of Parliament Larry Miller and Member of Provincial Parliament Bill Walker were "angered" by the agreement. After having reviewed the contents of the Agreement, MP Miller said he was "deeply disappointed" about aspects of the agreement that will "no doubt kill local sport fishing in [the] bays." MP Miller and MPP Walker were also upset about the funds provided under the agreement, stating that SON members were being paid to fish.[24] This public characterization is misguided; the money is for the assessment and sustainability of the fishery based on sound science.

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[24] "SON Gets Funding to Fish" Bayshore Broadcasting (March 13, 2013). A collection of the articles I reference in this paragraph and below are attached to this affidavit as Exhibit "H". "SON Gets Funding to Fish" is contained therein as Tab 1.

107. Online comments on the Owen Sound Sun Times website expressed outrage about MNR entering into agreements with SON in secret and jeopardizing sports fishing.[25] To make matters worse, MP Miller and MPP Walker issued a joint press release referring to the Agreement as an "insult."[26] They did not reference our treaty and aboriginal rights to fish within our Traditional Territory, nor did they discuss the history of exclusion of SON from the fishery. I heard that MP Miller reported that he heard from people who suggested violence in response to the agreement. Members of the public hosted meetings to express their "concern" over the agreement, organized protests and called for the agreement to be re-opened.[27]

108. As in 1993, we had concerns about the safety of our community members. Some of our members experienced backlash from the agreement – they were taunted at the docks and our children were taunted at school. We put the police, who are playing a role in ensuring that the implementation of the Agreement goes smoothly, on alert to protect our people and fishermen.

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[25] See the comments at the end of the article by Denis Langlois, "Miller Calls Fishing Agreement a Mess" Owen Sound Sun Times (March 14, 2013) and by Scott Dun, "Miller, Walker Condemn Payments to SON" Owen Sound Sun Times (March 14, 2013) [Exhibit "H" Tab 2]

[26] MPP bill Walker and MP Larry Miller, "Sports Fishers sold out by Ministry of Natural Resources: Response from MPP Walker and MP Miller" (March 12, 2013) [Exhibit "H" Tab 3]

[27] See "Important Announcement: Concerned Anglers to Host Session on Commercial Fishing Agreement" (April 20, 2013) ["Concerned Anglers Announcement"]; Dennis Langlois, "Small Turnout at Commercial Fishing Protest" Owen Sound Sun Times (April 26, 2013); Denis Langlois "Sports Anglers Want Fishing Agreement Reopened" Owen Sound Sun Times (April 27, 2013) [Exhibit "H" at Tab 4].

109. In response to the backlash from the agreement, Chief Kahgee and Chief Lee issued a press release defending our people and our rights. In that press release, the Chiefs wrote about our rights, the 2013 Agreement and its importance.[28]

110. Minister of Natural Resources David Orazietti also publically responded through a letter the editor sent to the Owen Sound Sun Times dated April 9, 2013, a copy of which is attached as Tab 6 of Exhibit "H".[29] Minister Orazietti confirmed what the SON has always known: that we have a treaty right to fish on the waters and that we were not obligated to enter into this agreement with MNR in order to exercise that right.

111. Despite the overwhelming negative public reaction by elected officials and the recreational fishing organizations, there were some non-SON individuals who spoke out in favour of the Agreement. Josh Choronzey of the Owen Sound Sun Times published an article commenting on the situation, which included a brief review of SON's rights and the history of the negotiations. Online, some commentators reminded critics that we had a proven right to fish – a right established by treaties and affirmed by Canadian Courts only 20 years prior.[30] Schools invited our Chiefs to educate teachers about SON's history and the agreement so that they could teach children in their classes about us and our rights.

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[28] Taking the High Road: The SON/MNR Fishing Agreement" (April 9, 2013) [Exhibit "H" Tab 5 to this Affidavit]
[29] David Orazietti, Minister of Natural Resources "Letters to the Editor – Both Commercial and Recreational Fisheries Can Exist" (April 9, 2013) [Exhibit "H" Tab 6].
[30] Josh Chronzey, "Some Context for Native Fishing Agreement" (March 14, 2013) Owen Sound Sun Times. online at <http://www.owensoundsuntimes.com/>. [Exhibit "H" Tab 7 to this Affidavit].

112. On April 22, 2013, Chief Kahgee, Chief Lee and Minister Orazietti participated in a ceremonial signing of the Agreement – reaffirming SON and MNR's commitments to the principles contained within it. A copy of their signatures in reaffirmation of the 2013 Agreement is attached to this affidavit as Exhibit "I". After the ceremony, Minister Orazietti repeated his already publically expressed opinion that SON did not need to enter into the agreement because of our treaty and aboriginal right to fish in our traditional territory.[31] Chief Lee commented on the importance of Minister Orazietti's statements about SON rights, stating that "We've never heard that kind of commitment, those kinds of acknowledgement of our rights."[32]

113. On that same day, a "peaceful protest" against the agreement was organized by non-native recreational fishers. In addition, some recreational fishing groups organized a "town hall style, non-confrontational information meeting"[33] for the following day, where calls were made for MNR to reopen the agreement.[34] Most recently, the Mayor of Georgian Bluffs has written to Minister Orazietti asking that the agreement be re-opened and amended.

114. The public outcry over the 2013 agreement was reminiscent of public reaction in 1993 to *Jones and Nadjiwon*. General threats of violence were made, although thankfully no one was injured or attacked. However, there are signs that we have moved forward. Non-SON individuals have stepped up in defence of our rights. Some members of the public have taken steps to learn about

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[31] Scott Dunn, "Minister, SON chiefs say fish deal a new chapter" Owen Sound Sun Times (April 22, 2013) [Exhibit "H", Tab 8].
[32] *Ibid.*
[33] Concerned Anglers Announcement, *supra* note 27 [Exhibit "H" Tab 4].
[34] Langlois "Sports Anglers Want Fishing Agreement Reopened, *supra* note 27 [Exhibit "H" Tab 4].

our history. Ontario has also publicly, for the first time, acknowledged our aboriginal and treaty rights in our traditional territory, confirming we are not required to enter into any agreement about the commercial fishery but rather are obligated to protect it.[35]

8. Summary – SON's Fight to Protect Its Fishery

115. Since the time of contact, and the beginning of the encroachment of settlers and industry on our lands and waters, our fishery has been under attack. Most recently, we have been criticized by elected officials for exercising our rights. We have had to make great efforts to protect our fishery, and who we are, from being wiped out entirely. Now we are facing the difficult task of rebuilding our fishery. We had hoped, and put our efforts into our Agreement with Ontario so that it could be the foundation of our effort to finally rebuild our fishery and restore it to its central place in our economy and culture. For example, we have created a business development office to work with Ontario and other agencies to create a vertically integrated fishery.

116. These efforts are ongoing and, properly implemented, will bring to fruition the obligations and commitments contained in the 2013 Substantive Fishing Agreement. At the very time that SON secures an agreement that would properly protect our waters and the fishery, however, another arm of government seeks to undo it all by building, transporting and burying nuclear waste several hundred meters from the shores of Lake Huron though the construction of a project that

[35] See Minister Orazietti's comment that SON, who has "unfettered" rights, "voluntarily" negotiated with Ontario out of concern for the long-term sustainability of the fishing resource: Denis Langlois, "Minister Praises SON For Negotiating Fishing Agreement" Owen Sound Sun Times (April 18, 2013) [Exhibit "H" Tab 9].

is unprecedented in Canadian history. SON should not have to endure further encroachment or attacks on our rights and our territory. Those days have long since passed. The 2013 Agreement is an important milestone agreement whose very implementation is now threatened by the DGR.

III. SON'S OTHER EFFORTS TO PROTECT THE FISHERY

117. What I have described above is our decades' long fight to have our rights recognized and build a new foundation for our fishery through negotiated agreements.

118. However, SON has fought to protect our rights and fishery on other fronts. Over the last fifteen years, SON has made tremendous effort, spent millions of dollars and devoted countless hours to protect the waters, fish and fish habitat in Lake Huron and Georgian Bay, through legal action, participation in numerous regulatory proceedings and sponsorship of scientific research initiatives. I will briefly describe these efforts in the paragraphs that follow.

119. In January 2013, community members noticed a shore well being constructed that was harmful to fish habitat. SON obtained an injunction to prevent the harm that was occurring. We then entered into negotiations with the Conservation Authority to create a better relationship to ensure that the resource was protected. We have attempted, as part of this effort, to engage the Department of Fisheries and Oceans ("DFO") in order to better protect fish habitat in our traditional waters. Most recently, SON has sent a letter to DFO Minister Shea expressing concern about SON's relationship with DFO and our attempts to reach a relationship agreement with DFO. Our struggle and difficulties to engage with DFO are set out in a letter recently sent by our Chiefs. It is annexed as Exhibit "J". As of the date of the swearing of this affidavit, we have not received a response from the Minister.

120. SON has been consistently and actively involved in the regulatory review of many different industrial developments in our Traditional Territory that could threaten our fishery. We have pushed for scientific and environmental study of the resource, in order that good and precautionary decisions can be made to allow only responsible developments and to mitigate any dangers that those developments might pose.

1. The Bruce Nuclear Site and Bruce Power Inc.

121. Many of these efforts have focused on the operations of Bruce Power and developments at the Bruce Nuclear Site – the site on which OPG now proposes to build its DGR Project. This area is particularly important to the SON fishery because it is close to and influences critical fish spawning areas within Lake Huron.

122. Over the last many years, SON has had a central role in the review of proposed developments and initiatives relating to Bruce Power, including:

    a. In 1997, an environmental assessment was carried out for a used fuel dry storage facility at the Bruce Nuclear site. SON went to the hearings and challenged the science and conclusions of OPG and others respecting the interaction of the facility with Lake Huron and the aquatic environment. As a result of our voice, a new research program was initiated to look at the question of Whitefish interaction with Nuclear Generating

Stations. This study was called "WINGS". Its history is described in a Final Report by Holes & Noakes, in 2002:[36]

> During the Bruce Nuclear Used Fuel Dry Storage Environmental Assessment (BUFDS EA) revew process in 1997, representatives of the Chippewas of Nawash First Nation expressed concern about the monitoring of lake whitefish in Lake Huron as part of the overall Bruce Nuclear environmental monitoring program conducted by Ontario Power Generation (OPG 1990). These concerns predate the BUFDS EA process and derive partly from the fact that the single largest component of the Nawash commercial fishery to which they have an established Treaty right (Walters 1988), the harvest of lake whitefish, is from the eastern Main Basin of Lake Huron, where Bruce Nuclear Power Development (BNPD) is located (OPG 1990)....The health of the ecosystem and the whitefish population(s) it supports in the vicininty of the BNPD are of fundamental importance to the health and economic viability of the Nawash community (OPG 1990) and other users of fisheries resources in Lake Huron.
>
> In response to these long-standing concerns about the effects of the BNPD on the fishing industry and the Lake Huron ecosystem near the Bruce Peninsula, a 3-year collaborative effort to jointly review the available scientific information on the ecology and population dynamics of both lake whitefish and round whitefish in Lake Huron was initiated in 1999. The project was conducted by the University of Guelph with field support from the Chippewas of Nawash and is funded by OPG and since 2001 Bruce Power (BP), which leased the Bruce A and B generating facilities from OPG.

b. In 2002, Bruce Power initiated an environmental assessment respecting its intention to restart two of its reactors (Units 3 and 4) after their refurbishment. In reviewing the application and review documents by CNSC, SON was extremely concerned about the manner in which ecological effects on lake whitefish and the results of the WINGS Project were being ignored. SON filed detailed submissions critiquing the work of Bruce Power and CNSC, and attended the one-day hearing into the screening report in Ottawa

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36

on December 12, 2002. At those hearings, Nawash Chief, the late Ralph Akiwenzie, along with our biologist Dr Steve Crawford, made the case that the science behind the application was lacking and did not address SON concerns. Ultimately, the Commission made the decision that the application would not go to a fuller review and that the interests and concerns of SON could be addressed through a follow-up monitoring program as a condition of the approval. The Lake Huron Whitefish Follow-up Monitoring Program was initiated, and for a time, SON and its researchers were deeply involved in its work. However, as time went on, it became apparent that the direction research was going would not answer the key questions that SON had about the impact of the Bruce Nuclear facility on the total ecology of Lake Huron, and specifically, questions about populations of lake whitefish and the impacts on those various populations.

c. In 2006, Bruce Power began its application to build four new nuclear reactors at the Bruce Nuclear Complex. SON engaged in a lengthy consultation and accommodation process with the federal Crown, represented by the Canadian Nuclear Safety Commission (the "CNSC") to ensure that the project would be reviewed to the highest possible standards under Canadian law, and that the review would focus on the potential impacts of the project on SON Rights, interests, and way of life. The Joint Panel Review Agreement for that project identified SON specifically as having a unique interest in the territory and the project.[37] It went further to set out a new mandate for the panel to

[37] A copy of the JRP Agreement on the New Nuclear Power Plant Application is annexed hereto as Exhibit "K".

consider and take evidence on the potential impacts of the project on SON Rights and interests to support ongoing consultation efforts between SON and the Crown. The Agreement is attached here as "K". During the environmental assessment of the project, SON engaged experts both external and from within our community, as well as academic reviewers and legal support to review Bruce Power's application. SON representatives continued to meet with the CNSC to participate in a collaborative review of the application, all with the goal of identifying potential impacts on SON rights and the fishery. The project to build the four new reactors was subsequently abandoned by Bruce Power.

d. In 2008, Bruce Power was required to seek a licence for the refueling and restarting of two refurbished reactors. Again, SON made detailed submissions at the CNSC hearings emphasizing, in part, that the ongoing impacts of the facility on the fish and fish habitat of Lake Huron. In particular, SON pointed out its repeated complaint, first made in response to the inadequate follow up monitoring program described above, that the work that Bruce Power was doing in monitoring its entrainment and impingement effects were meaningless without an understanding of the nature of the whitefish populations in Lake Huron. As a result of our submissions, the CNSC imposed on Bruce Power a requirement that it undertake studies that would satisfactorily answer the questions and concerns of SON.

123. Following from the decision of the CNSC panel, SON engaged directly with Bruce Power to negotiate the terms of an agreement to carry out a collaborative study to answer five key

questions respecting the impacts of the facility on the Lake Huron Whitefish, and in particular set out a first of its kind course of study on understanding populations of the Lake Whitefish in Lake Huron so that impacts from contaminants, radiation, thermal changes, and entrainment and impingement could finally be understood. An agreement was concluded in May 2011. The study is referred to as the Collaborative Lake Whitefish Research Program and is being led by SON and Bruce Power with the University of Guelph and McMaster University.

2. The Integrated Power Supply Plan and the "MEI Agreement"

124. In 2007, the Ontario Power Authority proposed a new energy plan for Ontario referred to as the Integrated Power Supply Plan (the "IPSP"). Included in that plan were proposed developments that would have tremendous adverse impacts on SON's rights and interests, including direct impacts on our fishery. Most importantly, the IPSP called for the continued and potentially increased reliance on nuclear power at the Bruce Nuclear Site, as well as the development of offshore wind development in the waters off the coast of Lake Huron and within SON Traditional waters.

125. The IPSP had identified our Traditional waters, and the coast of our Traditional lands adjacent to those waters as the best possible sites for the development of onshore and offshore wind. These areas surrounded our historical fishing islands and were situated very close to important lake whitefish spawning grounds.

126. Because of potential for adverse impacts caused by such developments, SON became deeply involved in the Ontario Energy Board review of the IPSP. Again, SON was forced to devote

significant time and resources to understand and challenge government plans that threatened our fishery. Again, we were required to engage lawyers and external experts, as well as devote countless hours of the time of our Councilors and Chiefs to take up the reviewing and challenging the plan.

127. In late 2008, in an effort to negotiate an agreement on how the developments called for in the IPSP would be reviewed, approved and developed, SON engaged the government of Ontario, represented by the Ministry of Energy and Infrastructure, in negotiations to conclude an accommodation agreement. Negotiations were conducted over seven months in the summer and fall of 2009. An agreement was signed between SON and MEI in January, 2010 (the "MEI Agreement").

128. The MEI Agreement sets out many provisions for the protection of SON Territory and calls for engagement between SON and Ontario on energy related planning and development decisions.

129. The MEI Agreement specifically refers to the off-shore wind development and states that no decisions that would permit the development of off-shore wind until an extensive consultation process with SON was undertaken. It states that:

> Prior to any government decision which would permit renewable energy development in SON Traditional waters, the Parties agree to establish a consultation process to address the matter, including consideration of: the findings of the Natural and Cultural Values study as they might be relevant to a proposed Project in SON Traditional waters; a determination of adverse effects or impacts

on SON Rights; and Special measures to mitigate adverse effects or impacts on SON Rights.[38]

130. Shortly after the signing of the Agreement, the Government of Ontario announced a moratorium on the development of off-shore wind.

131. The MEI Agreement also specifically addresses decisions regarding nuclear developments within the Territory and recognizes that these must be addressed and that Ontario and others must come to the table with SON to resolve them. It states:

> 33. SON has expressed concern about the history, current operations and future of the Bruce Nuclear site. The Parties agree that the resolution of these issues is complex and will require the participation of multiple parties, including SON, Ontario, Canada, Bruce Power, Ontario Power Generation and the Nuclear Waste Management Organization based on their respective authorities and roles.
>
> 34. The Parties recognize that a consultation and accomodation process is the appropriate mechanism for addressing the future of nuclear projects and facilities in Anishnaabekiing and that the process may include consideration of concerns relating to existing projects.
>
> 35. The Minister agrees to be a party to a consultation and accommodation process established between SON, Canada and other federal agencies around the future of nuclear projects and facilities in Anishnaabekiing, focused on those matters for which Ontario has jurisdiction, responsibilities or a role in decision-making.[39]

132. From our perspective, the current decisions being made by the governments of Canada and Ontario, as well as OPG and NWMO, are all the kinds of decisions contemplated by the MEI Agreement. The actions now being considered with respect to the DGR Project fall squarely within our agreement, and must be dealt with as agreed and in an honourable manner. This is

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[38] MEI Agreement, section 31.
[39] MEI Agreement, supra.

especially so given the huge potential impacts of the DGR Project on our fishery and rights. This has not yet occurred, and all of these parties are proceeding to make decisions without our involvement and without any proper process or accommodation of our rights, interests and culture.

THE DGR AND THE THREAT TO THE SON FISHERY

133. All of the efforts I have described above were done to ensure that the waters, fish and fish habitat that we have relied on for our livelihood since time immemorial would continue to be able to sustain us. For our people, it has been one long fight against the constant encroachment and industrialization of our lands and waters, and the devastating effect this has had on the resource and our people's ability to exercise our rights to fish.

134. As I have explained, since time of contact and the beginning of the encroachment of settlers and industry on our lands and waters, our fishery has been under attack. We have had to make great efforts to protect it from being wiped-out entirely. Now we are facing the difficult task of rebuilding our fishery, but we are always on the back foot. We had hoped and put our efforts into our 2013 Substantive Fishing Agreement with Ontario so that it could be the foundation of our effort to finally rebuild our fishery and restore it to its central place in our economy and culture. We have invested in efforts to protect the resource through legal action, involvement in regulatory review and scientific research. And we have trusted in our MEI Agreement with Ontario to set out key protections against energy related industrial developments that could endanger the resource.

135. But now we have a new and potentially devastating project to contend with: OPG's DGR Project. We have heard that this project, if approved, poses many different kinds of threats to our fishery. The impacts of the DGR will be permanent, impacting our people and the fishery forever. And all of this is being done by a corporation of the Ontario Government—the same government that has entered into many agreements with us to help us protect our fishery.

136. Since we learned of OPG's plans to build the DGR at the Bruce Power site within our Territory, we have been trying to understand the project, and the threats it could pose to our rights, interests and way of life.

137. We have had many meetings of our leadership, communities and experts to try to understand what dangers it may pose. We have engaged world-class nuclear experts with deep experience in the development and regulation of nuclear projects, including nuclear waste repositories. These experts have reviewed all the information provided by OPG in their environmental impact statement and all of its support documents. Our experts and our team have visited the Bruce Nuclear Site to see the specific site proposed for the DGR. We have had many workshops with our experts, leadership, and community members to try to understand the Project.

138. We do not yet know all the dangers this project proposes, and we do not believe that OPG or NWMO or anybody else does either. But we do know that there are critical concerns that have not been fully addressed by OPG, and some that have not even been considered by OPG in any meaningful way.

139. Our experts have told us that the DGR Project is a "first of its kind" project, and because of this it is untested and many unknowns remain. Only a few underground repositories for nuclear waste have been built around the world. Even fewer have been used to store the "intermediate level" nuclear wastes that OPG has planned to place in the DGR Project. We are also told that no repository has been put into the kind of rock formation found under the Bruce Nuclear site. We have heard that of the few repositories that have been developed, some, like the ASSE II in Germany, are experiencing significant and dangerous problems. And all are so new that we do not know what kinds of problems might develop.

140. We also understand that OPG does not yet understand all the impacts that the construction and operation of the DGR Project could have on the fish and fish habitat. There are unanswered questions about run-off from the rock pile that will be created from the excavated rock and how this could affect the waters around the facility. There is poor understanding of the effect of the extensive blasting that will be required to build the facility and what impact this might have on fish. OPG has not considered at all the impacts on fish populations, nor do they have the ability to do so. As I explained above, SON is only now undertaking research that could lead to answers on these kinds of questions. Finally, OPG has not fully explained how it will gather information about the site to confirm its assumptions about the rock and its predictions on how the likely the risk of dangerous failures and leaks.

141. All of these shortcomings have caused our people significant stress, anxiety and fear – we simply do not know what the dangers of this project are. We are being asked to trust OPG and its science, and take on all the risk that they are right that the DGR Project will not cause significant impacts to our environment, fishery and, ultimately, our way of life.

142. An issue of great concern to us is that OPG has completely ignored a critical impact that the DGR **will** have on our Rights and our fishery. That is, that the DGR will cause a "stigma" that has the potential to devastate a local food economy, like our commercial fishery.

143. Stigma has been explained to us as a negative emotional judgment that forms about a place or thing and changes peoples' behaviour. Stigma is quite often developed around nuclear facilities and, in particular, around nuclear waste projects, partly because these projects are difficult to understand and partly because media like to exaggerate any nuclear incident, no matter how small. We understand that it is extremely difficult, often impossible, to eliminate a stigma once it's created.

144. As I understand this, even if there is no accident or malfunction at the DGR Project, the consequences of building a DGR at the Bruce Site could be devastating to our fishery. The mere existence of such a facility is enough. Even worse, any time a nuclear accident happens anywhere in the world, people will become more afraid of the DGR. The stigma will grow and our fishery will suffer even more, and there is nothing that OPG or Bruce Power could do about it. We are told that food economies are particularly sensitive to stigma and that there are examples from around the world where food economies have been seriously harmed, and even devastated, because of stigma.

145. We are told that two DGR projects planned for other places in the world (Yucca Mountain, Nevada, US and Cumbria County, UK) were ultimately rejected because of the potential for stigma to kill local economies. We are told that these other projects happened recently and that there is a very large amount of research available about these projects, but that OPG did not

consider any of this information in its submissions about the DGR. We do not understand how so much relevant information could be ignored by the very people who are asking for our trust and confidence.

146. We are also told that OPG did not even mention the protests and hearings that occurred when it tried to ship contaminated steam generators through the Great Lakes in 2010. I was at these hearings and remember how many people said they were afraid and that the risks were too great. We also understand that the amount of radioactive material in each generator was very small, especially compared to how much waste OPG wants to store in the DGR. We don't understand how OPG could say there is no risk of stigma from the DGR and nuclear waste after seeing the public reaction to the steam generators.

147. We are also troubled by what our experts tell us about OPG's analysis of stigma. Our experts tell us that OPG made many errors in its analysis and yet somehow still concluded the risk of stigma was minimal. We understand that OPG asked questions that were biased and surveyed very few people. We understand that OPG tried to measure potential stigma by surveying people who already live in the area, even though these people have an economic interest in the DGR Project and so are obviously biased.

148. We also understand that OPG made no effort to disclose or discuss any of the limitations of its analysis of stigma. Our experts tell us that OPG's conclusion of minimal stigma is different from what has happened at virtually all other nuclear waste projects, but that OPG does not even mention this fact. Instead, OPG did a very poor analysis of stigma and just concluded that the risk of stigma would be minimal.

149. These problems are compounded because of another nuclear waste management plan to build a DGR for all of Canada's spent nuclear fuel waste. This is a project being carried out by the NWMO. There is growing evidence that the spent nuclear fuel repository is likely to be developed at or near the Bruce Nuclear site.[40] Already all of the 5 local municipalities around the Bruce Nuclear Site, all within the SON Traditional territory, have engaged with NWMO to become the hosts for a new DGR for all of Canada's used nuclear fuel.

150. Our people do not believe that these two plans are unrelated. Rather, our people believe that OPG's DGR plan is only the beginning – a project to test the area for the used fuel DGR and to get local people comfortable with the idea.

151. We have sought assurances from government and NWMO and OPG that the spent fuel DGR would not be developed within SON Territory over our objections, but we have been rejected.

152. We have been told that this plan is not certain, and that nothing has yet been decided. But we have been given no assurances at all that we would have a say in this.

153. We also know that the possibility that another DGR for spent fuel will be built in our Territory, and the media attention and confusion surrounding the two projects together will only add to the potential stigma, as people will continue to be confused about what is going into the "nuclear waste dump" in our territory and likely assume the worst.

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[40] Much of this evidence is detailed in various SON correspondence and submissions annexed hereto as Exhibit "L".

IV. THE CONTINUING HISTORY OF BROKEN PROMISES

154. There are many ways in which the DGR Project threatens our commercial fishery, which, as I have explained, is the way our people have made a living since time immemorial. It has the potential to deal a fatal blow to our fishery and our aboriginal and Treaty rights. These questions have not yet been adequately understood or even studied by OPG.

155. From the perspective of our people, government and their corporations are once again taking unilateral action that will further damage or even kill our fishery. It is a continuation of the long and terrible history that we have been fighting against since the time of settlement. It could undermine all of the efforts that we have made in the last many decades to protect and reestablish our fishery and return it to a central place within our culture and economy.

156. These actions by the Ontario government's corporation could also undermine the agreements that SON and Ontario have made together. Ontario and SON have concluded four separate agreements that speak to and are designed to protect our rights, including those in the fishery, and to include us in decision making on projects that could negatively impact those rights. A

course of action that again allows OPG to make unilateral decisions about the future of our Territory and our rights is not only a broken promise but a broken legal commitment.

157. No decision should be made that would allow OPG to proceed with its DGR Project in a way that goes against our rights and agreements. This would not be fair, legal or honourable. The only proper way forward to protect SON Rights, interests and way of life is for Ontario and OPG to reconsider the plan for the DGR Project, understand all the dangers posed to SON rights and interests, and include SON in the ultimate decisions these critical decisions.

SWORN BEFORE ME at the)
City of Toronto, in the)
Province of Ontario)
this 15th day of August, 2013)
)

Commissioner for Taking Affidavits
LSUC # 60974J

PAUL JONES

EXHIBIT "A"

This is Exhibit .....A..... referred to in the
affidavit of ..Paul Jones.....
sworn before me, this .....15th.....
day of .....August..... 20.13....
.....
A COMMISSIONER FOR TAKING AFFIDAVITS

UNDER SIEGE

How the People of the Chippewas of Nawash Unceded First Nation Asserted Their Rights and Claims and Dealt with the Backlash

December, 2005

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Letter of conveyance from Chief Paul Nadjiwan

15 December 2005

Hon. Sidney B. Linden, Commissioner
Ipperwash Inquiry

Dear Justice Linden,

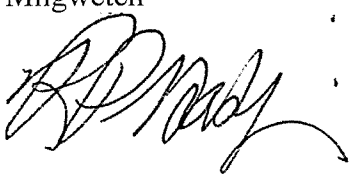
First, please allow me to thank you and your staff for visiting our community in September. Although the memories of events that this report covers are painful for many of our people, we appreciated the fact that you listened so respectfully to what we had to say.

This report of the Chippewas of Nawash Unceded First Nation to the Ipperwash Inquiry chronicles our community's dealings with the Crown on a number of matters from 1990 to 2005 with particular attention paid to the years around 1995. I urge you remember that this is the story of one First Nation. Most First Nations in Ontario have similar stories to tell.

Some readers might find the tone of the report brusque at times. However, I believe the paper is an accurate reflection of the frustration this community and many other First Nations feel as we try to practice our rights and express our beliefs in the unaccommodating atmosphere that still exists in Ontario.

I would like to direct your attention especially to our recommendations and to the summary of best practices collected in Appendix H. In spite of the struggles of the past, there is reason to hope that our relationship with the Crown will one day improve. Certainly, that is the spirit in which our recommendations, indeed our whole report, is written and now conveyed to you.

Miigwetch



Abstract

This is a story of victory, not victims.

This paper was prepared for Commissioner Linden and the staff of the Ipperwash Inquiry for their visit to our community on September 8-9, 2005. This paper was revised after that "Community Forum" to include information and comments they heard during their visit.

The Final Report of the Chippewas of Nawash Unceded First Nation to the Inquiry will have two parts:

1. **"Encountering the Other: Racism Against Aboriginal People":** A paper that looks at the particular kinds of racism that First Nations' people face all the time—the kind that they must deal with because simply because they are Native and the kind they must deal with because they are members of a group (a Native Band) that is collectively asserting land claims and/or constitutionally recognized aboriginal and treaty rights.
2. **"Under Siege":** The particular experience of the Chippewas of Nawash Unceded First Nation in dealing with the backlash to their assertions of their legitimate rights and claims. As much as possible, the story is told from excerpts of the many public education materials produced by Nawash over the past 15 years. The major flashpoints include the repatriation of a burial ground and the long struggle to regain their aboriginal and treaty rights to fish commercially.

Examined in "Encountering the Other" are:

- Some of the innumerable and profound differences between First Nations' people and Canadians (specifically those of western European heritage). For example: attitudes to nature and how one is to behave in it, methodologies of science (ways of knowing), ways of education and the socialization of children, notions of individuality, notions of etiquette (what is polite in one culture is impolite in the other), ideas of justice, attitudes toward the land, values of success, methods of story-telling and history-making (the oral tradition is misunderstood and misapplied by the courts).
- How these differences make understanding "the Other" nearly impossible and are one of the contributors to racism.
- Canadians' misunderstanding or misinterpretation of history (the Covenant Chain, the Two-Row wampum and the language of the treaties).
- How these barriers were overcome in the old days (the protocols and imagery of the Covenant Chain wampum).
- Various definitions of racism (leading to a new definition and a new way of thinking about racism against aboriginal peoples).
- Recommendations from various Inquiries that may help governments deal with racism.

- Recommendations from the Chippewas of Nawash Unceded First Nation for the consideration of the Ipperwash Inquiry.

Examined in "Under Siege" are:

- The specific case of the Chippewas of Nawash Unceded First Nation who, in the years between 1992 and 2005 dealt with a number of confrontations with Canadians:
    - Burial ground vigil in Owen Sound in 1992.
    - Backlash to land claims and fishing rights from 1993.
    - Direct attacks on Nawash Band members and their property in the summer of 1995, climaxing with the burning of a fishing tug and attacks on Band members on Labour Day weekend 1995.
    - Continued discord and confrontation with Ministry of Natural Resources.
    - Revival of backlash during the negotiations of the new Fishing Agreement in July 2005.
- A review and analysis of strategies used by Nawash to deal with escalating interracial violence stemming from the assertion of their Aboriginal rights
- Recommendations from various justice inquiries and the Royal Commission on Aboriginal Peoples that, if implemented in Ontario, would have foreshortened the unnecessarily long and sometimes violent confrontation over First Nations rights and claims in the Bruce Peninsula.
- Recommendations from the Chippewas of Nawash Unceded First Nation for the Ipperwash Inquiry to consider.

We ask the reader to always keep in mind that although this is a chronicle of recent events in the history of the Chippewas of Nawash Unceded First Nation, every First Nation in Ontario, if not Canada, can tell similar stories.

The author of the paper, David McLaren, has worked under the direction of the Joint Councils of the Saugeen Ojibway Nations or the Chief and Council of the Chippewas of Nawash Unceded First Nation for over 15 years. He was directly involved with most of the events described here and is the author of much of the public communications material and strategies discussed in this paper.

A. A SHORT HISTORY OF THE CLAIMS, RIGHTS AND RESPONSIBILITIES ASSERTED BY THE SAUGEEN OJIBWAY NATIONS (AND THE DISCOMFORT THEY CAUSE)

The Chippewas of Nawash Unceded First Nation occupy Indian Reserve No. 27 on the eastern shore of the Saugeen (Bruce) Peninsula on Georgian Bay. Cape Croker is the non-Native name for our home. We call it Neyaashiinigamiing—a point of land nearly surrounded by water. The community is approximately 26 km. (16 mi.) from Wiarton, 64 km. (40 mi.) from Owen Sound or 250 km. (156 mi.) from Toronto. The Chippewas of Nawash and Saugeen manage the largest Aboriginal commercial fishery on Lake Huron. Nawash also manages the lands and forests of Neyaashiinigamiing which include rare alvar habitat and old-growth white cedars.

We refer to ourselves as *Anishinaabe*, which is translated by elders at Cape Croker as "the good of the earth" or the "good beings". The Ojibway people are the *Anishinaabek.* Our language is *Anishinaabemowin.* The name of our First Nation is "Nawash", after Chief Nawash, who fought beside Tecumseh in the war of 1812.

1. Pre Contact

The Anishinaabek of the Bruce Peninsula originally occupied and controlled over 2 million acres in southern Ontario, including the whole of the Peninsula. Our history says the land was shown to us by the Creator; and indeed, the old stories handed down in the oral tradition contain details and land forms in the Peninsula that one can easily recognize today.

For example, an old story from the Nawash reserve tells of a time when the three large islands at the mouth of Colpoy's Bay were all above water and part of the Cape Croker Peninsula.[1] In fact, this was indeed the case some 7,200 (BP) years ago.[2]

Another old story still told in the Native communities of the Bruce Peninsula and Manitoulin Island relates how a man walked north from the tip of what is now the Bruce Peninsula. He met another man walking south. They exchanged presents and each returned to his own people. In fact, there was a land bridge between the Peninsula and the North Shore of Lake Huron some 9,300 years ago.[3]

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[1] There is also a reference to this story in "Griffith's Island," *The Directory for the County of Grey (1865-6)*, at http://freepages.genealogy.rootsweb.com/~wjmartin/grey3.htm (accessed 20 Feb. 2005).

[2] Dr. Steve Blassco, "Geological History of Fathom Five National Marine Park over the Past 15,000 years, *Ecology, Culture and Conservation of a Protected Area: Fathom Five National Marine Park,* Canada, ed. Parker and M Munawar. BP is Before Present time which, for archaeologists starts in 1950.

[3] Dr. Steve Blassco, ibid. Dr. Blasco and Lenore Keeshig-Tobias, the Coordinator of Interpretive Services for the Park and a Nawash Band member and Anishinaabe story-teller, have been able to correlate ancient geological events with events from very old Anishinaabe stories.

Nanabush, the great Anishinaabe trickster, once battled the giant beaver called Waub Amik who had built a huge dam at the narrow place where Lake Superior joins Lake Michigan in Lake Huron. When the dam broke, it created the Manitoulin archipelago which includes the smaller islands between Manitoulin and the Peninsula and the Thirty Thousand Islands off the eastern shore of Georgian Bay.[4]

Not only is it a fact that giant beavers co-existed with First Nations some 10,000 years ago (or earlier), but the description of the creation of the Great Lakes and islands in this story accurately represents the geological history of Lake Huron and Georgian Bay at the end of the last ice-age.

The aboriginal peoples of Turtle Island have always maintained we were created in North America and given the land and water by the Creator to care for. Recent research discredits the stubborn anthropological theory that the Americas were populated by immigrants rushing over an ice-age bridge between Siberia and Alaska.[5]

Excavations at Sheguindah, an ancient habitation and quarry site, on Manitoulin Island and at sites near Neyaashiinigamiing have yielded artefacts that testify to the age and sophistication of our early society. Archaeological evidence[6] indicates trade routes existed from the north, into the south, reaching at least as far as the eastern seaboard of the US. According to this and other archaeological evidence and the testimony of early explorers, and our own oral history, Native life was not, as Chief Justice Allan McEchern of the BC Supreme Court said, "nasty, brutish and short".[7] It was contented, civilized and long.

The point of all this for the present inquiry is that we know things Western scientists don't and we remember things Canadian historians have forgotten. This knowledge, which some call traditional knowledge, has always been discounted or simply dismissed. Yet we know it to be true and. Canadian experts are now finding out we were right. The lesson for the Crown, if it wants to deal fairly with us is, "don't dismiss anything we say; just because you don't know it to be true, doesn't mean it isn't."

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[4] This catastrophic rise of water levels in this area was, in fact, caused by isostatic rebound (weight of retreating ice sheets from the land) thousands of years ago. Lenore Keeshig-Tobias, presentation to University of Guelph students at Neyaashiinigamiing, April 30, 2005.

[5] "Scientists: Americans older than thought," *Associated Press*, July 5, 2005. "British scientists claimed on Tuesday to have unearthed 40,000-year-old human footprints in central Mexico, challenging previous studies that put the arrival of the first humans in the Americas at about 13,500 years ago."

[6] Jim Molnar, dig at Nochemowenaing, personal correspondence, 1991. The Sheguinda site is an early habitation and quarry that, when excavated in the late 1940s, archaeologists estimated to be 30,0000+ years old. Mainstream archaeology (which could not let go of the Bering Strait idea) re-evaluated the age to roughly 9,500 BP.

[7] Delgamuukw v Regina 1991, in Boyce Richardson, *People of Terra Nullius*, Douglas & McIntyre, 1993, p 300. This after the Gitksan and Wet'suwet'en had opened their history and hearts to the court in 4 years of testimony about the complexities of their society. George Blondin, Dene, in his "My Life in the Sahtu" describes a very different view of Native life pre-contact: people commonly lived to 100; child mortality was virtually unknown; people's spiritual life was rich and complex. He also mentions the Dene have archaeological evidence dating back 30,000 years. Presentation to Royal Commission on Aboriginal Peoples, June 1993.

2. Contact and Treaties[8]

1660s: An early French explorer of *les mers douces* (the sweet seas, or the Great Lakes) left behind a record of his visits with the Anishinaabek in the Lake Huron-Georgian Bay area.[9] His account reveals a people who live a good and healthy life from abundant whitefish, trout and sturgeon populations.

1760s: British fur trader Alexander Henry recorded his amazement at the abundance of fish the Natives were able to catch. It was apparent that the Anishinaabek of Lake Huron caught fish not just to eat but also to trade.

1761: Ojibwa Chief Minewehweh spoke to British troops who had arrived at Michilimakinac on Lake Huron and asserted ownership of the land, including water.

1763: The Royal Proclamation of 1763 reserved large amounts of land (including the Saugeen Ojibway Territories) for First Nations. It also forbad the issue of survey warrants or land patents there; it forbad the purchase or possession of Native lands by British Subjects (unless they had a special licence from the Imperial Crown); it ordered any subjects then occupying Native lands to remove themselves.

July & August 1764: The meeting at the "Crooked Place" (Niagara) at which the Anishinaabek of Lake Huron and other First Nations entered into an understanding with the British. Sir William Johnson presented the "eastern and western nations" with the Twenty-Four Nation Wampum. This might be considered a renewal of the Covenant Chain by which it was understood by the Crown and First Nations that they were of "one heart, one mind, one body". An attack on one was an attack on the other. But it was also understood each was neither sovereign nor subject to the other.[10]

1830s: The First Nations of the Saugeen Ojibway Territories initiated several actions to protect and preserve their traditional territories, including the issuing of licences and leases to non-Native fishermen, protesting the taking of rock and timber by lessees, and seeking to evict non-Natives who were using Saugeen Ojibway fishing grounds illegally.

August 9, 1836, Treaty No. 45½: Lieutenant Governor Bond Head of Upper Canada exploited the fear of the Natives in the Saugeen Ojibway Territories that their lands

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[8] http://www.bmts.com/~dibaudjimoh/page121.html holds more background information and links to the treaties and current land claims. These web references are links to more information on a topic at *Dibaudjimoh*, a website set up to replace a paper periodical when printing and distribution costs became too prohibitive. A Table of Contents with links is at http://www.bmts.com/~dibaudjimoh/page4.html. A Background History Page with links is at http://www.bmts.com/~dibaudjimoh/page3.html. In addition the *Illustrated History of the Chippewas of Nawash* (Nawash, 1996) is a well researched and referenced graphic history book produced by the First Nation for use in area schools.

[9] *Histoires Naturelle des Indes Occidentales*, par MLNP, found in Paris in Bibliotheque Nationale, Fr 24225, Ancien Oratoire 162, 196pp ca 1661, unpub.

[10] Williams, Paul, "The Covenant Chain." LLM. thesis, Osgoode Hall Law School, York University, 1982.

would be taken over by white settlers. Addressing them, he stated that this was inevitable and that the government was unable to prevent this, contrary to the Royal Proclamation. In this context, the First Nations agreed to a surrender of their lands south of the Saugeen (Bruce) Peninsula. In return for this, among other things, the Crown promised that it would protect the Saugeen Peninsula, and the islands and fisheries (which were inseparable to the Saugeen Ojibway) from encroachments by whites.

1847: Royal Declaration from Queen Victoria issued, recognizing the Saugeen Ojibway Nation "for a long time enjoyed and possessed and still do enjoy and possess" the Bruce Peninsula and the waters around the Peninsula.

1851: Canada passed an *Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury.* The Act confirmed that Aboriginal lands in Upper Canada were protected from settlement and encroachment by non-natives, until the Crown had obtained formal surrenders from the Aboriginal communities in order to open these lands for settlement.

13 October 1854 Treaty No. 72: The Saugeen Ojibway Nation entered a treaty with the Crown, involving most of the land in the Bruce Peninsula, after the Crown told the Saugeen that the government could no longer protect the Saugeen's land from encroachment by settlers. The day after the treaty was signed, the government finally took steps to keep settlers out of the area and prevent trespasses on the newly surrendered lands, in order to maximize the financial value of the lands when sold by the Crown.[11]

When early explorers made contact with the First Nations of this region, they found a sophisticated society that relied on the abundant fisheries in Lake Huron and Georgian Bay. They expressed amazement at the numbers and variety of species and made notes about the many different methods (including gill nets, trap nets, spears and hooks) our ancestors employed to harvest them.[12]

They also noted the Natives would fertilize eggs collected from female fish they caught with roe milked from the males. The fertilized eggs would be placed on the spawning grounds. At that time, the top predator in Lake Huron was the lake trout. Whitefish fed on small invertebrates in the water—they were not in direct competition with lake trout. Both were the staple of First Nations' fishermen.

The Anishinaabek of the Bruce Peninsula share a common territory and history. Our traditional territories include the Bruce Peninsula plus some two million acres south of the Peninsula. They also include the waters and lakebed of Lake Huron from the Maitland River basin west to the US border and north to midway between Manitoulin Island and the tip of the Bruce Peninsula, then south taking in half of Georgian Bay to the mouth of the Nottawasaga River. These waters and the lakebed were never the subject of any surrender.

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[11] See Appendix D for a map of the traditional territories and the claims of the Saugeen Ojibway Nations.
[12] Jemelda Johnston, "Chippewa of Nawash Fisheries," Chippewas of Nawash Unceded First Nation, 24pp, 1991 (unpub).

By the Treaty of 45½ (1836) we lost the south part of our traditional territories, but retained the whole of the Bruce Peninsula (then called the Saugeen Peninsula) and our rights to make a living through hunting and fishing. In fact, the Crown promised it would protect our fishing grounds and honour our rights to fish in the waters of their traditional territory—both on land and in Lake Huron and Georgian Bay.

Indeed the Crown recognized Saugeen Ojibway Nations' authority and ownership of the waters of Lake Huron and Georgian Bay, for they required non-Native fishermen to lease our fishing areas. And the Royal Declaration of 1847 from Queen Victoria clearly recognized the Saugeen Ojibway Nations "still do enjoy and possess" the shore and the waters around the Saugeen (Bruce) Peninsula.[13]

However, over the next 50 years, the encroachment of European immigrants on the Queen's Bush (which is how they referred to our part of Ontario) was relentless. The Crown told us in 1854 that the government could not longer protect our lands from settlers, so we were forced to sign the land surrender for the Bruce Peninsula. Yet, the day after we signed that treaty, the government took steps to do exactly what they told us they could not do: they put into place policies and actions to prevent settlers from trespassing on our newly surrendered lands, because the Crown wanted to make sure they got the best land values when they sold that land. In addition, in the process of negotiating the treaty, the Crown used tactics which were unfair and a breach of the Crown's duty.

After the Treaty of 1857, the Chippewas of Nawash took refuge in its unceded reserve at Neyaashiinigamiing on the shore of Georgian Bay. Meanwhile, the Saugeen First Nation had settled in their current reserve on the shore of Lake Huron.

During this time we survived in our traditional ways of hunting and fishing on the lands left to us, but even that became difficult as Canadian and American commercial fishing fleets took over our fishing grounds and the stocks began to run low. The mighty sturgeon (which in our language is *naame*, the same word we use for "prayer") was all but wiped out in the 1890s by Canadian and American commercial fishing fleets. Even the once bountiful lake trout, the backbone of our economy, was driven nearly to extinction by the 1950s.

Many of our children were sent (some taken forcibly by the RCMP) to residential schools at Spanish and Chapleau. The effects of the suppression of our language and culture, accomplished through physical, sexual, psychological and spiritual abuse are still noticeable today. The fact that they survived with a sense of pride and self as Anishinaabek is a sign of our resilience and determination. Many of our Band members who attended those places in the 1940s and 1930s are seeking redress for how they were treated. But they are now elderly and they fear they will die before their cases are settled.

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[13] Her Majesty Queen Victoria, "Declaration by her Majesty in favour of the Ojibway Indians respecting certain lands on Lake Huron," Styled as Letter Patent, June 29, 1847.

Our young men served in all the wars that Canada has joined. Chief Nawash, as a British ally, fought in the War of 1812 along side Tecumseh. In both world wars, we sent the highest percentage of our young men to war of any community in Canada—97% of the men went from Nawash. Many served not in defence of King or country but to protect their own First Nations and, perhaps, to make a case for their rights and claims.[14] However, when they returned from the battlefields they, along with all other Native soldiers, were not given the same recognition and benefits non-Native soldiers enjoyed. Their rights and claims continued to be ignored.

As Chief Ralph Akiwenzie wrote in a November 11, 1991 article that appeared in the *Bruce County Marketplace*:

> Many died and many received decorations for their bravery. But our vets returned to a different kind of freedom than did your vets. It was a twilight kind of freedom where they could not vote in a country they fought to protect; where they could not get a higher education without renouncing their Nativeness; where some were not even considered Native.

3. Our Land Claims

> My elders told me that our land is sacred to all the Ojibway. Anishinaabek surround the Great Lakes. I heard stories of how the Ojibway used to have their sacred ceremonies on the Bruce Peninsula. When they had their sacred ceremonies they could hear the heartbeat of the earth—the waves at Lake Huron against the Bruce Peninsula.[15]

It is nearly 200 years since our Chief Nawash fought beside Tecumseh in the War of 1812 and the first betrayal of the Covenant Chain when the British abandoned us in Michigan. In another 31 years will be the 200th anniversary of Treaty 45½ which we signed with tears in our eyes.

Over 150 years after the signings, a cloud remains over the treaties. Most of them were signed under duress—the Crown reneging on its commitments under the Royal Proclamation and in the 1836 treaties (No. 45 and 45½) to protect our traditional territories and rights.[16]

From the mid 1800s through to the late 20th Century, we sent many petitions and deputations to the government regarding our claims and rights and how both land and livelihood had been taken from us.

Finally, in the late 1980s, the chiefs of Saugeen and Nawash decided to reclaim what had been taken. We made several attempts to resolve our land claims arising from those

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[14] Personal correspondence with elder Fred Jones who served in WW2. His son, Paul, served with Canada's UN Peacekeepers in Cyprus.

[15] Nawash elder Donald Keeshig to Ipperwash Inquiry Commissioner Sidney Linden at Nawash Community Forum, Sept. 8, 2005.

[16] http://www.bmts.com/~dibaudjimoh/page39.html. Nahneebahweequa stands up for Nawash in 1997, 15 July 2005.

treaties through negotiations with both the federal and provincial governments. However, our claims did not fit the criteria for either a specific claim or a comprehensive claim and discussions through the Indian Commission of Ontario petered out.

In the early 1990s we sat down with Ontario and Canada to try to settle our claims on the unsold lands in the Bruce Peninsula. These were lands (mostly road allowances and lake and river bottoms) that the Crown did not sell after the 1854 Treaty and, not being sold, should revert to the Bands; or the Bands should receive money for them and compensation for the Crown's use of them for the past 150 years. However, neither Ottawa nor Ontario were willing to discuss compensation for loss of use and, if we had settled, they wanted a blanket release from any further land claims litigation. Those conditions, plus the low estimates of the land's worth being discussed at the table, plus word from Manitoulin Island that the people there were regretting their decision to accept a similar deal meant we had no choice but to walk away and look at our legal options.[17] Darlene Johnston was hired to research our claims.

Currently (2005), the two Bands are cooperating on two land claims which affect both our communities. The first land claim, started in 1994 and yet unresolved, seeks compensation for breaches by the Crown in the negotiation of the 1854 treaty.[18] The claim includes the return of some 50,000 acres in the Bruce Peninsula that were never sold plus an amount of money that would place the First Nations in the position they would be in now if the Treaty had never been signed. The second is an aboriginal title claim to portions of the lakebeds of Lake Huron and Georgian Bay.

News of the first claim triggered a backlash in the local non-Native community and a lot of fear mongering on the part of otherwise sober and responsible people. For example, the residents of Island View Drive, a well-to-do area strung out along the shore of Keppel Township just north of Owen Sound, petitioned their local council to grant them ownership of the shore road allowance in lieu of the land the municipality had taken for the road running through the backs of their properties.

Ontario's *Municipal Act* allows this sort of swap; however that shore road allowance was part of the land claim regarding Treaty 72. The First Nations were forced into court in order to overturn a bylaw that Keppel Township had passed granting the Island View Drive people the road allowance. The Township passed the bylaw quietly, giving all three readings in one evening session.

We won the court case, but not without a skirmish in the media.

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[17] Personal recollection confirmed by Ralph Akiwenzie, Chief at Nawash at the time. David McNab, in his book, *Circles of Time*, chronicles the dysfunctional way Ontario handled similar negotiations on Manitoulin Island during the Peterson and the Rae governments. Here the Ministry of Natural Resources imposed principles that clearly would not work: for example, no compensation for use of unsold road allowances, blanket release covering *all* claims the FNs might have against Ontario forever. Exacerbating the bad faith was what McNab calls "a pervasive institutional racism that assumes that Aboriginal people should be treated equally when in point of fact, they are not." p 128.

[18] http://www.bmts.com/~dibaudjimoh/page10.html. The $90 billion land claim, registered May 27, 1994. (accessed 18 July 2005).

The lawyer for the township, Don Greenfield, reacted by holding a press conference with local politicians at the Keppel Township offices. We sent representatives to attend what was apparently an open meeting (since the media had been invited and it was in a public building), but they were turned away at the door. In the meeting, local politicians were treated to an "information session" in which the land claim was referred to as a land grab and part of a long-term plan by the First Nations to take over the fishery.

Since we hung around until after the meeting, we were able to give the media our side of the story immediately. We followed up with articles, fact sheets, op eds, and presentations for various schools and service clubs in the region.

In the Fall of 1995, Guy George, a Native man from Kettle and Stony Point FN was killed in an alley in Owen Sound. Reports of the killing were sketchy, but they included reference to an argument about land claims between the man and his assailant.

In December 2003, Nawash and Saugeen registered the second claim in Ontario Superior Court; this one asserting aboriginal title to the waters and lakebeds of Lake Huron and Georgian Bay—the water-based part of our traditional territories which has never been the subject of any treaty.[19] So far, there has been surprisingly little public consternation expressed about the aboriginal title claim.

For us, the important thing is the land. Not for what we can use it for; it is the land itself that is a centrepiece to our culture. Wrapped up in the way we feel about our home lands is the knowledge that our dead, our ancestors, are part of the earth on which we walk and from which we take our food and shelter and medicines. And so our land claims become an expression of our beliefs, of our culture and a taking of responsibility for the well-being of the land—a role given to us in Turtle Island by the Creator.

So, when our land claims research turned up the location of a burial ground in Owen Sound, we had to assume responsibility for its return. The burial ground was of part of the one acre in Sarawak Township (now part of Owen Sound) reserved to us as a burial ground in the Treaty of 1857. Although the site was reserved land, homes had been built on it illegally. We were being excluded from the negotiations between the Crown and the current householders. We felt we had a responsibility to our ancestors to ensure the settlement was fair and that they would be left in peace.

The site was on 6th Avenue West, a suburban area in Owen Sound, not far from downtown. Nevertheless, our community began a vigil on the burial ground that lasted until we were sitting at the table as equals. In this way we protected the land and put our ancestors to rest. The full story is told below.

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[19] http://www.bmts.com/~dibaudjimoh/page120.html Nawash and Saugeen claim title to the lake bed of Lake Huron and Georgian Bay, registered December 23, 2003. (accessed 18 July 2005). The map in Appendix D also shows the extent of the aboriginal title claim to Lake Huron and Georgian Bay.

Since the conclusion of the Owen Sound burial ground matter, we know of one or two disinterments as a result of development or backyard renovations. In spite of the lessons of the Owen Sound burial grounds, remains were disturbed and removed. Again we had to intervene to ensure their repatriation was handled appropriately.

The discovery of remains all over Ontario serves to underscore the fact that First Nations have occupied and used this land for thousands of years, and that the bones of our ancestors are very much a part of this land. This is just one, but a very important, reason why Native people feel so strongly about land and insist so strenuously on our rightful claims to it. We are, after all, Anishinaabe, "good beings of the earth". An old man we call *akiwenzie*, for he is someone who "bends toward the earth" once again.

Another burial ground in Owen Sound has been identified at Mary Miller Park, on the western shore of Owen Sound, not far from the 6th Avenue burial ground. This burial ground was not reserved by treaty. Nevertheless, we tried to negotiate a return of the Park to our control. In this we were unsuccessful, but we did deliver a strong message to the City that we did not want the ground disturbed. So far, our wishes are being respected, but we remain watchful.

In the early 1990s, another burial area was found in a place close to Neyaashiinigamiing we know as Nochemowenaing. It has been called by the archaeologists who have visited it, one of the most significant sites in southern Ontario. Indeed, it is an area well known in our old stories—a healing place to which communities from all over the Anishinaabek Nation brought their sick and dying.

However, it is in private hands and scheduled for a cottage development. We have taken measures to protect the site and its location, but a resolution seems a long way away yet.

Although we were in discussions with the Province, the owner and the municipality regarding the protection of this important site, those discussions have stalled and the developer is pressing forward. The province has, in essence, left the matter to ordinary regulatory channels. When the developer sought a permit from the Niagara Escarpment Commission, we made a presentation at a meeting of the NEC. After we made a presentation, the Commissioners expressed their unhappiness that the issue (complete with highly significant burial grounds and cultural artefacts of great spiritual significance to regional Aboriginal groups) was being dumped in their laps.

In May 2005, the Commissioners refused the permit until the matter could be resolved through negotiations, but both the Ministry of Natural Resources and the Department of Indian Affairs have thrown in back to the NEC to deal with.

4. Our Fishing Rights

> I feel sorry for my forefathers, how they had to live. There was hardly any money here. They had to survive by fishing and hunting. A catch would be hardly 100 lbs a pull [a set

> of the seine net]. But non-Natives hauled in fish by the ton. And the government wouldn't share the fishery with the Natives here. We had that right all the time and they held it back on us. Just give us the chance to work. And I feel sorry for the people to have to go through this still ... always fighting for these things we never gave up.[20]

In 1992, the Chippewas of Nawash were taken to court for violating Ontario's *Game and Fish Act*. The First Nation mounted a defence based on section 35 of the 1982 *Constitution*, maintaining they retained communal aboriginal and treaty rights to fish for trade and commerce. Judge David Fairgrieve agreed and found the MNR had discriminated against the Chippewas of Nawash by forcing the Band to accept quota-based commercial fishing licences.

Judge Fairgrieve, in his *Jones-Nadjiwon* decision on April 26, 1993, also found the Nawash and Saugeen First Nations retained their rights to a commercial fishery in waters all around the Bruce Peninsula. The recognition of these fishing rights has lead to a small renaissance in the traditional economy of the people at Neyaashiinigamiing. Many have left welfare to make a living fishing.[21]

However, opposition from local sportsmen's clubs, aided by their special interest lobby, the Ontario Federation of Anglers and Hunters, has hampered negotiations between Nawash and the Ontario Government on outstanding issues. Instead of negotiating a lasting resolution and allowing the Bands to get on with rebuilding their economies, the Ontario government tried to impose another licence on them. These licences were rejected by the Bands as prejudicial to their rights. A Fishing Agreement was finally signed by the Bands and the Crown on June 22, 2000—seven years after the *Jones-Nadjiwon* decision.[22]

A second, four-year Fishing Agreement was signed July 5th, 2005, again after an unnecessarily long and sometimes acrimonious negotiation with the Crown, at least the Crown by right of Ontario. The Crown by right of Canada did not sign the current Agreement, and in fact, seems to be trying to abandon its fiduciary responsibility to ensure the First Nations' constitutionally recognized rights are properly protected. Even Ontario, with *Jones-Nadjiwon* to instruct them and the events of 1995 here and at Ipperwash behind them, refused to recognize the Fishing Agreement as a recognition of our aboriginal and treaty rights to fish commercially. And neither Ontario nor Canada has brought enough resources to the Agreement for the full expression of these rights, which includes the responsibility for the management of the fishery.

Indeed, the manifest inability of the Crown (both Ontario and Canada) to recognize our aboriginal and treaty rights, to allow full expression of our rights, and to reconcile them with the people they represent is one of the unhappy realities of our experience.

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[20] Nawash elder Donald Keeshig to Ipperwash Inquiry Commissioner Sidney Linden at Nawash Community Forum, Sept. 8, 2005.

[21] http://www.bmts.com/~dibaudjimoh/page18.html Quotes from the *Jones-Nadjiwon* decision, July 24, 2005.

[22] http://www.bmts.com/~dibaudjimoh/page102.html Nawash, Saugeen, Canada & Ontario sign landmark Fishing Agreement. July 22, 2005.

5. Communications

In the early 1990s, when the Saugeen Ojibway Nations decided to pursue their claims and rights, it quickly became obvious that the legal path and the path of direct action must be supported by a communications strategy.

In addition to legal expertise, we hired a communications coordinator whose job it was to ensure the First Nations motives and actions were interpreted accurately in the media and were heard by residents of the area. The early communications campaign consisted of:

- presentations by chiefs and councillors in elementary and high schools,
- presentations to local service clubs and other organizations,
- a series of articles in a prominent local magazine (*Bruce County Marketplace*),
- videos and printed materials describing the claims and rights of the First Nations people in the Bruce Peninsula,
- articles, media releases, letter to local and provincial newspaper,
- building and maintaining a network of supporters locally and provincially.

In spite of an aggressive public education campaign, it became apparent that it was not enough to deal with the backlash to our fishing rights which reached a violent climax in 1995. It was clear that we had to deal more directly with the racism we felt was fuelling the backlash. By 1995 our communications took many forms:

- public education,
- "persuading" the legal system to do its job,
- helping to persuade Ontario to negotiate a Fishing Agreement,
- dealing forcefully with disinformation and racism.

We took on the task ourselves, of communicating our rights and claims and the reasons why we were asserting them because it was in our interest to do so. However, the job of reconciling Canadians to First Nations' rights and claims must surely rest with the Crown. The recommendations of the Royal Commission on Aboriginal Peoples say as much. However, and the RCAP reflects this, public education must not be done without at least an equal involvement with First Nations. That means a significant portion of the negotiations budgets for land claim and resource access must go to the First Nation for the purpose of communications.

6. Our Rights and Responsibilities Are Our Work

It is important to understand how we think and feel about land and water to understand why we took the path we chose in asserting our rights and claims to both.

When we ask someone "Ahniish aen-anookeeyin?" we are asking what you do for a living. The Anishinaabe word for "work" (*anookeewin*)[23] is more than "occupation"—it connotes our ideas of duty and right (*daebinaewiziwin*). It is our duty (*daebizitawaugaewin*) to our families and our community to support them, to help them prosper and exercise their rights to live and work. *Daebinaewiziwin* is the word we use for "right". It is a right to make a living so far as we have need.

We work to fish, to hunt, to gather and prepare medicine, to build houses. And with this work, comes a responsibility to the environment and all our relations,[24] for we know how dependent we are on them.

All the Anishinaabemowin words here are both nouns and verbs. We *have* these things and we *do* them. This is important, for it means that the work itself is a right, a duty and a responsibility. So, if we were to translate our ideas about work, rights and responsibilities into the Canadian context, we would say that section 35, that recognizes our aboriginal and treaty rights, should recognize to our right to work, our *anookeewin*, with its attendant duties and responsibilities. To do so would be consistent with the United Nations' Universal Declaration of Human Rights, its International Covenant on Economic, Social and Cultural Rights, and its Draft Declaration on the Rights of Indigenous Peoples (especially Article 21).[25]

Hunting and fishing for sport is not *anookeewin*—it is a trivialization of our notion of vocation, and yet we are forced, if we want some sort of recognition of our right to work, to accommodate the avocation of sportsmen.

Conflict and confrontation are practically inevitable without a radical re-jigging of the relationship between First Nations and the Crown. In fact, it is usually only when First Nations people step outside the tiny rooms reserved for us that our ideas find their purest expression. But when we do that, we find ourselves in confrontation with Canadians, as indeed we did during the burial ground vigil in Owen Sound and when we refused the tiny cell of a fishing licence the Ministry of Natural Resources tried to impose on us.

Nevertheless, we are striving, with few resources, to translate our ideas of work, rights, duty and responsibility as well as we can into the Canadian context. Given that *anookeewin* is a core feature of our culture:

- If we are to claim to be stewards of the land, we must act like it; if are to practice our rights we must also exercise our responsibilities.
- People, both Native and non-Native have brought their concerns to us about projects being proposed for this area. We find the values and the concerns as expressed by the general public to be closer to our own than the government's.
- There are many gaps and inadequacies in the web of environmental protection woven by Ontario and the federal government.

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[23] Personal correspondence with Basil Johnston, Anishinaabe story teller and linguist. Also conveyed to Ipperwash Inquiry Commission during Community Forum at Neyaashiinigamiing September 8, 2005.
[24] By which we mean the animals, the plants, the fish, the birds … all living things on which we rely.
[25] These are quoted below in the section, "Recommendations: From UN Human Rights Documents."

- We believe we have a science (traditional knowledge) that can be of great assistance in understanding complex ecosystems and a way of thinking ecologically that has not yet found expression in the laws and policies of the Crown.
- By reclaiming our ancient role as caretakers of the land, we are providing another level of protection for a badly stressed environment.
- Taking a role in the protection of the environment raises our credibility when we speak of our rights; and it soothes the concerns of others when we pursue land claims.

The important lesson here is that our very ideas of such core cultural notions as "work", "duty", and "responsibility" are too big for the little room made for them in Canada's Constitution, in the even smaller rooms made for them in government legislation and policy, and in the tiny shack they are given in government practices. Our ideas of just about everything (including burial grounds, as we shall see) are radically different than their expression in Canadian law and precedent.

i) Fish

For us, the Fishing Agreement is a practical expression of our court-recognized aboriginal and treaty rights to fish commercially (although, for Ontario, it's a license). On the way to the Fishing Agreement, we negotiated the resources to help us fulfill our responsibilities to the fishery. Even before the first Agreement in 2000, we had hired a biologist to help us with the assessment of our catches, the management of the resource, and research into fish populations.

The work of Dr. Stephen Crawford (the University of Guelph biologist we engaged to help us establish a fisheries management regime) and our assessment staff was important for a number of reasons:

- It brought more expertise to bear on the fishery, for Dr. Crawford was successful in bringing other researchers to focus on questions about the fishery.
- It established the scientific credibility of the First Nations' view of the fisheries and how they should be managed.
- It gave the Bands a window on the western science of fisheries and on the MNR's approach to fisheries management.
- It helped persuade people of what our own science was saying: for example, that the stocking of pacific coast salmon in Lake Huron is an ecological time bomb.

ii) Water

We have seen, in recent years, the water level of Georgian Bay and Lake Huron drop by about a metre. So, when the International Joint Commission was instructed by US and Canada to examine bulk water takings, we felt obliged to add our experience. Chief Ralph Akiwenzie told a meeting of the commissioners in March 1999:

> We know of no reliable studies except the lessons of direct experience, of the Cree in Quebec and the Anishinaabek in Ontario ... the experience of the Cree with James Bay water diversion mega-projects, and our own experience with the dark side of making treaties with a country with voracious appetites.
>
> We also know that water takings such as those being contemplated violate the Native principle of respect due to all living things and the principle by which we should all operate: *first, do no harm.*
>
> How fragile ecosystems will be harmed by the bulk taking of water (however it is removed), we do not know. And if we do not know what the effect will be, *for seven generations*, it should not be done.
>
> What affects the environment, affects those who live in it, including the Anishinaabek and the fish and wildlife we rely on for food, ceremony and commerce.
>
> **Therefore, our only position is to oppose any plan to remove water in quantity from an ecosystem. Our opposition includes the taking of ground water and the taking of surface water.**[26]

Currently, the International Joint Commission (IJC) is looking at water quality by re-examining the Great Lakes Water Quality Agreement and at water quantity by examining current drafts of the Great Lakes Annex Agreements. At the IJC's biennial meeting in June 2005, Nawash Councillor Geewadin Elliott told the Commission that we saw no difference between water quantity and water quality. The Compact by the Great Lakes Governors does not stand up under the scrutiny of First Nations' environmental assessment. He too left the IJC with only one recommendation: no diversion of water from the Great Lakes Basin.[27]

iii) Land

When Chief and Council were notified (by non-Natives in the Bruce Peninsula, as it happened) about unsustainable logging practices by the Northern Bruce Peninsula Timber Co., we decided to intervene. Working with environmental groups in the area, and the local municipality, and finally, as a last resort, in the courts, we were able to prevent the Company from logging white cedar in a particularly ecologically sensitive area.

When we discovered plans for a large condominium development on Hay Island (which lies just off the south east shore of our reserve), we were able to force an OMB hearing that stalled the development and encouraged the owners to sell the island to someone whose plans were more compatible to the Island's ecology.

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[26] Ralph Akiwenzie and David McLaren, "Brief from the Chippewas of Nawash to the International Joint Commission concerning bulk water taking", March 1999. Available at http://www.bmts.com/~dibaudjimoh/page76.html.

[27] "Water Quantity is Water Quality: Remarks to the IJC," Saugeen Ojibway Nations, 10 June 2005. The position of "no diversions" has been reinforced by Chief Vernon Roote at Saugeen FN who insists that if the Compact is adopted, First Nations should have a veto over any diversion proposal, because of their rights and claims to the waters and lake bed of the Great Lakes.

When we were alerted to a proposal for the addition of another quarry in a series of quarries between Wiarton and Oliphant, we spoke at the OMB hearing to say the quarry would, among other things, hamper the free migration of large animals up and down the Peninsula. The OMB heard from a number of opponents and its decision ultimately meant the quarry could not proceed.

When we discovered a number of municipalities in our traditional territories were planning to lay a water pipeline from Georgian Bay south Walkerton with branches to communities in between, we decided to take a look at the environmental assessment that favoured the scheme. We discovered that the environmental consequences were neither adequately researched, nor properly rated. We took a look at what both Western science and Native science said about such diversions. We discovered they were saying the same things: environmental impacts were hard to foresee and even slight variations in the natural flow of streams and rivers led to ecological harm.

It is important to note that we were not notified of any of these proposals or projects early in their planning phases, in spite of our widely recognized claims and rights, and in spite of the fiduciary obligations the Crown owes First Nations. This obligation was spelled out for the Crown in 2004 by the Supreme Court's decisions in *Haida* and *Taku.*

iv) A First Nation Environmental Ethic

The ancient and traditional Anishinaabe environmental ethic might be simply summed up by four major principles:

1. First, do no harm.
2. Plan ahead seven generations.
3. Take only what you need.
4. If harm is done, remove the source of the harm and let the ecosystem heal itself.

Obviously, if these principles were applied to modern environmental assessments, a lot of developments and government initiatives would have to be scrapped or extensively modified. This may not be a bad thing, given the extent of the environmental damage we have seen, even in the relatively pristine Bruce Peninsula, since the first French and English explorers stumbled into our territories.

The evidence of our competency as environmental stewards is well recorded by the early visitors to our territories. Our objections to how the Crown has failed to regulate the rapacious practices of settler fishing and logging companies are also recorded. We believe we have aboriginal and treaty rights (and therefore responsibilities) to the stewardship of our traditional territories. That the Crown does not yet recognize our *anookeewin* to land and water does not mean we will not exercise them to the best of our abilities.

B. THE SIEGE (1990-2005)

Since we began to aggressively assert our claims and rights in the early 1990s, there was a marked increase in what one might call "hateful incidents". Of course, we have always endured hateful incidents—slurs in school hallways, small indignities at checkout counters in stores, slow and grumpy service from law enforcement and medical services. Of course some of us have had to deal with more—physically defending themselves in high school for example, or being refused accommodation or jobs, or service in stores and restaurants.

However, the slurs and indignities, both public and private, increased substantially in the early 1990s. We often heard from our acquaintances in the non-Native communities that they could not understand what was happening to the good relations they thought they had with us. It was as though our claims and rights themselves were to blame; as though we had somehow stepped outside the small world circumscribed for us by the boundaries of our reserve, by the laws of Canada and by our neighbours' perceptions of us.

The "troubles" reached a climax in 1995 when indignities turned into criminal acts. Our community was shocked and deeply saddened by the ferocity of the attacks in the summer of 1995, but not enough for us to backtrack on our claims and rights or to slacken the pace with which we were pursuing them. It was as though, as one of our residential school survivors said in the context of the ill treatment she received at Spanish, "It didn't matter to them, we were only Indians."

This section takes a look at the "troubles" that the non-Native community said were sparked by our assertions of our rights and claims. And it sketches what we did to prevent trouble and, when we could not, what we did to deal with it.

1. Oka (September 1990)

In the summer of 1990, we and our sister Band, Saugeen First Nation, walked the length of the Bruce Peninsula to highlight our land claims and to publicly announce our intention to pursue them. It was a peaceful march and we handed out a lot of educational information. The OPP accompanied us in cruisers that they did not hamper our walk or our distribution of materials.

Then the town of Oka foolishly decided to expand a golf course into a burial ground near Kahnestake sparking a 76-day standoff between the Canadian Army and Haudenosaunee Warriors. How difficult it was for our veterans to see the army attack and harass Native people in Canada. As elder Donald Keeshig said during the Ipperwash Inquiry's visit to Neyaashiinigamiing,

> I totally disagree with the way Oka was handled. I see the army of Canada being sent to different countries as peacekeepers. Why weren't they sent to Oka as peacekeepers? Same thing happened in Ipperwash. No one talked to them. That's all the people at Stoney Point wanted … negotiations."

Our people, like other Native people across Canada, felt a profound sense of solidarity with the people at Kahnestake. At a long public meeting one night in early September, we discussed the situation in Québec. Finally, in the early hours of the next morning we had decided, as a community, to set up a blockade in solidarity on Highway 6, next to our hunting reserve.

By 6 am the next morning a blockade of rocks and trees was on the highway; tents and food were in the bush; the Chiefs were present and everyone had a role. We rented a radio to maintain contact with our communications coordinator who, from a location on the reserve, was able to contact the media and the officials with whom we wanted to talk.

We had set up the blockade after the long Labour Day weekend and in a place that would allow emergency traffic to detour around us. Nevertheless, our actions coincided with similar actions in other parts of the country and it was not lost on the press or the politicians that First Nations could, if they acted together, pose a real problem for the movement of commerce.

The Ontario Provincial Police maintained a wait and see attitude throughout the blockade. They set up cruisers at the detour points around the blockade and occasionally met with the Chiefs at the site. They asked if we would allow an ambulance through (we did, although there was some suspicion it contained not a patient but surveillance equipment). Politely, they informed us that they were seeking an injunction against our presence on the highway.

The blockade brought attention from the Ontario and federal cabinets that we would not otherwise have been able to get. For example, Murray Elston, then a Cabinet minister in the Liberal Peterson government of Ontario, conveyed our concerns about the situation at Oka to both the Ontario and Québec governments and directly to Sam Elkas, the minister in charge of the Quebec Police.

We felt we could do no more than this so we dismantled the blockade as quickly as we had set it up. In spite of the inconvenience that people experienced, there was a great deal of expressed support for our action. We were visited by sympathetic members of the non-Native community, notably the United Church minister from Tobermory, David Maxwell. Some of them brought food, such as the folks from the Orchid Trail Inn at Hepworth who put their delicious contribution on their menu as "barricade soup".

Here are some excerpts from some of the letters in the Owen Sound *Sun Times*:

> Justice is not brought and set in your lap, you have to stand up and reach out for it. If enough people treated unjustly, fail to stand up and reach out, then justice may become out of reach for us all. (Allen Wilford, LL.B., Past President, Canadian Farmers Survival Association)
>
> Thank you for your recent blockade of Hwy. 6. Peaceful, unpredictable, conspicuous actions of this sort will doubtless be repeatedly needed in coming years in order to keep the attention of ... governments. (FW Schuler, PhD, Bishop Mills)

> We, like the Indian People, look to the past, the present and the future for a hopeful resolution to your original aboriginal rights and your right to self-determination. (JP Couch, Owen Sound)

In the Toronto papers almost all letters to the editor in the Globe and The Star expressed support for Native concerns as they were brought to light by Oka.

It is important to understand that the public perception of Native claims and rights was much more sympathetic in 1990 that it is today. A public opinion poll was taken by the federal government during the last week of the standoff at Oka, at a time when the government and the Army were in full control of the media.

The poll indicated that Canadians were extremely sympathetic to First Nations rights and grievances: 73% of the people who took part in the poll were ready to recognize Natives as a founding people in the Constitution. Most (56%) are ready to recognize Native Nations as distinct societies. In fact, English Canadians, in 1990, were more ready to recognize Natives as having a "distinct society" then they were to recognize Québec as having the same. Two thirds of those polled said they supported the idea of reserving a block of parliamentary seats to represent Natives. When Canadians were asked how much of Canada they would be willing to give up to settle land claims, most said they were ready to give up one fifth of the country.

Today, the amount of land in the hands of First Nations remains at one fifth *of the area Canada has reserved for parks*. Polls as early as 1994 indicated the support of 1990 was evaporating.[28]

Why the public retreat from sympathy for First Nations? Possibly fatigue—it seems as though the relationship between First Nations and the rest of Canada is getting worse and the social, economic, and political gaps are getting wider. In the early 1990s a vicious backlash from the right responded to the Oka standoff and the reports of the Royal Commission on Aboriginal Peoples. The backlash grew and found "grass-roots" support in organizations such as BCFIRE (British Columbia Freedom of Individual Rights and Equality), ONFIRE (the Ontario chapter), the Ontario Federation of Anglers and Hunters, and the Common Sense Revolution in Ontario. We were forced to deal with this backlash as we were asserting our fishing rights, and that battle is described below.

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[28] A slim plurality (41% to 38%) of Canadians felt Aboriginal people were being "*unreasonable*" in their land claims (actually, a very slim margin thought they were reasonable, but a huge margin from QC tipped the balance to "unreasonable"). Blockades of public highways were no longer OK with Canadians. R. Ponting, "Racism and Stereotyping of First Nations" in Satzewich, Vic (ed), *Racism & Social Inequality in Canada*, Thompson Educational Publishing, 1998.

2. Burial Ground Vigil, Owen Sound, December 1992

> In his Dec. 7, 1996 *Sun Times* column on Grey-Bruce history, Paul White wrote, "The handling of Native land questions in this area can perhaps in part be understood when it is considered how the names given to Sarawak, Keppel and the community of Brooke originated."
>
> In the late 1850s, the Governor General, Lord Bury, gave his nephew, James Brooke, the responsibility for dealing with the Natives in the Bruce (and Nawash in particular). Brooke had just recently sought refuge in Upper Canada after narrowly escaping assassination on the South Seas island of Sarawak. It seems Brooke and his family had set themselves up as minor potentates and made themselves extremely rich at the Natives' expense.
>
> In Canada, James Brooke named the community of Brooke after himself, Keppel township after his uncle's family name and Sarawak after his South Seas fiefdom.
>
> The Treaty of 1857 (by which the Nawash Band surrendered the Nawash settlement at "Sarawak") explicitly states that "one acre be reserved and set apart for a burying ground." This acre, located in the community of Brooke in Sarawak Township was supposed to be unceded land. Nevertheless, the land was sold (illegally) and resold until, in the 1980s, a developer built two houses on part of it.
>
> Those two houses were at the centre of the Nawash Band's bid to have their burial grounds returned to them in 1992. In order to preserve the Band's interests, the community united and set up a vigil on the property in question. All day and night for a week in a very cold December, Band members lived in the backyards of their own land while the homeowners watched from behind their curtains.[29]

It is important to understand how First Nation peoples view burial grounds. To us, our ancestors are alive and they come and sit with us when we drum and sing. We did not bury them in coffins, so they became inseparable from the soil. They are literally and spiritually, part of the earth that is so a part of us. That is one reason why we have such a strong feeling for the land of our traditional territories—our ancestors are everywhere. It is a sacrilege to disturb even the soil of a burial ground. It is an outrage to disturb, in any way, actual remains.

a) Chronology

February 9, 1857: Treaty 82, by which the Chippewas of Nawash Unceded First Nation lost their settlement at Owen Sound (in Sarawak Township) and moved to Colpoy's Bay and Cape Croker. One acre of burial ground reserved.[30] As time goes on the settlers of Owen Sound also inter their relations at the reserved site. On the old maps of the original

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[29] At *Dibaudjimoh Nawash*, http://www.bmts.com/~dibaudjimoh/page39.html, 25 July 2005. History is always present for us; a truism lost on most government negotiators.

[30] Treaty No. 82, 1857 regarding the Nawash reserve at Owen Sound. *Indian Treaties and Surrenders, Volume 1, Treateis 1-138*, Fifth House Publishers, 1982, p. 213. Also at http://www.bmts.com/~dibaudjimoh/page124.html, and in *The Illustrated History of the Chippewas of Nawash*, 1996, p 87.

Rankin survey, lots 97 and 99 of Amelia Street (now 6th Avenue West) are clearly marked, "Indian graveyard".

1903: Letter from the Indian Agent at Cape Croker regarding the burial grounds at Sarawak Township. The old people of Nawash FN, including Peter Kegedonce, came to a meeting with a representative of Indian Affairs who asks the FN to dispose of their burial grounds in Owen Sound. Nawash refuses, pointing out that many of their ancestors are buried there and that they should not be disturbed.

Nevertheless the Dept. of Indian Affairs continues to deal with the City of Owen Sound saying that once the City can prove all the remains are removed, the government will issue a letters patent for the land. No such proof was ever received by the Department and no patent was ever issued. Non-Native residents of the area are told to come and collect their dead, but Nawash is not so notified.

July 18, 1903: Letter to the Department of Indian Affairs from Owen Sound to lawyer Mr. Tucker protesting the removal of remains from the burial site, saying, about the Natives buried there: "the cemetery is a resting place of very many Indians and it is surely a desecration to disturb their remains since, as they were buried without being coffined, their remains have become practically a part of the soil and it is impossible to remove them. The writer, Mr. Tucker, was told this morning by an old and respected resident of Brooke, that some of the bodies had already been used in the manufacture of bricks."

1985-7: A developer seeks title for the burial ground lots on 6th Avenue and, in spite of the clear markings on the original survey, the City of Owen Sound accepts his documentation that the lot had been previously patented. The City brings in a Provincial archaeologist who spends a few hours on the site with a small caterpillar scraping back the surface of the ground. Although the land had not been used since the time it was a brickyard, the surface scraping turns up coffin handles and nails. Nevertheless the Provincial archaeologist files a report saying the cemetery has "ceased to exist" and the City issues a permit to build on the site.

The developer builds two single dwelling houses and sells the lots. No one informs the First Nation.

Summer 1992: Darlene Johnston, Nawash Band member and land claims researcher comes across the 1903 letter from the Indian Agent. Because the claim to the burial grounds site in Owen Sound is so clear, the Band receives money and cooperation from the Department of Indian Affairs for research. The Department begins negotiations with the homeowners to vacate the site.

Fall 1992: The Department of Indian Affairs provides documentation to Darlene Johnston (the 1903 letter from lawyer Tucker) that shows it had known about the burial ground but did not act to protect it.

October 1992 (Thanksgiving): Nawash Band members, including elders, take the drum to the site on 6th Avenue West. The homeowners call the police who are informed that this is a reserve burial ground and they have no jurisdiction there.

Nawash passes a bylaw acknowledging the site as a burial ground and allowing them to remove trespassers (*ie,* the homeowners), but the Department of Indian Affairs refuses to authorize it.

November 1992: No progress is being made in negotiations between the Department of Indian Affairs and the homeowners. The government's negotiator, Arlene Wright, refuses to involve the First Nation. Nawash hears that the homeowners have rejected offers of around $500,000 (more than twice the value of their homes) and that the Department is negotiating with money from their Special Claims fund—in other words with money that other First Nations are trying to access.

December 3, 1993: In order to assert its own authority over its own burial ground and therefore be included in the negotiations around their burial grounds, the community begins a week-long vigil at the burial ground site on 6th Avenue West and at Indian River. Band members, led by Mel Elliott light a sacred fire on their land at 6th Avenue West. It takes six days to get a face-to-face meeting with Ross Reid, the Parliamentary Assistant for Indian Affairs, but once that was accomplished, it takes only 9 hours to negotiate a settlement. Before our involvement, it had taken the Crown 9 months to resolve nothing.

During the vigil we meet with a man who had worked on the construction of one of the houses. He could not tell us his name for fear of reprisals but he did reveal that remains had been found during construction but the crew was ordered to cover them up and to keep quiet about it.

December 9, 1993: Once we are satisfied with the designation of the land as reserve and the process being proposed to resolve remaining issues, we end the vigil.

June 1994: When we remove the houses from the 6th Avenue site, we discover remains just under the concrete basement floor that looked as though they had been disturbed by the construction but covered up and concrete poured over them.

August 1994: One of the houses was sold and removed in private sale. The other was removed and floated by barge from Owen Sound to Neyaashiinigamiing were it served as the office for our land claims research, literacy and communications programs.

There a number of insults and desecrations n this story. Our burial ground had been used to quarry marl in the late 19th century. The marl (which, given the manner of traditional burials, must have contained remains our ancestors) was used in the making of bricks during the building of Owen Sound. Some of the old stonework can still be seen in the basements of stores along Second Avenue, adjacent to the Sydenham River. The Crown did not honour our wishes (which were clearly stated at the 1903 meeting) that we did not want our ancestors disturbed. The city of Owen Sound recklessly issued patents to our reserve when it ought to have protected it. The contractor (and who knows who else) covered up the discovery of remains, itself a criminal offence. We were left out of negotiations over our own land.

The story is a clear example that nothing much has changed over the last 200 years in the way the Crown, and its citizens, deal with us. Remember, this was in 1992, a little less than two years after the conclusion of the standoff at Oka.

In 1992, support for First Nations claims, especially if they involved burial grounds, had not yet begun to weaken. Not that a lack of public support in the polls would have deterred us from what we had determined to do. That was decided at a meeting of the whole community. We were not happy that we had been left out of the negotiations between the Department of Indian Affairs and the householders. And we were not happy that the federal government was going to use money from the Specific Claims fund—money that would have been used for other First Nations.[31] We did the only thing we thought might work … we took back our land and our ancestors.

Mel Elliott, a Councillor at the time, was given the job of leading the healing vigil. Although Darlene Johnston, our land claims researcher and a lawyer, wanted to be at the site, Mel told her she had to leave in the evening in case something were to happen. Her expertise would be needed outside the burial grounds. As it turned out, when the federal government finally did open the negotiations to us, Darlene was instrumental in achieving success at the table.

The Owen Sound police were quickly on the scene, but maintained a respectful and watchful distance. Here again it was Darlene's job to speak with them and make sure they understood that the land belonged to us and the reasons why we felt it was necessary to be there. The head of the Owen Sound RCMP detachment attended and did much to keep the channels of communication open between the federal government and us. Insp. Traxler, the head of the OPP command at Mount Forest, travelled up on several occasions to speak to Chief Akiwenzie. All were calm, reassuring presences for local authorities.

It didn't take long for the media to show up, mostly because we had sent them a press release about the same time Mel Elliott was setting up camp.

b) The vigil by media release

One of the contributing factors to getting to a negotiating table is wide and favourable media coverage. One way of describing what happened in Owen Sound is through the press releases we sent out, almost on a daily basis to encourage that coverage. The media releases helped secure the credibility of the Band because it told the public we had not undertaken the vigil on 6th Avenue lightly or without doing our homework.

To some degree, open access to the media is an insurance against aggressive action by police and members of the public. At the Community Forum we held for the Ipperwash Inquiry is September 2005, Sheena Smith, who was one of the youth at the burial ground vigil, said that truckloads of people would drive past the 6th Avenue West site yelling slurs and obscenities. Without the constant presence of police and media, she felt some of those encounters could have resulted in violence.

[31] It seems First Nations are always paying for the mistakes of others.

We used cell phones so the media could reach Chief Akiwenzie and Darlene Johnston, the land claims lawyer, directly, at 6th Avenue (and so we could call for help if we needed it). Their careful and intelligent responses to reporters' questions had the effect of earning the First Nation more credibility and of squelching some of the misinformation that was beginning to circulate.[32]

As long as you can control the message, the media is an effective means to educate the public.

1st Media Release: Thursday, December 3, 1992

OWEN SOUND—Today at first light, members of the Saugeen Ojibway, principally from the Nawash Band at Neyaashiinigamiing (Cape Croker), occupied their old burial grounds in Owen Sound. Four members of the Band have lit a sacred fire in the yards of the people who have squatted on the burial grounds on 6th Avenue West. More band members are encamped at another burial ground at the mouth of the Indian River.

It is the latest shot in a lengthy battle to have certain reserve lands in Owen Sound returned to the Saugeen Ojibway.

"These reserve lands contain the remains of our dead," says Chief Akiwenzie of the Chippewas of Nawash. "They were reserved as Indian lands in the treaty of 1857, but were never protected by the Department of Indian Affairs. As a result, they were illegally sold and are now the sites of modern houses. For all the desecration these grounds have suffered, they are still sacred to us. They are still Indian Land. We have waited for over 100 years for them to be restored to us. We will not wait any longer."

Over the years the burial grounds at the mouth of the Indian River and on 6th Avenue West in Owen Sound have been disturbed in a most sacrilegious way. Graves were looted, artefacts (including a corpse) were sent to museums, and the soil from the 6th Avenue West site was used to make bricks for construction in Owen Sound.

Darlene Johnston is a Professor of Law at Ottawa University. She is also a member of the Chippewas of Nawash. "We told the Department of Indian Affairs the way we wanted these lands dealt with. Since the federal Government allowed the sale to happen in the first place, it is the federal Government's responsibility to return them to us."

The Department of Indian Affairs has known of the Saugeen Ojibway concerns for over a year and of the Bands' six point plan for correcting the situation:

1. A full and proper apology from Canada;
2. A survey to confirm these lands identified by the bands are those reserved in the 1857 Treaty.
3. The restoration of the land to its original state.
4. Fair compensation to the present occupants of the land.
5. Provision of a fund to restore, protect and maintain the burial grounds.
6. The erection of a monument recognizing these lands are Saugeen Ojibway burial grounds.

"The Department, after all this time, has accomplished only the survey," says Chief Akiwenzie. "The lands we identified in our research are indeed the reserved burial

[32] The story is told in the *Illustrated History* and on the web in a mixture of press releases and illustration (starting at http://www.bmts.com/~dibaudjimoh/page21.html).

grounds set aside in the Treaty. We know the Department has offered the occupants a lot of money—above fair market value—but the homeowners are holding out for more. It is offensive to us that greed should so taint a process of return and healing."

Darlene Johnston added, "Sure the Department of Indian Affairs has said they will prosecute the current occupants if they cannot come to a settlement. But it's time we, as a First Nation, stood up and defended our lands ourselves. It should be the Saugeen Ojibway who take the heat for court action—not the federal government. But it should be the federal government who funds the court action. Trouble is, they won't. Taking our white neighbours to court won't make us very popular in the area. But then we've never been very popular here anyway."

Chief Kahgee of the Saugeen First Nation near Southampton said, "We support the actions of the Nawash First Nation. It's like the straw that broke the camel's back. So many of our experiences with Government have soured of late—Ontario has banned the sale of our fish, Canada is making it hard for us to negotiate our land claims as equals. The burial grounds are seen as one more, particularly gruesome, frustration."

Chief Akiwenzie said, "It is time for non-Native governments to truly recognize our right to self-government and back off enough to let First Nations assert their own jurisdiction and authority. That's mostly what this occupation is all about. We are symbolically taking back our land and honouring those who have become part of it."

The Saugeen Ojibway do not believe the Department of Indian Affairs is acting in their best interests and therefore demand the following:

1. Immediate control of the process of returning the lands to reserve status, including no further monetary offers without Saugeen Ojibway approval.
2. A commitment to remove the structures currently desecrating the burial grounds.
3. A commitment to restore, protect and maintain the burial grounds.
4. A commitment to fund a monument recognizing these burial grounds as unceded territory.

Until the First Nations are satisfied the other governments recognize the Saugeen Ojibway jurisdiction and authority over these lands, the sacred fire of the occupation will not go out.

2nd Media Release: December 4, 1992

OWEN SOUND—The Saugeen Ojibway will continue their occupation of their burial grounds in Owen Sound through the weekend and into next week if necessary. The First Nation has received no response to their demand to be included in negotiations around their burial grounds from the Department of Indian Affairs.

Darlene Johnston is a Law Professor from Ottawa University and Land Claims Research Coordinator for the Saugeen Ojibway. "The galling thing," she says, "is that the Department has set up a phone and fax number to talk to everyone but us. They are telling people that negotiations are proceeding and are proceeding well. There are no negotiations that involve us, and we will not recognize any result that does not involve us."

It's time governments stopped imposing solutions on Native people, says Chief Ralph Akiwenzie. "Here we are taking the flack for something they caused in the first place, and we're not even part of the negotiations."

The Saugeen Ojibway are demanding only two things from Indian Affairs Minister Tom Siddon:

1. Immediate control of the process of restoring the burial grounds.

2. A commitment that no settlement will be implemented without the consent of the Saugeen Ojibway.

Today, Ovid Jackson, the mayor of Owen Sound visited the Indian River burial site and gave Chief Akiwenzie his commitment to talk to Siddon in an effort to expedite a resolution of the standoff. The Canadian Auto Workers Union have informed Tom Siddon of their support for the action of the Saugeen Ojibway.

There is a danger things might escalate if neighbours at the 6th Avenue burial site do not recognize the ceremonial drumming for what it is. "We urge people not to take offence at our drumming and singing," says Chief Akiwenzie. "It is our way of honouring the dead and returning them to peace.'

3rd Media Release: December 8, 1992

OWEN SOUND—A tentative step was taken today to relieve tensions at the Native burial grounds in Owen Sound. A meeting between negotiators for the Chippewas of Nawash and the federal Government has been scheduled for Tuesday morning, December 8. Ross Reid, MP and Parliamentary Secretary to Indian Affairs Minister Tom Siddon will meet Chief Ralph Akiwenzie, Darlene Johnston and members of the Nawash Band Council. There will be a press briefing at the 6th Avenue West site after the meeting, approximately 1:00 pm.

Last Thursday, the First Nation began a vigil of their reserve burial grounds at Indian River and 6th Avenue West. These are part of the one acre reserved by the surrender of 1857 as burial grounds.

By that surrender, the Chippewas of Nawash ceded (except for the burial grounds) the whole of Sarawak Township to the Crown. It was the site of the Nawash Band's largest and most prosperous settlement. The First Nation had laid out farms for Band members and much of the land was cultivated.

Many Band members purchased their own lands back at the public auction that followed the surrender. However, their certificates were withheld and their money refused. It was apparently Department of Indian Affairs policy that "those lots could not be sold to Indians."

"Although the Department of Indian Affairs had an obligation to protect the reserve burial grounds, it did not do so," said Chief Akiwenzie. "Now, 90 years after it allowed their sale, the Department's 'solution' is to negotiate a settlement with the current house holders on the two 6th Avenue West lots."

The Department has offered them over $500,000. The householders, through their lawyers, have demanded over $1 million.

Darlene Johnston is the Legal Research Co-ordinator for the Nawash and Saugeen FNs: "We have no quarrel with the householders receiving *reasonable* compensation for their trouble. In fact, we recommended that to the Department. But part of the problem is the Department is negotiating with Indian money. It is money that is coming from funds the Department has set aside for Specific Claims. It's money that would otherwise have been used to settle First Nations' land claims. Little has changed in the past hundred years. We're still being put in the position of having to buy back our own lands. We need a commitment from the Department they will not jeopardize other claims to settle ours."

To properly rectify the problem, the Bands require, from the Department of Indian Affairs:

- Immediate control of the process of restoring the burial grounds, including negotiations with the householders.
- A commitment that no settlement will be implemented without the consent of the Saugeen Ojibway.

4th Media Release: December 8, 1992, 10:00 pm

Neyaashiinigamiing—At a community meeting tonight at the Chippewas of Nawash First Nation, band members decided to end their vigil of the burial ground reserves at Indian River and 6th Avenue West.

Negotiators for the Band briefed the community on the results of negotiations with the Government that went well into the evening tonight. Chief Akiwenzie and Darlene Johnston were the main spokespeople for the Nawash First Nation. Canada was represented by Ross Reid, MP, Parliamentary Secretary for Tom Siddon and Dr. Gus Mitges, MP for Grey-Bruce.

At last a letter drafted by both sides was signed by Thomas Siddon, marking the end of nine hours of negotiations. In the letter the Minister gave his commitments for the following:

No decision or agreement concerning the First Nation's burial ground reserves will be concluded without the consent of the Chippewas of Nawash.

The nature of the process for resolving the concerns of the Chippewas of Nawash will be fair and equitable, non-adversarial and timely. The process will not be part of the specific claims process.

An independent facilitator acceptable to both Canada and the First Nation will be appointed to assist in a settlement of all issues concerning the Band's burial ground reserves. Negotiations will begin as soon as a facilitator is appointed.

Canada recognizes that the lots on 6th Avenue West are unceded reserve lands and the Chippewas of Nawash are now part of the negotiations to resolve this issue.

Chief Akiwenzie said, "This looks like a good agreement. We look forward to sitting down with all parties to finally put to rest this sad incident."

Darlene Johnston said, "Maybe, just maybe this is a sign that Canada is finally taking seriously First Nations' desires and rights to manage their own affairs. The Department of Indian Affairs sparked this confrontation by imposing a solution on us that would have been completely unsatisfactory to us. Tonight we have an agreement that recognizes our lands and our authority on those lands."

"We started out looking for greater control of the process for the restoration of our burial reserves and a demand that no solution would be implemented without the consent of the Chippewas of Nawash. We got that with this agreement."

We had a number of allies during the vigil. Many of our brothers and sisters from Saugeen joined us and we had the unqualified support of their Chief and Council. The Salvation Army dropped off warm clothes and sleeping bags, for some of our youth, while keen to show their support by being present did not have time to pack the proper gear. The Canadian Auto Workers from their Educational Centre at Port Elgin, dropped off boxes of food.

Epilogue: Press Release, June 7, 1993

OWEN SOUND, ONT. -- Human remains have been found under the concrete floor of a house that was the scene of a vigil by Saugeen Ojibway Natives this past winter. Natives from the Nawash reserve at Cape Croker (Neyaashiinigamiing) camped in the yards of two houses on 6th Avenue in Owen Sound for eight days last December in order to assert their jurisdiction over burial ground reserve lands in Owen Sound. Their vigil resulted in an agreement with the federal Government to confirm the land as reserve land; to remove the houses from the old burial site; and to re-consecrate the burial grounds.

Some doubt had been expressed by area residents and officials about the validity of the Native claim that the site is actually a burial ground. There can no longer be any doubt.

Chief Akiwenzie was part of an official party to view the remains on Wednesday, May 26. "Even before we descended into the basement of the house, I could feel the power of their presence. Their silent witness is a complete vindication for our vigil here last winter. If we had not intervened when we did, who knows what would have happened to our dead."

Certain non-Natives who have been involved with this issue accompanied the Nawash Chief and Councillors. They included:

- Alan Grant, Professor, Osgoode Hall Law School, facilitator for the burial grounds negotiations.
- John Donnelly, Associate Director General, Department of Indian Affairs and lead negotiator for Canada.
- Ross McLean, a lawyer from Chesley who acted for the Department of Justice in negotiations during the December vigil.
- Ovid Jackson, Mayor of Owen Sound.
- Lyle Love, Owen Sound City Manager.

Alan Grant said it looked as though the bodies had been disinterred during construction and then re-buried under a load of gravel and concrete. He said, "The Native crew who is removing the basements was carefully excavating the layer of gravel the original contractor had laid under concrete floor of the basement when they came upon the remains. To show respect, the Natives had placed earth over the remains. But from what we saw it would appear that, when the house was being built, the original construction had obviously disturbed the graves. It looked as though the gravel sub-floor was simply dumped over the remains before the concrete was poured."

The Nawash band feared the remains would be further disturbed by people if news of their discovery had got out before the site had been filled in. That has now been done.

Chief Akiwenzie: "The people buried here have united and empowered our community. The site will now be carefully cleared and filled in and the appropriate ceremonies performed. They will be disturbed no more."

Dr. Allan Grant from the Osgoode Hall Law School facilitated negotiations to a final resolution after we ended the vigil. When the householders left, they took everything—tubs, toilets, copper piping, carpets (including the under padding), even the kitchen sink.

One house was sold and moved off the site. The other we transported to the dock at Owen Sound and floated by barge across the water to Neyaashiinigamiing, some 30 km away,

by water. Here it houses the Nawash Literacy and Language programs. For years it held the Land Claims Research and Communications offices.

c) Why the Burial Ground Vigil was Successful

Ross McLean attended the Community Forum we held for the Ipperwash Inquiry. He is a lawyer based in Chesley and, at the time, the President of the Progressive Conservative Riding Association. He was contacted by Arlene Wright, the federal negotiator, after the burial ground vigil had started. At the time negotiations were not going well—the parties were not even talking with one another.

Ross brought in Gus Mitges, the area MP. Gus telephoned the bureaucrats in the department of Indian Affairs in Ottawa, but they were not helpful, saying only that negotiations were underway, they were very complex, and they had things in hand. However, it was evident that they did not, and, to make matters worse, they had dispatched a couple of public relations people who were camped out in a local hotel.

These people were issuing press releases with a similar message, and generally not contributing to a peaceful resolution because everyone could see that the bureaucracy did not have control over the situation. These PR people were in Owen Sound for a week and not once did they go to the burial site.

So Gus contacted the Minister of Indian Affairs, Tom Siddon. To the Minister he stressed the need for getting people with the authority to resolve matters to the scene. On the sixth day of the vigil, Tom Siddon's Parliamentary Assistant, MP Ross Reid met with Chief Akiwenzie, and certain Councillors and Darlene Johnston. It took only nine hours of discussions to resolve the confrontation. All the conditions that Nawash had outlined in its first press release had been met.

For the Ipperwash Inquiry Commissioner, Ross McLean sketched out the things that he thought contributed to a successful resolution:

- **Trust.** The trust he had for Mel Elliott and Mel for him allowed Ross to feel comfortable calling in Gus Mitges. Ross would encourage First Nations leaders to develop a relationship with MPs, and vice versa. The personal relationships that were developed before the confrontation helped in its resolution.
- **Good faith negotiating.** It was clear from the start that Nawash's only objective was the recovery of the reserve burial ground, and they were forthright, clear and objective in this goal. No one sought the limelight or personal satisfaction from the conflict. The Band didn't use the situation to redress any greater wrongs. They didn't seek to embarrass anyone. Addressing the issue in good faith, they were respected, and their positions were respected by the Members of Parliament involved. As well, the MPs themselves avoided grandstanding in front of the media or for the non-Native residents in Owen Sound. They blamed no one and embarrassed no one. They dealt directly with the situation and avoided completely the stonewalling and meaningless doubletalk.

- **Use of the media was for information.** The PR people from the Department only made things worse with their misleading spin on things. Their self-serving claims aggravated and annoyed all those who were directly involved and threatened the trust and good faith that was developing. After they were cut out of the loop, communications with the media made sure that the nature that the news was as accurate and non-inflammatory as possible.
- **Speed in getting to the right table.** Delay in resolving the issue prior to December 1992, led to loss of faith in the process and the occupation of the burial lands. Conversely, prompt action, albeit encouraged by confrontation, led to a restoration of faith between the parties.
- **Everyone with a legitimate interest was at the table.** Initially the government negotiated only with the two families. Although federal officials may have believed that that was right, intending to settle with the First Nation after dealing with the families, that left the Band out of discussions over their own land.
- **Avoid the agendas of third parties.** All parties avoided the agendas of parties not directly involved in the matter and so were able to keep the negotiations from being hijacked or derailed.

Ross identified some of the emotions that usually infect Native-government relations: stonewalling, contempt, mistrust and bad faith. In this situation, these were avoided and trust, good faith and respect were substituted. This seemed to be key to the successful resolution of the Owen Sound burial ground confrontation.

d) Dealing with the Backlash

The principle goal of our communications around the vigil was to prevent a backlash. During the vigil, Mel Elliot sent Nawash youth around to all the homes in the neighbourhood with background information and a standing invitation to our neighbours to come and chat about the situation. We took great pains to say, again and again, that although it was our land, it is a burial ground and we will erect no houses or other buildings. Indeed, today, it is a well-kept vacant lot with a cairn marking it as our reserved burial land.

But there was backlash. There was one particularly nasty and clearly racist letter that reached the Band addressed to Darlene Johnston; but otherwise the backlash was relatively minor. The lawyer for the householders tried to press their case in the *Sun Times* by writing a letter to the editor that was neither gracious nor accurate. We simply wrote a response correcting his misperceptions and he dropped the matter.

Who can know what people were saying in Tim Horton's but the public reaction was muted, thanks to a number of things:

- the facts were well researched and clearly presented at every opportunity;
- the issue had received so much accurate media coverage;
- our plans were well implemented and we covered all the angles—media, legal, historical, logistics, public relations.
- the leadership on all sides was always calm, articulate and credible;

- the federal government finally took negotiations with Nawash seriously and acted quickly;
- the police and the vigil keepers kept things calm at the site—there were no major confrontations between our people and others for the six days of the vigil, even though it was 5 minutes from downtown Owen Sound and in the middle of a suburban neighbourhood;
- It was only a year and a half after the Oka standoff and First Nations were still enjoying a modest public sympathy.

Nevertheless, we took the few negative letters to the editor seriously because they undoubtedly represented the views of a good segment of the population. They also afforded us with another opportunity to communicate our point of view. Below is one of our responses in the media. Chief Akiwenzie used one of his regular articles in the *Bruce County Marketplace* (a monthly publication with a huge area circulation) to respond to a particularly "misinformed" *Sun Times* letter writer:[33]

> "My frustration has turned to anger and to being prejudiced which I never thought I was."
>
> With this quote, I'd like to return to a place I left a couple of months ago—a discussion of what racism, prejudice look like and how they contribute to discrimination. The quote is from one of our neighbours on 6th Avenue West. (You will remember we own some property there—a burial ground, to be precise, that was reserved for us by the Treaty of 1857).
>
> This woman was expressing her feelings to a *Sun Times* reporter during the vigil we staged at the site this past December. "Residents agreed that the occupation was breeding prejudice among their children who are frightened and feel threatened," the article says. None of our neighbours gave his or her name to the reporter.
>
> Now I don't want to put words into this person's mouth, but let me tell you what I hear she is saying: "I never thought much about the Indians in the Bruce until they began camping next door, but now that I think of them, I think I'm prejudiced."
>
> I want to ask her, if her children were indeed frightened and felt threatened, what did she do to reassure them? Did she tell them the facts? Did she come over to our place to talk to us, to hear our side? Did she bring her children over to play with the many children from our communities who were there? Sixth Avenue West was not Oka.
>
> If you can remember my article here a couple of months ago, I went to my dictionary for a definition of prejudice: "a judgement or opinion formed before the facts are known (esp., an unfavourable, irrational opinion); the act or state of holding preconceived, irrational opinions; hatred or dislike of a particular group, race, religion, etc."
>
> Prejudice seems to be a product of misinformation, or lack of the facts—ignorance. But what does prejudice become if this ignorance persists in the face of facts?
>
> Here's another quote for you: "Before writing this letter, I considered the consequences of my actions. I could be called a bigot, racist, liar, anti-Indian, etc., and all those other words one might be called when one goes against the grain and speaks his/her mind." Thus began a recent letter to the editor of the Sun Times. At least he signed his name.

[33] Chief Ralph Akiwenzie "Fear and Loathing in the Bruce Peninsula (part 2)" *Bruce County Marketplace*, 15 January, 1993.

> Now I don't want to call this fellow any of those names, if his concerns and questions had not already been answered by the intensive media coverage around the burial ground vigil. But I believe they had been.
>
> He asks, in his letter, why the police were not enforcing provincial law and city by-laws. The answer was clearly reported: because our reserve burial grounds are out of their jurisdiction. The burial grounds are lands reserved by treaty. It is our land—always has been. It is irrelevant that a suburb has been built on top of it.
>
> He states that "the houses in question had title to their land, but in a matter of days it was taken away." Again the reporting was clear and accurate. The householders did NOT own that land. It was illegally sold first in 1903.
>
> The Department of Indian Affairs admits the mistake and was active in negotiations to restore the reserve burial grounds to us. They re-surveyed the lots at Indian River and on 6th Avenue West to be certain. There has never been a Crown patent issued on those lots. Someone must have known their title was not clear. The *Sun Times* reported that it was almost common knowledge that they were Native burial grounds.
>
> The point is that all of this was well and fully reported in the *Sun Times* and on radio and TV. Indeed, the letter writer states he has "been reading with great interest the ongoing dispute concerning land claims over the past months." Yet he persists in his ignorance. Perhaps his opinion is a prevalent one in your communities. I don't know. But I do know that, in the face of the facts, his beliefs are irrational.
>
> My dictionary defines racism as: "an irrational belief in, or advocacy of, the superiority of a given group, people, or nation, usually one's own, on the basis of racial differences having no scientific validity." A bigot is defined as, "one whose attitude or behaviour expresses intolerance, as because of race, religion, politics, etc."
>
> Can you see my problem? I don't want to believe my neighbours are bigots, or even racists. So what am I to make of people who continue to hold beliefs or opinions that fly in the face of facts? The facts seem to have no effect, so reasoning with them will do no good. Do I ignore them and risk the danger that their opinion will gain merit because it stands unchallenged? Do I rant and rave and point my finger and scream, "bigot!" or "racist!"?
>
> How do I challenge such people? Or perhaps I shouldn't challenge them at all. Perhaps they aren't my problem. Perhaps they're yours.

One of the important things to emerge from exchanges in the media like this—and there were several—is that public education on Native matters does not always work. We felt it was necessary to deal squarely with the racism that underlies the backlash when Natives assert their rights and claims.

There is no doubt that bigotry and maybe even racism is behind much of the backlash we faced from the burial grounds and most certainly from the exercise of our fishing rights. Our own test for bigotry is, as Chief Akiwenzie suggests, the stubborn repetition of misinformation in the face of well-publicized fact. Therefore, in all our public responses we took care to get the facts right and to repeat them again and again.

Once we started to take on the bigots, directly and publicly, we detected a gradual and subtle shift in public (and editorial) sympathy. It appeared the bigots became isolated in

their own communities. Their inflammatory letters to the editors grew less frequent. And editors grew more reluctant to print them.[34]

3. Fishing Rights, 1990-1995

> I've been threatened over hunting and fishing. The Conservation Officers and RCMP were always after us. There was no work here when I was young. We couldn't rely on fishing, because we weren't allowed to go very far from our reserve to fish. If we went beyond the "lines" set up by the MNR, they were ready to charge us and take our equipment from us. I remember our grandfathers used to sleep on the shore to watch over their seining nets. The MNR said it was against the law to use a seine net on our reserve. I always felt the MNR and the RCMP were our enemies … they were always after us.[35]

While this is a report on the problems faced by the people of the Chippewas of Nawash Unceded First Nation and our response, we want to make it clear that our sister Band, the Saugeen First Nation, faced these same problems with us and, in many cases, we worked side by side to respond to them. It was, for example, a joint decision to pursue the recognition of our fishing rights through the courts.

a) Background

The backlash over land claims and burial grounds was mild and easy to deal with compared to the backlash that formed against our aboriginal and treaty fishing rights.

We have had to deal with opposition to our rights to make a living by fishing ever since European settlers began to lease our fishing grounds. In the 19th century, when someone abused our hospitality, and the fishery, we simply removed their nets and their fishing camps. But as their numbers increased, this became harder and harder to do until, eventually, when we needed to fish, we had to do so as though we were fugitives in our own land.

Elder Ross Waukey told of the times when he was a boy fishing with his father at the mouth of Colpoy's Bay in the 1920s. When they heard an engine fire up in Wiarton, they would pull their nets and row for shore because it would be the police coming to seize their catch.[36]

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[34] Evidence of this is difficult to assemble and is mostly anecdotal. For example, Jim Merriam, the editor of the *Sun Times* during the mid-1990s told me that they were refusing to print some pretty scurrilous letters. Of course, that might have as much to do with a fear of being sued as it does with a change in editorial policy. Nevertheless, the author of this paper detected a marked change in the editorial content of local radio and newspaper over the 5 years from 1990 to 1995. It has become more informed, more balanced and more thoughtful.

[35] Nawash elder Donald Keeshig to Ipperwash Inquiry Commissioner Sidney Linden at Nawash Community Forum, Sept. 8, 2005.

[36] Personal correspondence, ca 1997.

It is important to recognize that First Nations' struggle for the right to earn a living from the land is not restricted to this area of the province. First Nations all over Ontario have felt, and continue to feel, the debilitating effects of opposition to even the most benign practice of their rights to hunt and fish.

If you talk to Chief Glen Hare of M'Chigeeng First Nation on Manitoulin Island, he will tell you about Operation Rainbow. This was a sting by the MNR against Native hunters on the Island in the early 1990s. It resulted in some 35 Native hunters being charged. The operation and the prosecution took over 7 years and cost taxpayers millions of dollars.

MNR conservation officers pretended to be American hunters running out of vacation time. They offered money to Native hunters to hunt deer that, supposedly, had eluded them and then charged the hunters with the commercialization of game. In some cases they added alcohol to their inducements so they could lay weapons charges as well. The bands involved soon exhausted their legal funds, and the Province, notwithstanding the constitutional issues raised by the Bands, pressed on with the successful prosecution of a number of hunters.[37]

At a meeting to discuss the backlash to the practice of their rights held at Curve Lake in July 1992, we heard from several First Nations about the impact of the public smear campaign being organized by anti-Native rights groups:

- A teacher from a local school reported that after a meeting organized by the Ontario Federation of Anglers and Hunters (OFAH) in Apsley that discussed Native hunting and fishing in that part of Ontario, his students said that Natives were slaughtering fish and game.
- People reported seeing posters and flyers all over opposing Native rights to hunt and fish.
- Garden River took their concerns to the local school board, but they were not listened to.
- Tyendinaga fishermen were the target of protests and abuse from sportsmen's groups in the Bay of Quinte area.

At a Conference on the Criminalization of Native Rights held in Toronto in 1994, Darryl Stonefish from the Delaware of the Thames told of another sting operation by the MNR; this one to catch Band members selling fish out of their store on the reserve. The Conservation Officers posed as tourists just after some fresh fish.

The charges came after a lengthy campaign on the part of local anglers and the Ontario Federation of Anglers and Hunters to paint Delaware fishermen as little better than thieves. The President of the Kent County Bowhunters Club led a number of demonstrations against Delaware fishing from spots on the shore opposite to the reserve. Anti-Native articles appeared regularly in the Chatham News. Darryl Stonefish estimates

[37] Testimony at a Conference on the Criminalization of Native Rights hosted by Nawash, Toronto, October 1994.

the annual catch of walleye by Band members to be just 150,000 pounds a year, probably less than the estimated angler harvest on the Thames.[38]

Nevertheless, the OFAH smear campaign insisted the Delaware were taking 600,000 to a million pounds a year—a charge that was repeated and given credence by "Open Season", a segment of CTV's *W5* that aired March 22, 1992.[39] In that episode, Eric Malling endorsed the OFAH's claim that the Delaware (and Nawash and other First Nations) were illegally taking huge numbers of fish. Malling's crew came to Neyaashiinigamiing and interviewed Chief Akiwenzie and Councillor Greg Nadjiwon. Their search for a smoking gun of rampant over-fishing by Nawash was not successful, largely because the statistics didn't support it, because Ralph and Greg handled themselves well in the interview, and because we challenged their assumptions and apparent bias on the spot.

They were more successful with the Delaware of the Thames. They interviewed a fisherman on the banks of the Thames River, Dale Jacobs, who had caught only one fish in his dip net. They asked him to tie that one fish into his net and then took several shots of him catching the fish again and again.[40] In the show they repeated the OFAH charge of overfishing with no rebuttal from the official MNR report on the Thames Walleye fishery or the First Nation.

Our response to this was to ask a professor in Ryerson University's media program to view the W5 episode and write a report. Her report demonstrated a bias in the language and direction of the piece. We shared that report with the Canadian Radio and Television Commission (CRTC) and the Executive Producer of W5, Peter Rehak. We asked for a meeting with CTV officials, which we did not get.[41] The CRTC did a cursory investigation and more or less referred the issue back to the CTV to deal with. However, there were no further such stories done by CTV. Indeed, in situations like this, where apologies and retractions were unlikely outcomes, that was our objective: to stop the proliferation of disinformation going out to the public.

In February 1992, the Ontario Federation of Anglers and Hunters organized an "Emergency Public Meeting" of sportsmen's groups from the Ottawa Valley in Pembroke Ontario. "Come out and hear of the Ontario NDP Government Agenda to turn over management and control of many of *your* natural resources to the Natives of Ontario", said the ads. The keynote speaker was Mike Harris, then Leader of the Opposition in the Ontario Legislature. Also on the speakers list were Hector Clouthier (past President of the Ottawa Valley Lumberman's Association and a federal Liberal

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[38] Conference, Ibid. Estimates of angler harvests are hard to come by since the MNR stopped surveying them in 1988. However, an MNR report, "Lake St. Clair Walleye Stock Assessment" (March 1992) said that assessment of past harvest rates indicate that fish taken by Native, sport and commercial fishing do not appear to be the cause of a perceived decline in one particular year class of walleye.

[39] At the OFAH AGM February 27, 1993, Davison Ankney, then President of the OFAH, took credit for getting that story to air.

[40] Personal Correspondence.

[41] Letter to Peter Rehak, from David McLaren, November 3, 1993.

candidate), Phil Morlock, Director of Shimano Sport Fisheries Initiative and Rick Morgan, then Executive VP of the Ontario Federation of Anglers and Hunters.

Mr. Harris stuck to slamming the aboriginal policies of the NDP government. Mr. Morlok scared everyone by claiming the NDP was planning to turn over all the natural resources to the Natives: to bring "apartheid to Ontario with personal rights defined by heritage." Mr. Clouther said that the reason Natives were after comanagement was because "they don't have the knowledge to manage on their own—so much for their 'traditional knowledge' … many reserves, and I say this respectfully, leave a lot to be desired when it comes to proper management and cleanliness."[42]

Mr. Morgan took his audience on a slide show trip through Ontario listing one "atrocity" against conservation after another: a million pounds of walleye taken by the Delaware of the Thames (up from earlier OPAH figures of 600,000), geese slaughtered in James Bay. He railed against self-government for First Nations, the NDP Native agenda, the interim Enforcement Policy, aboriginal trading practices, Natives hunting in parks, Natives holding wild game feasts as fundraisers (which OFAH clubs do all the time), Natives shooting wild turkeys, Natives hunting in an unsportsmanlike manner, Native rights causing racism.

Notice of the meeting was sent at the last minute to the closest First Nation, the Algonquins of Golden Lake. Representatives of the First Nation were allowed to speak, but they had to speak from the floor.

By the mid-1990s, the OFAH switched from reporting on Native hunting and fishing "outrages" to disseminating analyses of section 35 of the Constitution, critiques of Supreme Court of Canada decisions (particularly *Sparrow*), and defining what involvement First Nations should have (if any) in the harvesting and management of resources.

There are several points to this very brief rendition of the backlash against Native hunting and fishing rights in Ontario in the early to mid-1990s:

1. It was organized[43], well funded, pervasive and persistent, and most toxic to the reconciliation of Ontarians and First Nations.
2. It reached into the highest levels of government.[44]

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[42] Transcript of "Emergency Public Meeting on the Future of Fishing, Hunting, Tourism and Lumbering in the Ottawa Valley", Pembroke, February 10, 1992.

[43] The OFAH membership hovers around 70,000-76,000 members but they are organized in member clubs across the Province. The executive of the OFAH and the clubs are politically astute and well-connected and often well-respected in their communities for the work they do on stocking and habitat rehabilitation. They are businessmen, policeman and local politicians. Analyses of Native rights cases and issues were quickly disseminated by the OFAH in its inserts in the Mclean-Hunter publication, *Ontario Out of Doors*, and in its own syndicated TV show, *Angler and Hunter*.

[44] Especially when Chris Hodgson (himself a member of the OFAH) was Minister of Natural Resources. Staff from the MNR's Fish and Wildlife Branch crossed over to the OFAH and vice versa. This had the effect of solidifying an already cozy relationship between the bureaucracy and the OFAH. However, it must be recognized that the first Fishing Agreement the SON signed with Ontario in 2000, was signed by John Snobelen, the Tory Minister of Natural Resources.

3. It interfered with attempts by the government and First Nations to negotiate accommodations of Native rights to hunt and fish and it set back the full recognition of aboriginal and treaty rights in Ontario by at least a decade.
4. The backlash was endorsed, even aided, by some people within the Ministry of Natural Resources.
5. While those who took part in the backlash maintained they were merely voicing their objection to the "race-based" policies of the NDP government, the people who felt the full, hateful impact of the campaign were Native people.
6. The OFAH, in the early 1990s, provided the reports, analysis and propaganda that both fuelled opposition to the accommodation of aboriginal and treaty rights and gave it some legitimacy.[45]
7. Regardless of which party is in power, government intention alone is not enough to guarantee the recognition of and respect for aboriginal and treaty rights.
8. The opposition to the fair practice of aboriginal and treaty rights was so fierce and ran so deep, that it almost seemed bred in the bone—there was no rational argument that could succeed against their opposition.

It is into this atmosphere that we asserted our aboriginal and treaty rights to fish commercially.

b) Chronology

Mid-1800s: Crown admits the Saugeen Ojibway Nations possess and enjoy waters around the Bruce Peninsula in an 1847 Royal Declaration.[46] First Nations lease their fishing grounds to non-Native fishing companies.

1857: First *Fishery Act* "gives" the public right of way over navigable waters. Act ignores Native jurisdiction over fishery and the Native concept of ownership. In fact, Natives are not mentioned at all. The Act opens the way for Europeans to fish without restraint. Fish stocks begin to decline.

1862: William Gibbard, the Crown's Fisheries Overseer for Lakes Huron and Superior, illegally leases out fishing grounds around the Bruce Peninsula and Manitoulin Is. without permission from First Nations. Protests from the Saugeen Ojibway Nations about the abuse of their fisheries by non-Native lessees are seldom successful. The Crown threatens Nawash Chiefs that they will lose their "free fishing" if they disturb the lessees.[47]

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[45] The impact of the OFAH lobby is analyzed in greater detail in the Saugeen Ojibway Nations' presentation to the Royal Commission on Aboriginal Peoples, "Ontario's Dirty Little War", March 1993. At the its AGM in February 1994, the OFAH pledged to make the fight "to protect Ontario's resources" against Native abuse a top priority; and the Treasurer of the OFAH suggested, in his report, that this stand would be a big draw for new members. To its credit, the OFAH, under the management of Executive Director Mike Reader, has abandoned its adversarial position on Native rights.

[46] Reproduced in Polly Keeshig-Tobias, *The Illustrated History of the Chippewas of Nawash*, Chippewas of Nawash Unceded First Nation, 1996, p.82.

[47] Ibid p.76.

1860-1880: Encroachment on SON fishing grounds is so severe, that the First Nations are squeezed out of their own fishery. Sturgeon, a fish of great cultural and spiritual meaning to the Anishinaabek are piled and burned as garbage by non-Native fishermen on the First Nations' own Fishing Islands. The fires can be seen for miles and burn for days.

1884: Nawash FN allows, by BCR, Captain Dunn to use Whitecloud Island as a summer resort for 10 years but the First Nation clearly retains its right to fish around the Island.[48]

Late 1800s: Non-Native fishermen discover sturgeon hold caviar. They fish them to extinction by the turn of the Century.

1897: First attempt to restock a fishery (Lake Ontario). Crown uses roe and eggs collected by Nawash.

Mid-1900s: Lake Trout stocks crash.

1981: Ninety of the Fishing Islands (mostly rocks that are islands depending on the water level) in Lake Huron returned to reserve status. Native fishermen are still barred from Lake Huron.

1984: The Ontario MNR finally regulates commercial fishing in Lake Huron. Nawash is given a quota and a licence; Saugeen is not. Quotas were determined based on the historical catches of the commercial fishermen. The MNR ignores the nature (small shore-bound fishing punts) and history (rights never surrendered or extinguished) of the Native fishery and applies the same method to both Native and non-Native fishermen. The Nawash licence gives 12 Native fishing families roughly 2% of the total allowable catch of the fishery and restricts Nawash fishermen to a postage-sized area adjacent to their reserve. The commercial value of the Nawash share of the fishery is approximately $20,000 a year. The rest of the fishery around the Bruce Peninsula (worth over $1 million annually) is allocated to 12 non-Native fishing tugs. Nawash Chief and Council take the licence under protest. The MNR harasses or charges Nawash fishermen every year thereafter.

October 13, 1989: Ross Forgrave, a Wiarton JP forces eleven Nawash fishermen, one of them the Chief of the FN, some of them elderly, to stand for 45 minutes as he lectures them about fishing over the MNR imposed quota. He portrays them as thieves, greedily taking too many fish. Then he fines them a total of $32,000 plus jail time ($200 and 30 days for one fisherman who had caught 9 fish).

1989-90: MNR runs a sting operation against Nawash fishermen that lasts 18 months and costs taxpayers some $150,000. MNR Conservation Officers buy some 20,000 pounds of fish and charge Native fishermen for fishing over quota.

April 1990: Nawash and the MNR have entered into negotiations for a fishing agreement that will include a modest increase in quota as well as assessment and enforcement provisions. In June, Nawash drafts a comprehensive Management Plan which spells out rules and regulations for Native fishermen, stocking programs to enhance the resource, statistics on how to increase the catch, co-management details with MNR, jurisdiction, and developing Native expertise in fisheries management and enforcement. In the fall of 1990 formal negotiations on the Interim Agreement begin with MNR. MNR suspends licensing and quota requirements during negotiations.

June 1991: Nawash refuses to sign its fishing licence. The MNR agrees not to charge Nawash Native fishermen for fishing without a licence as long as negotiations continue on an interim fishing agreement.

[48] Ibid, p.77.

October 8, 1991: Jim Ritchie from the Saugeen FN and Marshall Nadjiwon from the Chippewas of Nawash Unceded First Nation put their small, open fishing boats into a very rough and dangerous Lake Huron (where neither is allowed to fish) to serve symbolic notice the two Bands intend to assert their ancient aboriginal and treaty rights to fish.

March 2, 1992: Glennis Hughes of the United Church receives a letter from Natural Resources Minister Bud Wildman saying that Ontario recognizes the First Nations have some sort of right to fish commercially.

March 1992: Ontario and the Chippewas of Nawash are in negotiations for an Agreement in Principle concerning the comanagement of the Bruce fisheries. The Agreement also means a modest increase of quota. On March 27th, Ontario is to sign the Agreement and withdraw charges against Nawash fishermen; but then refuses to sign and refuses to withdraw charges. The MNR bans Native-caught fish by preventing fish-buyers from purchasing fish from "all unlicensed vendors" (*ie,* Nawash fishermen).

May 1992: Unable to sell fish, Saugeen Ojibway fishermen launch a federal court action to have the ban lifted. Action stalls as the federal Department of Fisheries questions the jurisdiction of the court, claiming this is not a federal matter, even though the laws are federal, the case involves First Nations, and MNR Conservation Officers have dual status as both provincial and federal officers.

June 8, 1992: The trial of former Nawash Chief Howard Jones and fisherman Francis Nadjiwon on charges of fishing over an MNR-imposed quota begins. Peggy Blair, lawyer for the Saugeen Ojibway Nations, and Darlene Johnston, expert historian, enter over 400 documents to prove aboriginal and treaty rights to fish for trade and commerce. The Crown cannot argue extinguishment, in part because the Minister of Natural Resources had already recognized the Saugeen Ojibway Nations' right to fish commercially.

June 12, 1992: Negotiations toward an Agreement between Ontario and the SON resume when the MNR agrees to lift the ban on the sale of Native fish.

June 22, 1992: At a meeting with George Tough, Deputy Minister of MNR, SON representatives expect to sign an Interim Fishing Agreement. But Mr. Tough tells us that the OPP is investigating him for counselling to commit an offence (*ie,* allowing fish buyers to purchase fish from unlicensed commercial fishermen, namely Nawash fishermen). The investigation was initiated by Owen Sound based Conservation Officers in his own Ministry.[49] On returning home we learn the MNR had *already re-imposed the ban* late Friday afternoon on June 12th.

Fall 1992: Nawash Councillors and staff travel southwestern Ontario selling fish to protest the ban. At well-publicized meetings in Kitchener, London and Stratford, organized by the Mennonite Central Committee, our supporters meet and purchase our "illegal" fish. The *Jones-Nadjiwon* case proceeds.

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[49] In a remarkable interview in the Owen Sound *Sun Times* (27 April 2005—see Appendix G) retiring Conservation Officer Joel Tost took credit for laying this complaint against senior MNR staff—a clear case of the enforcement arm of the MNR interfering with the legitimate political objectives of the Crown. In the article, Mr Tost makes clear his continuing difficultly with government policy to recognize Native rights—a difficulty some COs seem to have still. OPP officers did investigate the complaint in 1992, but no charges were laid.

April 26, 1993: Judge Fairgrieve releases his decision in *Jones-Nadjiwon* in Toronto.[50] He declares Ontario's licencing management scheme discriminatory, unconstitutional and unenforceable against the Chippewas of Nawash and recommends Ontario abandon its "high-handed and adversarial approach" to negotiations. He dismisses all charges of over fishing against Nawash fishermen.

May 30, 1993: Ontario announces it will not appeal the Fairgrieve ruling.

June 9, 1993: Chippewas of Nawash offer to negotiate a comanagement agreement.

October 24, 1994: It takes Ontario over a year, but it finally agrees to negotiate comanagement.

March 10-12, 1995: Nawash Fisheries Conference, the largest Native-run fisheries conference in Ontario brings anglers, non-Native scientists and managers together with Native commercial fishermen and fisheries managers.

May 26, 1995: Ontario provides funding for a biologist, but refuses to fund public consultation and education as it had agreed to in the letter of commitment.

Early summer 1995: A Nawash fisherman's boat is sabotaged and defaced with graffiti that says: "splake thief".[51] Later in the summer, another fishermen, who had lost 2,000 yards of nets to someone who had lifted them or cut them free, dutifully reported his losses to the OPP. No one was apprehended. He was on the verge of bankruptcy when *he* was charged by the OPP for booby-trapping his nets in an effort to protect them.

August 1, 1995: The Chippewas of Nawash table a comprehensive strategy to develop public support, to assess the impact of aboriginal and non-aboriginal fishing on fish stocks, to assess the long term health of the fisheries stocks, and to develop the comanagement plan. Violence and the new Ontario government's intransigence pre-empt the strategy.

August 5, 1995: About 75-100 angry anglers from the Grey-Bruce area march on Yolanda Jones a Nawash Band member who is selling fish at the Owen Sound open market with her daughters. The sportsmen are protesting against Native fishing in Owen Sound. They are led by Grey MPP Bill Murdoch, Parliamentary Assistant to MNR Minister Chris Hodgson. A scuffle breaks out and Nawash supporters link arms to bar the sportsmen from attacking the stall. One of the protestors throws a plastic bag with a rotting salmon onto the fish on the stall.

August 15, 1995: Soon after the Harris government is elected (June 1995), the new Minister of Natural Resources, Chris Hodgson, pressured by local sports fishermen, meets with the Chippewas of Nawash. At the meeting he informs the Band that the new government is not interested in discussing comanagement.

August-September 1995: In the space of about a month some 10,000 metres of Native nets are stolen or damaged in various incidents. A Native boat was set adrift. Two Nawash boats were sunk.

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[50] *R v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182. (Prov. Div.) [hereinafter *Jones-Nadjiwon*]. A summary of the *Jones-Nadjiwon* decision is at *Dibaudjimoh on the Web*, http://www.bmts.com/~dibaudjimoh/page18.html, 5 July 2005.

[51] "Splake" is the name of the hybrid fish (speckled-lake trout cross) with which the MNR was trying to stock Georgian Bay in an attempt to replace the decimated indigenous lake trout. We said it would never work—that it was a hybrid and would therefore not reproduce well on the one hand and it could not replace a fish that had taken hundreds of thousands of years to adapt to the waters of Lake Huron and Georgian Bay. A few years later, the MNR finally recognized their splake-stocking program was a failure, largely for these reasons.

September 3, 1995: In the early morning hours, four Native young men are assaulted by a mob of 35 non-Natives in Owen Sound. Three Nawash Band members are seriously stabbed. It will be ten months before anyone is charged with the stabbings.

September 3, 1995: A Nawash fishing tug, sunk a couple of weeks before, is burned to shell at the federal government dock at Howdenvale in broad daylight on a busy Labour Day weekend. Forensic tests show the fire was deliberately set. No charges are laid. In the weeks leading up to the fire, thousands of dollars worth of Nawash nets are stolen or destroyed in the water. Other Nawash boats and equipment are vandalized.

September 9, 1995: Nawash invites Greenpeace to dock their campaign ship, the *Moby Dick,* at the reserve on their way through the Great Lakes. At a dockside press conference Greenpeace officials say they are impressed with the fisheries assessment and management unit the FN has built and give their support to the sustainable way the FN is fishing.

October 1995: Someone takes a gunshot at yet another Native fishing boat. Not a single person has been charged in all the incidents. The local MPP, Bill Murdoch (who is also a Parliamentary Assistant to Natural Resources Minister Chris Hodgson), suggests, in a Toronto *Globe and Mail* interview, that "the Chippewas" were doing it themselves.

October 25, 1995: After a brief exchange of positions, and without consulting the Bands, Chris Hodgson, Minister of Natural Resources writes Chief Ralph Akiwenzie to say he will only discuss proposals in terms of a licence issued under the Aboriginal Community Fishing Licence Regulations (ACFLR). The Chippewas of Nawash request further clarification of those terms and conditions of the proposal that appear to contravene the Fairgrieve decision. Ontario's response makes it clear that the province intends to impose conditions of licence, some of the terms of which Fairgrieve had already ruled unconstitutional.[52]

March 1996: Federal Indian Affairs Minister Ron Irwin offers to facilitate negotiations between the Chippewas of Nawash and Ontario. Ontario does not respond. The Chippewas of Nawash obtain correspondence between Ontario and the federal Department of Fisheries and Oceans in which the Province promises it would not apply the ACFLR except where agreements have been negotiated with First Nations.[53]

May 29, 1996: Chippewas of Nawash by-law 13-96 is ratified by the Dept. of Indian Affairs and becomes federal law. As such it supersedes Provincial regulations. It provides for the strict regulation of Nawash fishermen on reserve waters and for the gathering of information on the fishery by Nawash fishermen and managers. The Chippewas of

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[52] For example, Native fishermen would be restricted from fishing in areas that J. Fairgrieve found were clearly within the traditional territories of the SON; and the licence would arbitrarily set quotas of fish. In addition, Judge Fairgrieve had also clearly stated the Crown must not deal with First Nations in such a "high-handed" manner.

[53] This was the Province's position under the NDP. The Province brought in the ACFLR (federal regulations which a Province can opt into) in order to resolve a conflict between sportsmen and the Williams Treaty FNs. These FNs (now called the United Anishinaabek Councils) lost a court bid to have their hunting and fishing rights recognized (the court found they had given them up in the Williams Treaty of 1923). The Ontario Federation of Anglers and Hunters mounted a vigorous campaign to prevent Natives from these FNs from hunting or fishing, even for food and ceremony, without a licence. The NDP felt the growing conflict could be resolved by issuing the Bands an ACFL, which they did with the FNs' agreement. The Minister of Natural Resources wrote the government would not impose any other licences without similar agreement from FNs. However, that policy was reversed by the Harris government. Today, (August 2005) several FNs in Ontario have been edged into accepting ACF Licences as the only way they would be allowed to practice commercial fishing short of going to court to prove their rights.

Nawash ask to meet MNR officials so that information concerning management of the fisheries can be shared.

June 24, 1996: Ontario tries to unilaterally impose licences under the Aboriginal Communal Fishing Regulations (ACFLR) on the Chippewas of Nawash and Saugeen FNs.[54] The licence is rejected by both bands. Nawash states its by-law 13-96 adequately controls its own fishermen and protects conservation.

July 1996: A Nawash fisherman's nets again disappear from Georgian Bay. OPP take no action. No charges are ever laid in the property damage offences against Native fishermen.

July 12, 1996: Nawash releases University of Guelph biologist Dr. Steve Crawford's report which concludes there are major flaws in MNR's fishery management program for Georgian Bay and Lake Huron.

August 9, 1996: MNR and OPP seize 2 Nawash fishermen's nets as a "warning" to comply with the terms of the June licence imposed by the MNR. During a race to the nets, an MNR boat cuts off one fisherman, Francis Lavalley, a number of times. Francis, in order to avoid one collision, throws his motor into reverse, damaging it. His nets, new when he laid them, are ruined when COs lift them improperly. MNR admits they never intended to charge the fishermen. Francis is unable to make a living for a number of weeks until he can repair the motor and acquire new nets.

August 16, 1996: Nawash closes area 5-8 (Owen Sound & Colpoy's Bay) to its own fishermen out of concern for whitefish stocks and lake trout since the total allowable catch (TAC) for whitefish in 5-8 is reached. The FN calls on the Ministry to close the bays to all fishing, including angling. MNR refuses to close the recreational fishery.

August-September, 1996: The annual sports fishing derby, the Salmon Sports Spectacular out of Owen Sound proceeds. Nawash monitors the fishing effort of anglers on the water by counting the numbers of boats and lines during the derby. The effort is huge. Along with salmon, the anglers catch numerous lake trout (splake)—the species the MNR is trying to rehabilitate and the species which the MNR charged Nawash for catching in 1990 after an expensive sting operation. There is even a prize for the biggest trout. The Salmon Spectacular takes about 260,000 pounds of fish out of the waters of Owen Sound and Colpoy's Bay in a two-week period every August.[55]

February. 1997: MNR tries to impose a second licence on Nawash and Saugeen. The First Nations ignore that one too.

April 20, 1997: Sportsmen from all over southwest Ontario pack a meeting room in Owen Sound to hear about the danger the Native fishing is posing for the sport fishery that local OFAH clubs built with stocked Pacific coast salmon. SON reps are not invited, but go anyway. Local MNR manager Dave McLeish accuses the Native fishery of jeopardizing the MNR "splake" stocking program. Andy Houser, Director of MNR's Fish

[54] Letter from Minister of Natural Resources Chris Hodgson to Chief Ralph Akiwenzie, June 24, 1996.

[55] Based on an estimate of 258,000 pounds taken in the derby in 1995. No one knows for sure because neither the derby organizers nor the MNR do creel surveys. But assuming an average weight of 20 pounds per fish and 3 fish caught for every fish registered with derby organizers, 4300 fish registered translates to 12,900 fish caught at 20 lbs each or 258,000 pounds or 129,000 tons. Assume one-third of that is trout (splake), that's 43,000 tons of government-stocked fish in 2 weeks. To put this in perspective, the MNR sting in 1989-90 netted only 20,000 lbs of Nawash-caught trout over an 18-month period.

and Wildlife Branch releases dubious and prejudicial financial information on how much the MNR has provided to the FNs to support negotiations and reporting.[56]

June 24, 1997: MNR lays charges against two fishermen from Nawash and one from Saugeen for not adhering to the licences that the Bands had rejected as being prejudicial.[57]

July 30, 1997: Nawash publicly welcomes news that the federal government has appointed Judge Stephen Hunter to mediate discussions with Ontario.

August 13, 1997: MNR releases a "stock status" report which places the burden for the Ministry's failed splake and backcross rehabilitation program on the Chippewas of Nawash.[58]

August 25, 1997: Nawash releases Dr. Stephen Crawford's report criticizing salmon stocking by the MNR and the local sportsmen's clubs.[59]

October 6, 1997: Two men from Owen Sound go on trial for stabbing two Nawash youths, September 3, 1995. The trial ends in January 1998 with a plea bargain.[60]

October 16-18, 1998: Nawash holds a second fisheries conference in Owen Sound. Once again, Native and non-Native fisheries scientists and managers come together to discuss the impact of court decisions, environmental degradation and new assessment tools on the management of fisheries in Ontario.

Spring-summer 1999: Nawash and the MNR continue to negotiate fisheries issues, mediated by Judge Stephen Hunter. The MNR and Nawash are exchanging information on the fisheries and Nawash continues to assess its catches and supervise its fishermen.[61]

November 18, 1999: Twenty-four hours after the Supreme Court's *Marshall 2* decision, MNR issues a directive to fish buyers to stop purchasing all fish, except chub, effectively closing down the Native fishing industry.[62] Twenty-four hours after the closure, a Native man, Patrick McDonald, the husband of Yolanda Jones, dies of hypothermia in a cold Lake Huron when he tries to move his nets before the MNR's deadline.

December 13-24, 1999: Nawash discovers MNR did not have a variation order as required by law to stop the purchase of fish. Nevertheless, MNR Conservation Officers board Nawash boats. Nawash seeks a Judicial Review of MNR actions. MNR officials

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[56] For example, Mr. Houser claimed that the MNR spent half a million dollars to support negotiations and reporting of harvests. What he didn't mention was that much of that money was raised by the Bands through programs already in existence. Neither did he speak of the amount of money given to non-Native commercial fishermen in lucrative buy-outs of their licences, or the amount the MNR had spent in enhancing and monitoring the non-Native recreational fishery. See "MNR and OFAH blame SON for Trout Stocks at SOS Meeting", *Dibaudjimoh on the Web,* http://www.bmts.com/~dibaudjimoh/page27.html.

[57] Ibid, "MNR charges fishermen at dawn of talks" at http://www.bmts.com/~dibaudjimoh/page26.html. This was also a press release. 24 July 2005.

[58] Ibid, "Can MNR manage Ontario' fisheries?" http://www.bmts.com/~dibaudjimoh/page31.html. 24 July 2005.

[59] Ibid, "Media Release: Nawash releases study on Salmon introduction", http://www.bmts.com/~dibaudjimoh/page15.html. 25 July 2005

[60] Ibid, "Trial against 2 men accused of stabbing Nawash Band members ends" at http://www.bmts.com/~dibaudjimoh/page38.html. This article also describes some of the problems with the case. 24 July 2005.

[61] Ibid, "Nawash and MNR still negotiating over fisheries", at http://www.bmts.com/~dibaudjimoh/page25.html. 25 July 2005.

[62] Ibid, "MNR bans sale of Nawash and Saugeen fish … again & MNR boards Native boats; Nawash seeks Judicial Review." at http://www.bmts.com/~dibaudjimoh/page4.html, 24 Jul 05. The MNR's actions were clearly harassment and the Judicial Review said they were illegal.

come to court Christmas Eve with a hastily assembled variation order signed by the Minister. Since the New Year begins a new quota regime, the matter is dropped and the stop purchase order lifted January 1.

June 22, 2000: Saugeen Ojibway Nations, the Ontario Ministry of Natural Resources and the federal Department of Indian Affairs finally sign a comanagement Fisheries Agreement—seven years after the Jones-Nadjiwon decision.[63] The SON sees it as a recognition of their aboriginal and treaty rights proven. Ontario insists on calling it a resource use licence.

November 2000: The Saugeen Ojibway (Nawash and Saugeen FNs) and the MNR together agree to close the fishery to further fishing, since total allowable catches are reached.

January 5, 2001: Rather than use the dispute mechanisms in the Fishing Agreement, the MNR confiscates fish and bans purchases of fish it alleges were caught outside the zone stipulated in the Agreement. The Saugeen Ojibway object to MNR actions.[64] Tensions and tempers rise on the dock at Meaford as non-Natives protest the Native harvest.

February 2001: MNR refuses to share long-term lake-wide data with Nawash biologists, even though the Ministry had given the same data to the University of Toronto. This seriously jeopardizes the Fishing Agreement (which requires both sides to exchange information) and the joint FN-MNR management of the fishery. It takes the intervention of Minister Snoblen's office to obtain the data.

December 31, 2003: The first Fishing Agreement expires. Negotiations begin in January 2004 for a new Agreement under the mediation of Judge Stephen Hunter. They will take a year and half to conclude.

January 14, 2004: In a letter to Chiefs Akiwenzie and Roote, Dave McLeish, the Regional MNR Manager says he is concerned about lake trout stocks.

July 12, 2005: A new Fishing Agreement is signed by Ontario Natural Resources Minister David Ramsay, Saugeen Chief Vernon Roote and Nawash Chief Ralph Akiwenzie. The Saugeen Ojibway Nations consider the Agreement to be a recognition and realization of their aboriginal and treaty rights to fish commercially. The MNR still calls it a licence and the parties agree to disagree. The federal government is not a signatory to this Agreement and there is some doubt the Crown will come up with the funds to enable the FNs to work as equal partners in the management of the fishery. This could jeopardize the Agreement and restrict the full expression of SON's rights and responsibilities (our *anookeewin*).

August 2, 2005: Grey County Council passes a resolution (without inviting the Saugeen Ojibway Nations to present their point of view) that opposes the new Fishing Agreement which "would extend the fishing rights of the First Nations without first providing an opportunity for consultation by other interested stakeholders."[65] This is one of a number of missives from Bill Murdoch (MPP), Larry Miller (MP) and local municipal councils

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[63] Ibid, "Nawash, Saugeen, Canada & Ontario sign landmark Fishing Agreement" at http://www.bmts.com/~dibaudjimoh/page102.html, 24 Jul 05.

[64] Ibid, "MNR confiscates fish in first test of Agreement" at http://www.bmts.com/~dibaudjimoh/page106.html 24 July 2005. Also "Net worth [of fish caught]—nothing", Owen Sound *Sun Times*, January 10, 2001. The MNR faxed its total allowable catch figures for the area in question to the Band offices when they were closed between Christmas and New Years.

[65] Letter from David Fawcett, Warden Grey County to Hon David Ramsay, Minister of Natural Resources, August 3, 2005.

complaining about the Agreement which will see our fisherman practice their rights deeper into Owen Sound Bay and Colpoy's Bay.

c) Ross Forgrave (1991)

On June 14, 1991 Justice of the Peace Ross Forgrave referred [in court] to a Sun Times article in which Ministry of Natural Resources were quoted as saying that, for the time being, they would not charge Cape Croker Natives for fishing without a license or quota as long as negotiations continue on an interim fishing agreement. JP Forgrave called the actions of the Natives a "flagrant violation of Ontario legislation," and the MNR decision not to charge them, "blatant discrimination." Then he adjourned until September 20 charges for fishing without resident licences against seven non-Natives.

About three years ago, 11 Cape Croker fishermen were charged with fishing over their quota of splake. They appeared before Justice of the Peace Ross Forgrave who kept them standing for 45 minutes while he lectured them on their abuse of the resource. Then he fined them a total of $32,000 and sentenced most to 30 days in jail.[66]

Such was the treatment Native fishers and hunters suffer all too often. Not just here, but across Ontario. The NDP government brought in an Interim Enforcement Policy (IEP) that referred any charges Conservation Officers chose to lay against Native hunters and fishers to the Deputy Minister of Natural Resources. The Deputy was to consider the charges in light of the Constitution and Supreme Court of Canada decisions and determine whether the charges should proceed. It was a reasonable response, short of amending the *Game and Fish Act,* to the constitutional realities of aboriginal and treaty rights. And yet, the IEP incensed many COs, most sportsmen, apparently, Justice of the Peace Ross Forgrave.

When they found their charges against Native hunters and fishers stalled by the IEP, Conservation Officers began laying charges outside the Policy. Many of these cases were heard by Justices of the Peace who are not really equipped to decide complex aboriginal and treaty rights cases. Another barrier for First Nations' people is the cost of running a defence based on their aboriginal and treaty rights. Such a defence can easily cost upwards of $100,000 and many lawyers are asking an up-front payment of $10,000 from aboriginal clients who want to fight harvesting charges based on their rights.

Another barrier is the English language; for many defendants, especially in the north, English is not their first language. Even if a Native defendant understands English well, he or she might still be tripped up by a question that employs a double negative: "Is it not true you didn't have your gun safely stored?" [67]

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[66] Excerpt from a letter to the editor of the Owen Sound *Sun Times*, David McLaren, June 18, 1991.

[67] Personal correspondence, Mary Robinson, Barrister and Solicitor, Thunder Bay ON, 16 December 1993. This is a failing of the adversarial nature of Canadian courts that Rupert Ross, a Crown attorney in NE Ontario explores in his book, *Dancing with a Ghost*. It is a failing that is also explored in "Encountering the Other".

Occasionally, however, a Justice of the Peace would surprise the Conservation Officers as did JP W Albert who stayed charges against three Batchewana FN Band members for spearing fish during a closed season on the Bar River. JP Albert used Supreme Court of Canada decisions to note that aboriginal fishers must not be forced to rely on prosecutorial discretion for recognition of their rights.[68]

The favourite target of COs became First Nations' hunters hunting outside their traditional territories. These people were charged under the *Game and Fish Act* on the rationale that their aboriginal and treaty rights to hunt for food and ceremony did not extend beyond the boundaries of their own traditional territories.[69]

If a Native hunter so charged is lucky enough to find a competent lawyer he can afford, trying to argue a constitutionally protected aboriginal right before a JP is a "nightmare". If such an argument is made, the Crown forces the accused to prove he or she is descended from the signatories of the treaties.

But back to Justice of the Peace Ross Forgrave. When he called our fishermen's rightful practice a "flagrant violation of Ontario legislation" and then called the MNR's refusal to prosecute them during negotiations for a Fishing Agreement, "blatant discrimination", we felt we had heard enough. We notified the Ontario Attorney-General and laid a complaint with the Judicial Council.[70]

In the meantime (October 1991), Marshall Nadjiwon, a Nawash fisherman, called up Jim Ritchie at Saugeen FN and suggested they go fishing. As Marshall recalled to Sidney Linden:

> We got together with people of Saugeen because the MNR never let them into the waters at all. I phoned up Jim Ritchie and I said, 'I've got so many charges on me right now that another charge won't hurt. If you want to go into Lake Huron and pursue fishing with me as a person from Saugeen, we might be charged and jailed but we'll have to find out if we've got rights for fishing.' It did end up in charges. Many of the fishermen went there and all went into the waters the next year.[71]

When the case of the seven non-Native anglers returned to court in September 1992, Forgrave withdrew, citing a "communication" he received which he considered tampering with the justice system and contempt of court.

A lawyer from the Attorney General's office was present in court to help JP Forgrave with the law if he chose to deal with the charges against the non-Native fishermen. The government lawyer said after court that the Ministry's decision not to charge Natives is

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[68] Ojibways of Batchewana FN press release, "Fisheries prosecution against treaty fishers stayed as abuse of process," Sept. 6, 1997. Case cited as *R v Nolan, Barath and Barath*. However, the press release notes, similar charges against a Garden River FN Band member in 1995 did result in a conviction.

[69] Personal correspondence, Kathy Beamish, Barrister and Solicitor, Sioux Lookout ON, 23 November 1993.

[70] Personal records of David McLaren.

[71] At the Nawash Community Forum Sept. 8, 2005.

consistent with Government policy and quite within the bounds of sections 35 and 15 of the Constitution.

Shortly after JP Forgrave withdrew from the case against the sports fishermen, he resigned. He was given a farewell party by OPP officers and MNR Conservation Officers.

Justice of the Peace Ross Forgrave's court was, perhaps, the spark that ignited the community's resolve to assert their rights. As the Chief at that time, Peter Akiwenzie, told Hon. Sidney Linden:

> We started with strong individuals in the community who were prepared to undertake the act of fishing knowing they had a right to do it. We realized there are consequences of fighting the white man's laws. But knowing how unfair those laws are we chose to work around them and still show the respect to the fish so there would be something there in the future.[72]

d) Fish Buy Protest (1992)

Rather than accept another arbitrary ban on the purchase of our fish in 1992 (see Chronology June 22, 1992) we decided to sell fish ourselves. By that time we were actively building a support network of churches and Non-Government Organizations (NGOs) in Ontario, so we asked our allies to buy fish from us. At every fish-buy we posted a sign:

> The fishermen of the Saugeen Ojibway have been unable to make a living due to a ban placed by the Ontario Ministry of Natural Resources on the purchase of their fish. This was done in spite of Ontario's clear recognition of the Saugeen Ojibway's aboriginal right to fish for trade and commerce.
>
> THANK YOU FOR YOUR SUPPORT BUT BE WARNED ...
>
> By purchasing our fish you are in technical violation of the *Game and Fish Act*. Anyone purchasing fish from an unlicensed vendor (ie. the Saugeen Ojibway) is liable to a fine and the confiscation of purchased fish.

Nevertheless people bought our fish all up and down the Bruce Peninsula, in Kitchener, London and Stratford. The Canadian Auto Workers' Educational Centre in Port Elgin purchased 70 pounds for its cafeteria, but the MNR confiscated the fish a few days later. Some purchasers were questioned, but none were charged.

However, one of our supporters, David Maxwell, the United Church minister in Tobermory was forced to leave his ministry by opposition in his congregation to his support of the Native fishery.

e) Jones-Nadjiwon (1993)

[72] At the Nawash Community Forum Sept. 8, 2005.

Saugeen Ojibway Begin to Plan for the Future[73]

Nawash First Nation—On Wednesday night, April 28th, at the Nawash First Nation Band Office, Saugeen Ojibway fishermen began, for the first time in over 100 years, to plan how they would exercise their aboriginal and treaty right to fish for trade and commerce.

That right was affirmed in a recent Ontario Court judgment handed down in Toronto on April 26th by Judge D.A. Fairgrieve. In that judgment:

1. Charges against a former Chief of the Nawash Band and a Nawash fisherman were dismissed.

2. The Judge followed the lead of the Supreme Court in *Sparrow* and section 35(1) of the Constitution by finding the Saugeen Ojibway has priority over other users once the needs of conservation have been met.

3. Due to the right and priority of the Saugeen Ojibway, the quota system used to regulate the commercial fishery is unenforceable with respect to the Native fishery.

4. A ban imposed last year by the Ministry of Natural Resources on Saugeen Ojibway caught fish is also unconstitutional.

Quoting from the judgement:

> "The regulatory scheme [of the MNR] has made no attempt to extend this priority to the Cape Croker Band [*ie,* the Nawash Band, one of the bands of the Saugeen Ojibway], but has instead favoured anglers and non-Native commercial fishermen. The allocation of quotas to Cape Croker, much less the Saugeen Ojibway Nation as a whole, did not reflect their constitutional entitlement to priority over competing user groups. ...
>
> As a practical matter, the Court cannot compel good faith or recognition of changed realities. All that can be done here is to state the conclusion that the quota restrictions do not meet current constitutional standards and are, accordingly, unenforceable against the defendants."

According to Chief Ralph Akiwenzie, it is not the Saugeen Ojibway who should bear the brunt of conservation. He said, "During the trial last summer, evidence from the MNR itself showed that we take only a small fraction of the fish considered by MNR to be most at risk. Non-Native commercial fishermen take 93% of the lake trout caught commercially. Every year, non-Native anglers in the Bruce catch at least twice the lake trout we catch for trade and commerce."

At the meeting of the fishermen Wednesday night, less time was spent celebrating the victory than in planning for the future.

Chief Akiwenzie: "We reviewed the regulations we have put in place to regulate our own fishermen. Strong emphasis was put on the need to keep accurate, daily records of our catch. The fishermen were reminded to ensure dead fish and offal were brought on shore and not allowed to foul the waters. And certain enforcement measures were endorsed."

The *Jones-Nadjiwon* decision that recognized our rights to fish commercially was, of course, the catalyst for the huge changes that took place on the waters of our traditional territories around the Bruce Peninsula. But choosing to fight charges in court can also be

[73] Saugeen Ojibway Press Release, April 29, 1993.

seen as the only reasonable response to the Crown's reluctance to negotiate an accommodation to our rights that it had itself admitted existed.

Many in the non-Native community blamed the decision of Justice David Fairgrieve for causing the backlash that erupted. Some still point to it as an example of "judicial activism," but of course that's a label applied only to court decisions they don't like.

The *Jones-Nadjiwon* is, perhaps, the best argument around against "equal treatment" because it exposes the effects of treating people who are not the same as though they were the same. In arriving at its regulatory regime in 1984, the Ontario MNR simply added the previous six years catches for each license holder, including the Chippewas of Nawash, and divided by six to come up with the annual total allowable catch for each licensee. Not taken into account were our rights, our extremely small catches (roughly 2% of the total harvest around the Bruce Peninsula), the nature of our equipment (small open boats), and the traditional sharing of the harvest with members of the community. Some years, the MNR had no records at all of our catches, but they added those zeros to the six-year total.

The result of being treated equally was that we were allowed a small and woefully inadequate portion of the total harvest, our rights where ignored, and we were subjected to zealous prosecution under the *Game and Fish Act*. As Judge Fairgrieve said in his decision:

> The Band's fishing income is a crucial part of its subsistence economy, and the limited access caused by the quota produced greater deprivation and poverty and contributed to increased unemployment and poverty, individually and communally. The quota had a serious adverse restriction and constituted an infringement under section 35(1) [of the 1982 Constitution]. ... The Native fishery was seen as just one part of the commercial fishery. No special regard was given to the Band's fishery operation, quite apart from the question of any constitutional priority.[74]

An insightful response to the cries of "equal rights for all" and "one law for everyone" has been made by Judge Murray Sinclair in the report of the *Manitoba Aboriginal Justice Inquiry*:

> Systemic discrimination involves the concept that the application of uniform standards, common rules and treatment of people who are not the same constitutes a form of discrimination. It means that in treating unlike people alike, adverse consequences, hardships or injustice may result.[75]

Both these insights were communicated to the public several times, but the perception that we were treated fairly and "equally" in the allocation of quota persists.

Another quote from Judge Fairgrieve in the *Jones-Nadjiwon* decision explicitly lays the blame for the dispute at the feet of the Ministry of Natural Resources.

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[74] For other quotes from the *Jones-Nadjiwon* decision, go to http://www.bmts.com/~dibaudjimoh/page12.html, 2 Aug. 2005.

[75] In "Toward a Definition of Racism" Saugeen Ojibway Nations, 1993 in Appendix E.

> What should be stated, however, is that a high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s. 35(1) of the Constitution Act, 1982, particularly after the judgment of the Supreme Court of Canada in Sparrow, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.
>
> ... The imposition of a prohibition against the purchase of lake trout from Band members pending negotiations and a new arrangement which recognizes the priority of their aboriginal and treaty rights would, in my view, also be unconstitutional. It would also fail to reflect the high standard of honourable dealing which the public expects its government to take in respect of the rights of the aboriginal people.

His conclusions also condemn the actions of the MNR from 1995-99, years *after* he read out his judgment in court on April 26, 1993 (see the Chronology for comparison).

f) Presentations to RCAP (1993)

The Saugeen Ojibway Nations made two presentations to the Royal Commission on Aboriginal Peoples in an attempt to focus attention on what was going on in the Bruce Peninsula and to communicate to the Commissioners what we felt to be the most troublesome roadblocks to reconciliation between First Nations and Ontario.

Our first presentation, in March 1993, was titled "Ontario's Dirty Little War" and described the criminalization of Native rights by the anti-Native rights lobby and some elements of government policy and practice (of which the highlights are reviewed in this paper).

The second paper is titled, "Issues of Jurisdiction" and examined how the jurisdictional issues that lead to confrontations around Native rights have been handled in other areas, principally the United States. The recommendations, based on the US experience, said, in part:[76]

- First Nations have a legitimate claim to jurisdiction over natural resources.
- First Nations require access to natural resources to re-create traditional economies.
- First Nations must be more aggressive and asserting rights to and jurisdiction over natural resources.
- There are three elements necessary for successful assertion of jurisdiction:
    1. successful legal action
    2. public relations to counter anti-Native rights lobby and secure public support (all the US groups interviewed emphasized the crucial role of public education)
    3. the management plan and infrastructure which includes enforcement.

[76] Saugeen Ojibway Nations', "Issues of Jurisdiction" Submission of the Saugeen Ojibway Nations to the Royal Commission on Aboriginal Peoples, December 1993.

- The federal government needs to accept his fiduciary responsibilities for First Nations and support, rather than frustrate, their assertion of jurisdiction over natural resources.

These recommendations are similar to ones made in the final report of the Royal Commission on Aboriginal Peoples regarding the recognition of aboriginal and treaty rights. All the recommendation from "Issues of Jurisdiction" are reproduced in the Recommendations section, below.

We hoped that Ontario would see that Native rights could be recognized and comanagement accepted if lessons for resolving jurisdictional squabbles could be taken from other jurisdictions. Of course that hope pre-supposed the Crown was willing to learn the lessons and act upon them.

g) Ontario Federation of Anglers and Hunters—Creating a dangerous atmosphere (1991-1995)

INDIAN OUTRAGES

by Chief Vernon Roote

"Indian Outrages" ran the headline in The Collingwood Enterprise in 1875. The paper reported that a non-Native fisherman in the area, Mr. Malory, "had all his nets taken from him by the Cape Croker Indians." The reporter accused the Indians of theft and went on to declare they had no right to take Mr. Malory's nets even if he did "encroach a little too close to the islands occupied by the Indians."

Well, you can't believe everything you read in the papers, especially when they report on things that happen in "Indian country." An investigation was made and here's what really happened ...

- Mr. Malory was fishing without a license.
- Mr. Malory was fishing inside the Cape Croker licensed fishing grounds.
- Encroachment was becoming a real problem for the hard pressed Cape Croker fishermen and they complained to the local fishery overseer. He recommended the Native fishermen handle it themselves (thereby doing his job for him). And so they did. They *confiscated* Malory's nets.

Those are the facts of the matter. Simple enough—the Natives were slandered by the paper. But as usual, when you enter Indian country, there's more. To truly appreciate what went on, you have to be aware of the historical and cultural context of events. Consider these facts too ...

- Our people have been fishing in the waters all around the Bruce since time immemorial.
- When the first French explorers came this way, they found whitefish and sturgeon (some up to 12 feet long) in such abundance that these fish were not only the staple of the Ojibway diet but the foundation of a vigorous commerce with other First Nations.
- Although we have surrendered vast tracts of land, we never surrendered our fishing grounds.

- This was recognized by various officials in the 1800s and, in 1868, we were given a special licensed area, not to *allow* us fish, but to *protect* what was left of our once abundant fishery.
- Confiscation was our traditional way of dealing with poachers—we simply took away their means of poaching.

Now, our way of viewing history is a bit different than yours. We don't see history as a steady progression to a more civilized world. We see it more as a continuum. … People certainly don't change all that much.

So it really comes as no surprise to us that the same sort of thing that happened in 1875 is happening again, today. Natives, who managed the fisheries of Ontario quite well, thank you, before your ancestors came along, are being labelled as the greatest threat to fishing in the Bruce since the lamprey eel swam up the Seaway and into the Great Lakes.

You may not have seen it, but there is a "fact sheet" from the Ontario Federation of Hunters and Anglers that is going the rounds of the fax machines. It accuses Natives of everything from hunting pregnant moose to "the wholesale killing and selling of valuable fish stocks." Here's how OFAH puts it in their fact sheet:

"At Cape Croker, MNR undercover officers gathered evidence of wholesale killing of valuable fish stocks. Apparently they bought almost seven tons of fish from local Indians themselves and this is probably the just the tip of the iceberg."

Note the words "apparently" and "probably." Those words are used a lot in the fact sheet. At least the local papers have been a little more accurate this time. Here's what really happened ...

- MNR mounted a 15-month sting operation to catch Cape Croker fishermen doing something illegal. It netted (please excuse the pun) some 13,000 pounds of splake with a wholesale value of roughly $12,000. The operation cost the Government $150,000.
- The splake bought by the MNR were over quota, but the species is a legal part of the Cape Croker commercial fishing license.

And, once again, there's more to the story than just the facts.

Since 1875, Governments have cut our fishing grounds back, without our permission or any compensation. Today, we are left with a postage stamp sized area off Cape Croker.

Today the Cape Croker fishery accounts for only *one* per cent of *one* allocated territory—the Fishing Islands on the Lake Huron side. Those islands used to be the backbone of our traditional fishery. Now we can't even fish on the Huron side.

The Cape Croker fishery remains traditional in its methods—small 16-foot boats with one or two fishermen each—hardly competition for either the deep water high-tech tugs of the non-Native fishery or the Bruce's army of sports fishermen.

A proposed agreement between the Saugeen Ojibway and Ontario to re-establish a viable commercial fishery for our people is intended only to return to us what we never surrendered and to ensure our fishermen are able to make a decent living once again.

I'll leave you with one more fact. The very first attempt to restock a fishery was made in 1889 with parent trout from Cape Croker and with the co-operation of the Saugeen Ojibway First Nation.

Outrageous, eh?[77]

In our estimation, the campaigns and the lobbies of the Ontario Federation of Anglers and Hunters (OFAH) set back Native rights in Ontario by at least a decade. In the early and mid-1990s they effectively poisoned the environment in which First Nations were attempting to work out some very difficult constitutional issues around their aboriginal and treaty rights with the Provincial Crown. The effects of their campaigns are still being felt.

As discussed earlier, we did the best we could with limited resources to get our point of view to the public. By carefully reviewing the facts and history behind the controversies brewing around our rights and claims, as Chief Roote did in the above article, we hoped to gain supporters and discredit the disinformation being put out by the anti-Native rights lobby.

In 1991 we invited the Executive Director and President of the Ontario Federation of Anglers and Hunters, Rick Morgan and Davison Ankney respectively, to meet with us at Neyaashiinigamiing to discuss our fishing rights. They took us up on the invitation and met with us at our Band office on Canada Day, July 1, 1991. We told them about how Nawash and Saugeen had never surrendered their rights to earn a living from fishing. We told them of the central importance of fishing to our culture and our economy. We told them we were hoping that a Fishing Agreement with Ontario would lead to a measure of self-sufficiency and a better-managed fishery.[78]

We even asked them what they would like to see as a consequence of a Fishing Agreement. They said:

- Sports fishing preserved and enhanced;
- A workable conservation scheme;
- No additional commercial licences (Ontario must buy out existing, non-Native licences).[79]

Nevertheless, in a later edition of their magazine, Ankney dismissed the meeting as "a history lesson". Ironically the Fishing Agreements of 2000 and 2005 accomplished all the things the OFAH said it wanted in 1991. There's just no satisfying some people.

We even joined the Ontario Federation of Anglers and Hunters and attended meetings in our region as well as the annual general meetings of the whole organization. While we were politely listened to, we were not heard. We were not able to persuade the OFAH away from their campaign to oppose the recognition and implementation of Native hunting and fishing rights. In January 1995 we took a resolution to Zone H of the OFAH in an attempt to get the Federation to drop its anti-Native rights positions and focus more

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[77] Chief Vernon Roote, "Indian Outrages" in *Bruce County Marketplace*, July 1991.
[78] A position put forward by, of all groups, the CD Howe Institute: Richard Schwindt, "The Case for an Expanded Indian Salmon Fishery", in *Market Solutions for Native Poverty*.
[79] Personal notes on the meeting.

on pollution and habitat degradation. The resolution was defeated by a vote of 82 OFAH members to the three Nawash representatives.

When we attended the OFAH annual general meetings we discovered an interesting tradition: the Ontario Minister of Natural Resources always attended and spoke on the morning of the second day of the AGM, in what the agenda called the "Accountability Session". This tradition continues and the Minister brings his senior political staff as well as senior Ministry of Natural Resources Fish and Wildlife staff.

We also discovered that staff at the MNR frequently moved to the OFAH and vice versa. Chris Brousseau, who had the Native file at the OFAH in the mid and late 1990s previously worked for the MNR in northern Ontario. He returned to the MNR a few years ago. Andy Houser, the head of the Fish and Wildlife Branch in 1997 switched to the OFAH to work on the Hunting Heritage, Hunting Futures initiative that produced the *Heritage Hunting and Fishing Act 2001*, a kind of bill of rights for sportsmen.

That Act established the Fish and Wildlife Heritage Commission that now works to promote sports hunting and fishing, and to advise the Minister on hunting and fishing matters and on expenditures from the Special Purpose Account. This Account was established by the *Fish and Wildlife Conservation Act, 1997* from all revenues collected under that Act (*eg,* fishing and hunting licences). The money from this account goes right back into the "conservation or management of wildlife or fish populations" to support, for example, fish stocking programs, including the stocking of Pacific coast salmon in the waters in which we fish. The Wildlife Heritage Commission that oversees the Special Purpose Account is appointed by the Minister, largely from the sports hunting and fishing industry.

The chairman of the precursor to the Fish and Wildlife Heritage Commission was Phil Morlok, one of the speakers, with Mike Harris, at the infamous "Emergency Public Meeting" meeting at Pembroke in 1992.

In the fall of 1995, Chris Hodgson's MNR mailed out its renewal forms for its "Outdoor Cards"—the new hunting and fishing licensing program established in 1993. Along with the form was an invitation and application form to join the Ontario Federation of Anglers and Hunters. Also in the MNR envelope was a postage paid mail-back card for a subscription to the *Ontario Fisherman*, an outdoors magazine edited by Darryl Choronzey, an outspoken opponent of our fishing rights. Although the OFAH (and, we assume, the *Ontario Fisherman*) paid for part of the mailing, the message to us was clear: the MNR supports those who oppose Native rights. The MNR, in the fall of 1997, again mailed out application forms for the OFAH along with its Outdoor Card renewal notices.

So, in many ways, the connections between the MNR and the sport hunting and fishing industry lobby were very strong. And they remain strong today.

The success of our public education program locally was muted by a well-funded[80] and well-organized campaign that persisted in the face of fact and rational argument. It was Ontario-wide, and to protect ourselves locally, we often had to respond directly to the misinformation the campaign promulgated.[81]

At the 1992 Toronto Outdoor Show, part of the OFAH's exhibit included blow-ups of articles written by outdoors writers from all over Ontario complaining about Natives' rights to take game and fish without MNR regulation. The articles also alleged, without substantiation, that Native people were abusing the resources.

We were alerted to this by one of our band members. David McLaren travelled to Toronto to review the display and notified Rodney Bobiwash and Jay Mason, two leaders of the Native community in Toronto. They and others from the Native community carefully read all the articles and, finding them offensive and inaccurate, calmly removed them from the display, saying they promoted hatred against Native peoples.[82]

As part of its anti-Native rights campaign that same year, the OFAH circulated mail-in cards for politicians. On the card addressed to "Messrs. Mulroney and Clark", the OFAH said, "As a result [of section 35(i) of the Canadian Constitution], there have been large Native kills of spawning fish, nesting birds, moose, deer, wild turkeys, etc. during seasons that are closed to non-natives in Ontario." These allegations were not backed up with evidence and their phrasing suggests the OFAH does not understand that section 35(i) of the Constitution supersedes Provincial laws and regulations, as the *Sparrow* decision of the Supreme Court and the *Jones-Nadjiwon* decision in Ontario court had, by then, confirmed.

In the 1993 kit sent out to its clubs to help them recruit members, the OFAH claims as a reason to join that, "there have been countless instances reported of Natives abusing fish and wildlife resources." Again, no evidence is offered, but the charges continue in the most inflammatory of terms: "So ... the carnage goes on. Spawning fish continue to be taken, pregnant deer and moose killed, wild turkeys shot and sold."

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[80] In 1998, the OFAH spent roughly 20% of its budget, or $1,000,000 on communications and education, including their in-school program, inserts in the Mclean-Hunter publication, *Ontario Out of Doors*, etc. (From a review of OFAH budgetary information provided at the February 1998 OFAH annual general meeting.) Then there are other organizations that promote the sports agenda such as Shimano Canada and Hunting Heritage, Hunting Futures, a cross-border group, and the Canadian Wildlife Federation. (See Helen Forsey, "Gunning for Conservation", *Canadian Forum*, Jan/Feb 1994, pp 22)

[81] Only a few examples of the dis-information we faced are included here. More examples and a deeper analysis appears in "Encounters with the Other" and in the Saugeen Ojibway Nations' presentation to the RCAP, "Ontario's Dirty Little War" and on the web at http://www.bmts.com/~dibaudjimoh/page4.html (scroll through the Contents to find relevant articles.)

[82] Reported in the Toronto Star, 1992, "Irate Natives rip down 'racist display'". At the same event, Rodney Bobiwash released a memo on Ontario Ministry of Environment, Northwest Region, letterhead that declared "open season on Indians ... also known regionally as Bogan, Wagon Burner, Spear Chucker, etc." The memo calls for substituting game animals such as deer, moose, deer and rabbits with Indians "so the province will not lose license revenue and hunters will not lose their skills." Copy of memo in Saugeen Ojibway Nations' files and *Toronto Star*, "Police probe 'hateful' memo urging 'skinning' of Natives.", 1992.

In its paper, "Problems Arising from Sparrow: Politics vs Conservation" the OFAH states, "All game and fish laws are established for conservation and resource management purposes. This means all people, regardless of race, should be subject to the same laws."[83] This statement is misleading for it does not recognize the reality of the law: that Native rights are protected by the 1982 Constitution, and that Native users of resources (where resource rights are established) are recognized by Canadian courts to have priority. This does not mean Native rights are above conservation. It simply means other users must be restricted for conservation purposes before First Nations users. However, the OFAH position consistently denies the priority nature of First Nations' rights.

By 1994, the OFAH began to provide what appeared to be rational and lawyerly arguments against the recognition and implementation of aboriginal and treaty rights. These papers were widely circulated to its membership and in government.

In publication after publication, paper after paper, meeting after meeting, the OFAH hammered away at its message: Natives are "abusing fish and wildlife resources"[84], so all must be subject to same treatment under the same laws, notwithstanding the Constitution and Supreme Court decisions. And notwithstanding that J Fairgrieve and others have pointed out that when Native people are treated as though they were the same, the result is discrimination.

> No one group should have any more rights to natural resources than any other group. A corollary is that everyone should be subject to the same law.[85]

In its submission to the Royal Commission on Aboriginal Peoples, the OFAH essentially denied the history and the reality of the Native presence in North America.

> … with the arrival and dispersal of aboriginals across the continent, their few numbers, lack of modern technology and transportation methods, led to some form of co-existence between man and nature. … While the more stationary groups locally extirpated fish and wildlife resources, their camps were simply moved to alternate or new locations where fish and game were plentiful. On a provincial or country-wide basis, there was simply not enough people to have much of an impact on natural resources. [86]

According to the OFAH, we, even before contact, "extirpated" fish and game locally and then moved on. We had no spiritual connection to the land or to the fish and animals we hunted. Our societies had no sophistication and therefore no real form of self-government as Canadians might think of it today. Our populations were sparse and therefore made a negligible impact on the environment (a position incompatible with the OFAH's own

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[83] Ontario Federation of Anglers and Hunters, "Problems Arising from Sparrow: Politics vs. Conservation". p.13, 1994.

[84] From the OFAH kit sent to its clubs in 1993 to help them recruit members. It continues: "So ... the carnage goes on. Spawning fish continue to be taken, pregnant deer and moose killed, wild turkeys shot and sold." For more quotes, see http://www.bmts.com/~dibaudjimoh/page13.html.

[85] Ontario Federation of Anglers and Hunters. 1993. *Self-Government and Comanagement in Ontario: The OFAH Submission to the Royal Commission on Aboriginal Peoples.* Peterborough, 1993, p.10.

[86] Ibid, p.3.

assertion that Native groups "extirpated fish and wildlife" and with credible estimates of aboriginal populations in North America of 20 million[87], many of them stationary farming societies[88]). To top it all off, the OFAH asserts, we are not native to North America—apparently, we came from Siberia, across the Bering Straight a scant 10,000 years ago.[89]

All this ignores the overwhelming oral, historical, archaeological, anthropological and current evidence to the contrary on every point. In other words, it meets our test of bigotry—the stubborn repetition of misinformation in the face of well-publicized fact.

And if there were any doubt as to the appropriateness of the label, let Davison Ankney, the OFAH President at the time, remove it. In a letter on OFAH letterhead to Minister of Natural Resources Bud Wildman dated August 15, 1991, he wrote,

> We have, in 2 centuries, brought Native people out of the Stone Age and have given them written languages, modern health care, education, our technology and many other benefits.
>
> … before European settlement, North American Indians had the "aboriginal" rights to do whatever they, as groups, decided to do … among other things, the right to declare war on other tribes, and depending on the group, the "right" to practise human sacrifice and slavery.

h) Sportsmen's clubs (1992-1997)

> I read in the paper Mr. Perks saying, "The Natives have all these rights. Where's my rights?" So I went over to the *Sun Times* and tried to explain his rights: I'm the whitefish and you're the splake and the salmon. I'm indigenous and you're introduced. So I should be entitled more than you to do what I'm doing today.[90]

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[87] Olive Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times, 1993, p. 26.* Population estimates for both North and South America hover around 100 million. Within 100 years of 1492, the population was reduced to around 10 million (Ronald Wright, *Stolen Continents*, Penguin, 1993 pp 3-4). That's a death rate of almost 1 million people a year, about the same rate at which Jews were exterminated by the Nazis in the mid-20th Century. The aboriginal population of Canada at the 2001 census (Métis, Registered Indian and non-registered Indian was under 1 million (www.statscan.caenglish/census01/ accessed October 20, 2005).

[88] Estimates of Haudenosaunee villages approximate 10,000 people, Ronald Wright, *Stolen Continents* op cit, p 118.

[89] A good analysis of the OFAH submission to the RCAP is in Brian McInnes, "Conservation or Control", student paper for Native Studies 200, Trent University, November 12, 1996, unpub. One of the difficulties for First Nations is that there has been very little analysis of the anti-Native rights lobby in Canada by the academic community and very little serious scrutiny by the media. More had been written on hate groups such as the Heritage Front, than on more main-stream groups such as ONFIRE or BCFIRE or OFAH or on the influence of individuals such as Tom Flanagan on the Reform Party. And yet these are more responsible for the failure of government to implement effective aboriginal policies in the early 1990s than the hate groups.

[90] Francis Lavalley to the Ipperwash Inquiry, Nawash Community Forum, Sept. 8, 2005. Mr. Perks was a commercial fisherman operating out of Meaford; but we heard the same question from the sportsmen. One day, on the dock at Meaford, Mr. Lavalley and Mr. Perks met and embraced: "So you're the whitefish and I'm the salmon. You shouldn't disrespect me like that," said Mr. Perks. Francis said, "I'm wasn't disrespecting you, I was explaining it to you." A little while after that came news that Perks had finally

Sportsmen's clubs throughout Ontario are organized into ten OFHA Zones. Each Zone has its own executive, which makes up the Board of the Ontario Federation of Anglers and Hunters. It is an efficient structure for getting information up, from individual clubs to the Provincial Federation and down, from the head office in Peterborough to individual clubs and members.

In rural Ontario, these clubs wield considerable influence, many of their members also serve in local service clubs such as the Lion's Club or Kiwanis. There are many good men (and some women) members of sportsmen's clubs who care deeply about conserving fish and wildlife in Ontario. There is no question that not every member agreed with the OFAH's Native agenda in the early 1990s. But the fact remains, many did and the impact of their lobby was felt mostly by Native people across Ontario.

Between 1990 and 2000, local opposition to SON fishing rights was visceral. From the OFAH their members heard "evidence" about the so-called "large Native kills of spawning fish, nesting birds, moose, deer, wild turkeys, etc." They read the Federation's briefs on comanagement, the *Sparrow* decision and its presentations to the RCAP. They attended meetings at which they heard news about First Nation hunting and fishing rights through their own "Native Affairs" liaisons who never bothered to talk to the First Nations next door to them.

Over the years, until the first Fishing Agreement was signed in 2000, we fought a running battle with local sportsmen's clubs in the media. Most of it was in the *Sun Times* by way of letters and op eds. Our responses were often printed in regional papers such as the *Kitchener-Waterloo Record, the Sault Ste Marie Star* (because Native fishing was, and still is, a contentious issue on the North Shore too) and the *Toronto Star*. Occasionally we were able to place articles in the *Globe and Mail,* but never in the *National Post*. We took part in discussions hosted by the Owen Sound Mclean-Hunter cable company. Chief, Councillors and staff took part in phone-in shows on Owen Sound radio, CFOS.

In the Spring of 1995, David McLaren and Eric Johnston organized a Fisheries Conference that turned out to be the largest Native fisheries conference in Ontario. We invited fisheries biologists, Native and non-Native fisheries managers from Ontario and the US.[91] We invited members of the local sportsmen's clubs and Native fishers from Nawash and Saugeen and from other First Nations from around the Great Lakes.

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taken a very nice buy-out offer from the MNR. Again, the non-Natives are well-compensated for their part in the story. Neither Francis nor any of the other fishermen received compensation for being kept out of the fishery for over 100 years. None received tugs, or equipment or training. Today Francis is in debt.

[91] In the States, tribal fishing rights have been recognized since the mid-1980s. With that recognition, which the US federal government ***supported*** in the courts, has come funding for tribal management of their own people and comanagement with State Departments of Natural Resources. The fight for recognition of rights was just as ferocious there, but comanagement is now accepted and certainly better funded than in Ontario. For example, tribal fisheries managers sit on committees of the international Fisheries Commission along with Ontario and State representatives. Ontario has blocked similar representation from First Nations here.

It served a number of purposes:

- It brought sportsmen, Natives, and the MNR managers together in a neutral atmosphere that focused on biology and conservation.
- It allowed Ontario fisheries managers to hear US tribal managers talk about the success of tribal resource management programs, many done in partnership with State authorities.
- The university-based biologists presented the latest research on fish populations and the implications for fisheries management.
- The scientists confirmed what we had been saying about the fisheries was accurate (particularly that the stocking of exotics like Pacific Coast salmon is an ecologically risky practice).

It was not however, enough to prevent the Summer of Hate in 1995. And even after that horrible summer, the Sydenham Sportsmen's Club was still printing misinformation about our fishing:

> Of course the unregulated Native fishery on the Great Lakes continues to be on the forefront for all of us. ... the Natives don't want stocking for salmon. ... salmon are readily available at Native fish stands. ... consider informing your MPP as to your views on recreational fishing as well as the gill net fishery in Owen Sound and Colpoy's Bays.[92]

Chief Akiwenzie wrote to the sponsors of the Salmon derby and described how offensive the brochure was to Nawash and to Native people in general. He went on to refute, point by point, the misinformation of the Sydenham Sportsmen's Association:

- The SON fishery is not unregulated; in fact we had biologists assessing our catches and by-law officers enforcing our rules.
- We don't want salmon stocking because scientists and our elders tell us it is bad for the health of the Great Lakes.
- Our fishermen target whitefish, not salmon but if salmon end up in our nets, we will not throw them away.

When the local sportsmen could not persuade the public that we were a threat to the fisheries, they claimed our fishing rights would ruin the economic boon that their annual fishing derbies bring to the region.

There was no evidence that this was true. However, in April 1997, the Sydenham Sportsmen's Association held a large public meeting at the Bayshore arena in Owen Sound to put their case of the economic value of stocking Pacific Coast species of salmon to the public. The meeting promised to be another edition of the 1992 meeting of sportsmen in Pembroke Ontario. We made a point of attending and visibly recording the proceedings.

We quickly discovered that the other side of the argument for a salmon-based sports fishery was that Native fishermen where endangering it. Mayors and members of

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[92] Sydenham Sportsmen's Association, in their Owen Sound Salmon Spectacular derby brochure, August 1996

Chambers of Commerce from a number of surrounding towns rose to say how much the fishing derbies meant to the economies of their municipalities.

Questions and comments from the floor were not allowed. So we held an impromptu press conference after the event in which we refuted many of the claims that were made at the meeting. The press coverage the next day was relatively balanced.

Today relations between the Saugeen Ojibway Nations and the Ontario Federation of Anglers and Hunters are not unfriendly. This is probably due to a combination of change in the leadership at the OFAH and battle fatigue on both sides; we skirmished with them for over 10 years. While we disagree on many issues—principally the stocking of exotic species of fish—we each understand that the other wants to ensure fish and animals are there for future generations. At this point of time, in 2005, we seem to be on a parallel course: they are following their path to conservation, we ours.

Although we have been successful in muting the backlash from local sports fishing groups, we know that opposition to our fishing remains and work on the local front still needs to be done. Opposition to the most recent Fishing Agreement (signed 12 July 2005) has flared up again.

i) Political Opposition (1991-1995)

The intellectual groundwork laid by the OFAH in its position papers on Native rights and claims, dove-tailed nicely with the Common Sense Revolution led by Mike Harris. We tried to engage him early in a discussion of our fishing rights but without much success:

> Dear Mr. Harris:
>
> In your statement, as reported by CP, you said "We are talking about the illegal sale of tonnes of fish for commercial purposes." That sounds like you may be getting your facts from an Ontario Federation of Anglers and Hunters fact sheet that has been going the rounds of the fax machines.
>
> OFAH, in that document, has this to say about the Cape Croker commercial fishery (which, by the way, was duly licensed by MNR until negotiations on a new fishing agreement began this Spring)...
>
> "At Cape Croker, MNR undercover officers gathered evidence of wholesale killing of valuable fish stocks. Apparently they bought almost seven tons of fish from local Indians themselves and this is probably the just the tip of the iceberg."
>
> The words "apparently" and "probably" are indications that these may not be facts at all. And in fact, they are not.
>
> Here are the facts of the Cape Croker case. They have been well reported in the media:
>
> - MNR mounted a 15-month sting operation to catch Cape Croker fishermen doing something illegal. It netted (please excuse the pun) some 13,000 pounds of splake with a wholesale value of roughly $12,000. The operation cost the Government $150,000.

- The splake bought by the MNR were over quota, but the species is a legal part of the Cape Croker commercial fishing license.

There is more to the story than this, of course, and I urge you to read the material I have attached. Let me just say, that the Saugeen Ojibway contend that they have an aboriginal right to fish commercially in the waters of Lake Huron and Georgian Bay.

We know the Supreme Court has identified only fishing for food and ceremony as an aboriginal right. But there are other ways to define the rights of Natives. They are mentioned in section 25 of the Charter and they include agreements such as the one we are seeking with the MNR.

As you know, Native issues are extremely complex and difficult to understand without a thorough knowledge of the history of the relationship between the Crowns and First Nations. I urge you again to read the attached material.

If you need further information, I would be happy to provide it to you. We have extended an invitation to anyone, including OFAH to meet with us. We extend the same invitation to you.[93]

A few days before we wrote this letter to Mr. Harris, he had mailed one of his own, personally addressed to all OFAH members, in which he expressed his concern "about the NDP government's direction on Native hunting and fishing in Algonquin Park." He went on to say:

> Any decision to allow natives unrestricted [sic] hunting and fishing rights in Algonquin Park runs contrary to the designated use of the park. It threatens Algonquin Park's traditional role of providing a wide range of tourist and recreational opportunities, and it runs counter to fair and responsible resource management, while fuelling a public backlash that may well jeopardize the legitimate rights and aspirations of Ontario's Native community.[94]

So there it is: our rights threaten everybody—cottagers, tourist outfitters, anglers, hunters, hikers, bird watchers. They must be unfair and irresponsible because they threaten "responsible" resource management. They also cause racism that will jeopardize the "legitimate" rights of Natives. Our rights are a plague on the landscape and, for the good of all people everywhere (even ourselves) they should not be allowed.

If you are uncertain of this interpretation, look at the questionnaire Mr. Harris attached for his readers to fill out and return. Here are two of the questions:

1. If natives are given expanded hunting and fishing rights in Algonquin Park, will camping and recreational activities:
   a) be more safe
   b) remain as safe
   c) be slightly more safe
   d) be significantly less safe
   e) don't know

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[93] Letter to Mike Harris from David McLaren, June 19, 1991. This was not responded to.
[94] Letter (with attachment) from Mike Harris, Leader of the Progressive Conservative Party of Ontario, personalized to OFAH members June 4, 1991.

4. Should the Ontario government allow leniency for natives who are currently violating fishing and hunting restrictions?
   a) ___yes b) ___no c) ___don't know.

Is it any wonder that when people protested government policy, they came after us? Here is the leader of the official opposition in Ontario lending his authority to those who hate us and himself contributing to the poisoned atmosphere in which we were trying to assert and practice our rights. In spite of the Constitution and a Supreme Court of Canada decision in *Sparrow*, we were being told, as Yolanda Jones put it to the Ipperwash Inquiry at the Nawash Community Forum, September 8, 2005:

> You're not allowed to be here, so go to the back of the bus. I have a right to be here, my kids have a right to be here. I have no intention to be at the back of the bus.

In May 1993, just before he was elected Premier of Ontario, Mr. Harris said, in an article in *Ontario Out of Doors*,

> Unless a Supreme Court decision gives [sic] an Indian band special aboriginal rights to game and fish, Natives and non-Natives should be treated alike. ... The orders from Mike Harris will not be same as they are from Bob Rae to lay off.[95]

His feelings about Natives (as opposed to NPD policy) were more clearly articulated in an interview in the *Peterborough Examiner*, October 29, 1994:

> There's a whole notion of guilt because native people haven't fully adapted from the reservations to being full partners in the economy ... Too many (Natives) spend all their time on courts and lawyers and they just stay home and do nothing."

And Chris Hodgson, shortly after being made Minister of Natural Resources in the new Harris government, said in the same publication, "As far as I'm concerned, conservation of species takes precedence over the race of the hunter. Conservation laws should be enforced equally."[96]

The idea that laws should be enforced equally regardless, in this case, of the protection the constitution affords aboriginal and treaty rights, is to discriminate against our rights. Judge Fairgrieve, in *Jones-Nadjiwon*, describes how this happens (see section on *Jones-Nadjiwon*, above). The Saskatchewan Conference Church Society Committee identify this phenomenon in their report, *Beyond Ethnocentricity*:

> [Alliances for those seeking power or of those in power are] made stronger first by exaggerating the differences between those with power and those without, and then by

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[95] "Tory Leader Mike Harris Speaks Out on Game and Guns", *Ontario Out of Doors* interview, May 1993, p.61. Mr. Harris also told the Algonquin Land Claims Alliance that he would scrap the Province's Interim Enforcement Policy (IEP) that gave Natives "special hunting and fishing rights" (*Ontario Out of Doors*, August 1995, p.40). Chris Hodgson, as Minister of Natural Resources, did scrap the IEP and brought in the Aboriginal Compliance Guidelines. However, as a consequence of *Perry v. Ontario* (both before J Cosgrove at the Ontario Court of Justice, General Division, in 1996 and before the Ontario Court of Appeal in 1997) the MNR re-instated the IEP and amended it to embrace Métis.

[96] "The New Minister of Natural Resources", *Ontario Out of Doors* interview, August 1995, p.40.

> assigning values to these differences. The assigned values are made to stick and eventually to become part of the "natural" order of society. ...
>
> Once the situation has jelled and powerful [the Crown] and powerless [First Nation] alike have begun to "breathe" such attitudes, then it is safe as a precautionary measure against change to do two things: to stress the flexibility of the situation by pointing to carefully selected "token members" of the powerless who have entered the ranks of the powerful; and to verbally minimize the still all-important differences and *to insist that all are equal.* Whereas initially, it was important to stress the differences, it now becomes advantageous to stress the sameness -- the equality of *all* --in order to effect the same racist ends.[97] *[emphasis added]*

The Common Sense Tory government of Mike Harris was, on this score at least, in lock-step with the Heritage Front which, in a press release dated January 27, 1992 said: "First and foremost, the men and women of the Heritage Front believe in equal rights for all, and special privileges for none." At least the Heritage Front believed "past wrongs [caused by government policies] should be rectified and an equitable solution to all disagreements should be sought through open dialogue."[98]

The mantra of equal rights for everyone regardless of race sounds fair, but when it is applied by governments and is intoned by mainstream media, it is a recipe for racism and a call to arms for bigots.

About this time the Reform Party of Canada took up the cudgel in the House of Commons by complaining about the "unregulated" Saugeen Ojibway Nations fishery. We waylaid Deborah Grey at a Reform rally in Owen Sound in 1995 and told her she needed to hear our side. She obliged and, a few weeks later, along with the Native Affairs critic for Reform visited us at the Nawash Band office. We explained the details of the *Jones-Nadjiwon* decision and what we were doing to ensure the conservation of fish stocks. We said that commercial fishing was not only a right but a responsibility—one that would help the First Nations of the Bruce Peninsula develop work toward self-sufficiency, something we knew to be in the platform of the Reform Party. The meeting ended amicably and that was the last we heard any complaints from Parliament. Sometimes, the best you can do is quiet the opposition.

In an interview with the *Toronto Sun* on April 4, 1996, Chris Hodgson, as Minister of Natural Resources, announced his plans to allow farmers to kill, out of season, deer that raid their apple orchards. While hunting deer out of season will be new for farmers, "It's been done by the First Nations. But that hasn't been within the law," Hodgson said.

j) Hate in the Schools (1992-1995)

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[97] Saskatchewan Conference Church Society Committee, *Beyond Ethnocentricity* in Saugeen Ojibway Nations, "Toward a Definition of Racism," September 1993, reproduced in Appendix E, below.
[98] Heritage Front, "A Statement of the Heritage Front's Position Regarding the Affairs and Rights of Native Canadians," January 27, 1992.

One of the unfortunate consequences of asserting rights is that Native children become targets for the backlash. This we know happened in other areas of the Province and it happened here. Nawash has a primary school on reserve. Once our students pass grade 8, they leave for high school in Wiarton. Some used to go to Lion's Head, but the atmosphere there was too hostile, even after we had complained to the principal and the Bruce County Board of Education.

Chief and Council had heard rumours of comments by teachers and non-Native students in area schools, but the targets of hate, especially if they are children, do not always speak out about it. However, when it does come to light, as it did during a visit to the Lion's Head High School in September 1992, it must be acted on quickly.

Paul Jones and David McLaren were making another of their many presentations in the schools when a non-Native Lion's Head student made a number of derogatory statements about Native "rights" to free education, no taxation, and welfare. He also flatly denied the history (which was well documented) that we had been sharing with the students.

After speaking with the Educational Committees at Nawash and Saugeen, David McLaren called for a meeting with the principal of the Lion's Head school. Before the meeting, he asked Chastity Jenner, who was working in Communications at the time and was only a few years out of high school herself, to talk to her sister and others attending Lion's Head. She did, and came to the meeting with their stories.

The initial attitude of the principal, and a Bruce County Board member also at the meeting, was hostile denial. However, Chastity's recollections of incidents at the school, plus the stories from current students were too persuasive for them to ignore.

When Teena Millette worked with Communications, she instituted a noon-hour "seminar" for the Native students at Lions Head high school. This proved to be popular because the kids could ask questions about their own history in nourishing atmosphere—one in which they would not be ridiculed.

There was some very good work done in the area high schools by students themselves. Chris Keeshig blew the whistle on a math question that was in common use at Wiarton District High School. The question, "What did Chief Shortcake's wife do when he died?" was revealed when the math problems were solved: "Squaw bury Shortcake."

Jessica Nadjiwon, who was at Wiarton High during the summer of 1995, wrote and directed a play that went right to the heart of racism against Native people. To the school's credit, it produced the play. It was also remounted at the Nawash community centre.

Our immediate responses and the brave work of students helped, but obviously a longer-term solution was preferred. We felt that could be achieved by making materials we produced available in the schools and encouraging the Bruce County to incorporate them into regular course curricula.

That was one of the motivating factors for producing the *Illustrated History of the Chippewas of Nawash*. Researched and drawn by Nawash artist Polly Keeshig-Tobias, the *Illustrated History* gathered flattering reviews from established historians such as Ronald Wright, author of *Stolen Continents*, Native author Daniel David Moses, and Anishinaabe author Dr. Basil Johnston.

Then we suggested to the Bruce County Board of Education that they partner with the Band in producing the book, and in developing a study guide for it. But the Board turned us down.

They also turned down offers of other material, such as a video called *If You Would Only Ask Us.* This was a well-produced video of high school students asking common questions about Native peoples such as "Where do your rights come from?" and "Why do Natives not pay taxes?" They did send letters to their principals informing them the materials existed, but the principals had to purchase them out of their own small budgets. I think we may have had requests for one or two copies.

To its credit, the Wiarton High School has made room for Ojibway language classes and has invited Nawash writers and educators to address their students. However, much more needs to be done to inject our history and culture into mainstream curriculum, not only here but also across the Province.

In the summer of 2005 we received a large order of *The Illustrated History* from the Toronto School Board. Hopefully, it will catch on.

Lenore Keeshig-Tobias, after serving a term as chairperson of the Nawash Board of Education, was engaged by the Bruce County board to write an Anti-Racism and Ethno-Cultural Policy. However, after drafting similar policies for church groups and universities, she has come to the conclusion that this should not be a problem for Native peoples to resolve.[99] Racism and discrimination against our people are created and perpetuated by non-Native Canadians and are best dealt with by that community. We have enough to worry about.

Resources to deal with the backlash to our fishing rights were scarce, so we took advantage of any funding program we could find, including funding from the Ontario government's Anti-Racism Secretariat, an initiative started by the Rae government and cancelled by the Harris government.

We know that our brothers and sisters in Saugeen were experiencing similar difficulties in the schools in their area.

k) Hate in the Press (1992-1995)

[99] Personal correspondence, 1 August 2005.

In the spring and summer of 1993 after we had already spent much time and effort in dealing with misinformation about our fishing rights, a member of the Canadian Auto Workers, Doug Gammie from Oshawa suddenly seemed to be receiving a lot of attention from a *Sun Times* reporter. His agenda seemed to be to discredit the official CAW support for us. In addition, he was repeating much of the misinformation about the issue that we had already corrected in the pages of the *Sun Times*.

We responded in the letters page of the newspaper, but the *Sun Times* reporter on the story kept filing stories on what he was saying, and it was becoming a problem. Then, Mr. Gammie made the mistake of phoning one of our supporters who had commented on the stories in the *Sun Times.* Mr. Gammie left a message to say our supporter should talk to the *Sun Times* reporter if he wanted the facts. This indicated a stronger relationship between the reporter and Mr. Gammie than simply reporter and news story.

We took the tape to the editor of the *Sun Times*. We reminded him that we never had, in the past, tried to interfere with the reporting or the editorials that appeared in his paper. We felt however, that this smacked of the manufacturing of a story in an unbalanced way that had very little to do with journalism. The editor agreed and that was the last we heard from Mr. Gammie.

The point of this little story is to illustrate the lengths to which some will go to discredit our rightful claims; and the lengths to which we must go to prevent them.

Yet another episode of the same kind occurred when a retired business executive in nearby Mallory Beach, Mr RG Bolce began writing scholarly-like articles in the local papers about the history, origins and rights of our people. He had visited neither Nawash nor Saugeen to talk to anyone on the reserves. David McLaren, our Communications Coordinator finally telephoned him to discover his sources and to discuss his misinformed point of view.

Mr Bolce said he was writing the articles "for our own good". He said he never met an Indian he didn't like, but that we at Nawash were pushing white folks too far. He said we should have the same right as everyone else to fish and that we must be controlled the same as everyone else because we didn't have the knowledge or experience to manage the fishery ourselves.[100]

He was apparently getting his so-called archival information from a friend in Southampton. While some of that information may have been accurate, his interpretation did not stand up to serious review. Dr. Bill Fitzgerald, an archaeologist from the University of Waterloo was among those who wrote scathing rebuttals of Mr Bolce's "history" in the local papers.

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[100] Memo to Nawash Council from David McLaren, 16 November 1994. These remarks are racist by any definition although it's quite possible Mr. Bolce did not recognize them as that and probably really did think he was doing us a favour. The paper, "Encountering the Other" explores the nature of racism.

Nevertheless, Mr Bolce was rewarded by Albemarle Township Reeve Carl Noble with a "Senior of the Year Award" for …

> his unswerving devotion to enlighten, inform, and educate property owners, politicians, and others relative to the background behind the $90 billion dollar Bruce Peninsula land claim lawsuit as well as claims to fishing and hunting privileges granted to the Saugeen and Cape Corker natives.

The misrepresentation of aboriginal history by backlash journalists and historians is a real problem for First Nations. Not all First Nations are able to marshal the resources necessary to refute books and articles of shoddy and mean-spirited scholarship. However, if they are left unaddressed, they begin to infect the atmosphere in which First Nations must press their claims and rights. That atmosphere is breathed by editors of newspapers, shopkeepers, law enforcement officers, politicians, and judges—in short everyone who is in a position to make life miserable for First Nations peoples and may choose to do so if they think we are either criminals or not entitled to make the claims we make.

Over the years there have been several cheap shots taken at us and our rights and claims in the local media. For example, a cartoon in the August 2nd 1995 edition of the Wiarton Echo and Port Elgin Beacon Times showed a Native fisherman with his net right below the fish stocking tanker used by the sportsmen to transport their fingerlings from their hatcheries to the Bay.[101] Others, such as the editorials written by Darryl Choronzey in his *Ontario Fisherman* magazine were pretty close to the line.[102]

We ignored Mr Choronzey because he was being ignored by many in the angling community. However, we did not ignore an editorial in the *Markdale Standard* on October 25, 1995 (less than 2 months after the stabbings) entitled "Creating a climate of fairness and equality." Here are some excerpts:

> … [If it were white people who demonstrated at Oka] would the governments had been so wishy-washy and done nothing; as they did, pretty well kissing the asses of the Indians and letting them get away with murder?
>
> … Their ancestors, too, came from some other part of the world, just as did ours, and they deserve no more nor any less than any other Canadian; they have no right to fish, to hunt any time of year. They have no right to exclusive fishing rights over any waters in Canada. They have no rights the rest of us don't have.
>
> … like all chronic welfare recipients, they have become welfare-dependent and have no need to work, no duty to support themselves.

Can you imagine the outcry that such an editorial would spark if the writer had written about "the Jewish conspiracy" or the "crime-ridden black community"? But it was written in a small town weekly newspaper in rural Ontario about Natives and no one said much of anything. Except for us.

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[101] We responded with our own cartoons which can be seen at http://www.bmts.com/~dibaudjimoh/page36.html, 1 August 2005. Some are reproduced in Appendix C.
[102] Darryl Choronzey, "Special Rights for Special People Continues", *Ontario Fisherman*, April-May 1994.

It was unlikely that a charge of promoting hate against Native people would have succeeded in court given the current case law in Ontario. So we complained to the Ontario Human Rights Commission and to the Press Council (who wrote back saying they only dealt with dailies). We took the issue to the editor of the Owen Sound *Sun Times* who had some oversight authority with respect to the weeklies in the area. We were able to extract a retraction and an equal amount of space for a rebuttal. [103]

l) Summer of Hate (1995)

In the summer of 1995 there were three major confrontations between Native people and official Canada: at Gufstasen Lake, at Aazhoodena and on the Saugeen Peninsula (the old name of the Bruce Peninsula).

In June 1995, the Progressive Conservatives replaced the NDP as the ruling government. Remembering the promise of Mike Harris to enforce the *Game and Fish Act* against Native hunters and fishers and to treat everyone equally, the rhetoric and the lobby from OFAH sportsmen's clubs around us increased. Since there was no agreement and negotiations had stalled as a result of the election, we continued to fish according to our rights and we governed ourselves by our own fishing rules and fisheries science.

Since 1993 (almost right after the *Jones-Nadjiwon* decision) we had been governing our own fishermen. The regulations we set in place required fishermen to apply for permits from the Band Council, to report their catches to our assessment officers; they even set the size of nets. We hired by-law enforcement officers whose responsibility it was to ensure compliance with our rules and fisheries management plans.

We had (in 1994) engaged a fisheries biologist, Dr. Stephen Crawford, from the University of Guelph who had put together a management plan and an assessment crew. The fish from our fishermen's catches were counted and weighed and recorded. Samples were taken for further study and research began on the nature of whitefish populations.

We had even developed a comprehensive strategy to develop public support, to assess the impact of Native and non-Native fishing on fish stocks, and to begin research on fish stocks.

Property Vandalized and Stolen

Then our fishermen's boats are vandalized and their nets begin to disappear from the waters of Georgian Bay. Our fishermen lost some 10 miles of nets over the summer. We asked the OPP to investigate and to patrol (it is an offence to tamper with set commercial fishing nets), but no action was taken. Nothing came of tips that our fishermen and staff forwarded to the OPP.

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[103] Letter from David McLaren to Jim Merriam, 30 November 1995. Mr. Merriam knew about the Human Rights complaint and also agreed to a cross-cultural workshop with the paper's employees.

In a written statement, one of our fishers describes being harassed by an angler while trying to lift her nets near Vail's Point (about 15 miles east of Owen Sound harbour). For over half an hour, the angler circled their small open boat heckling them and demanding they stop taking "his" fish and get out of "his" waters. A *Sun Times* photographer was on board and asked to take their picture. They refused. The picture appeared in the paper the next day anyway, and her landlord of one of the fishers told her he would "blow her out of the water" and "trash all her stuff" if she were not out of her Owen Sound apartment in two days. She told us she was afraid to go back to Owen Sound for fear of being assaulted.

Anglers March on Nawash Fish Seller

On August 5, some 75-100 sportsmen, with Grey-Owen Sound MPP Bill Murdoch at the front, descended on the stall of Yolanda Jones who was selling fish with her two daughters at the Owen Sound Farmers' Market. We, and some of our non-Native allies in Owen Sound prevented them from rushing the stall.

Yolanda described the event to the Ipperwash Inquiry at the Nawash Community Forum:[104]

> I thought it was going to be a peaceful protest but it was abusive. If it hadn't been for non-Natives we would have been in real trouble because the anglers surrounded the booth. A bag of fish guts and a fish head was thrown on the booth. I remember some of their faces … one of them was a car dealer from whom my friend got a vehicle. I started to realize these protestors are people who have businesses in Owen Sound … they're pillars of the community.
>
> After the protest had died down, most everyone left. Bill Murdoch was one of the last to leave. Brenda [the manager of the Owen Sound Farmer's Market] caught up to him in the parking lot. She handed him the bag with the fish carcass and said, "Here, you forgot something."
>
> There was a man from the MNR who would buy fish from me at the Market. I thought he was more sympathetic than most. When things heated up, he panicked and he said he had to go check on his girls. The anglers were threatening his family.
>
> When I got married, my husband took over some of the fishing business. He started selling fish to the Order of Good Cheer in Owen Sound. They ordered large quantities from him. One day, Pat brought a couple of members to the booth at the market so they could apologize for the protest, which they did. Bill Murdoch came along, but he just walked away.
>
> We [her and her daughters] could have stayed home, but to me that's like the blacks saying, "we'll go to the back of the bus." You're not allowed to be here, so go to the back of the bus. I have a right to be here, my kids have a right to be here. I have no intention to be at the back of the bus.

On August 15, 1995, Chris Hodgson, the new Minister of Natural Resources visited the Nawash Band office in the midst of the troubles to tell us he had no interest in

[104] At the Nawash Community Forum Sept. 8, 2005.

comanaging the fishery with the Saugeen Ojibway Nations. He did or said nothing publicly to calm rising tensions or to assure us our property would be protected.

Native Youth Stabbed & Boat Set Ablaze

On Labour Day weekend, 1995, the same weekend on which Dudley George was killed at Ipperwash Park, Francis Nadjiwon's fishing tug was burned to a shell. Four Nawash youth were assaulted in Owen Sound and three of them were stabbed.

There was no public outcry, no expressions of sympathy in the local media—it was almost as though it was expected; that we had somehow brought all this grief down on ourselves. The rule of law did not seem to apply for us and the police who had only a few years earlier done such a good job at maintaining order at the Owen Sound burial ground vigil simply turned a blind eye to the attacks against us.

Many of the fishermen were close to bankruptcy after their nets were stolen and their boats vandalized or destroyed. Many of our community were afraid to go to town. Those that did, encountered not sympathy, but anger. Doors to shops were held closed when they tried to enter. Snide remarks were made in passing. Our youth were followed in stores. Some of our high school students stayed home. Our people felt they were under siege.

The Fire Marshal's office determined the boat fire was arson. OPP officers were assigned from Forest to do the investigation, but no charges were ever laid.

The Neighbours of Nawash, a non-Native support group led by Linda Thomson and Marilyn Struthers of Owen Sound tried to set up an account so people could donate money to help our fishermen buy new nets. No bank or trust company would touch it. Finally, after a bit of lobbying, they were able to set up an account at the Royal Bank and advertised it well. After a number of months only $1,200 had been collected, most of it from the Neighbours themselves. They closed the account and gave the money to the fishermen.

The Owen Sound police were slow to investigate the stabbings. In fact, David McLaren had to run a parallel investigation in order to encourage them to pursue an investigation at all. This was a serious incident. Four young Nawash men were swarmed by a crowd of more than 20 white youths. One Nawash youth was stabbed four times in the back, and other was stabbed through the arm and his face was slashed open.

Our youth mistrusted the Owen Sound police so much that they had to be encouraged to make statements to the police about the stabbings. Staff accompanied them to police interviews. Tips received by Nawash staff and band members were collected and

forwarded on to the police. Only in this way, were we able to "encourage" the police to find the attackers and charge them.[105]

Two men were finally charged ten months later, but then the local Crown agreed with defence counsel that the episode was just a drunken brawl that got out of hand. A judge, at a pre-trial hearing, determined there was no need for a trial.

When we learned that the local Crown was not going to take the accused to trial, we asked our supporters to protest. This they did with letters to the Attorney General of Ontario and with a protest outside the Owen Sound courthouse.

The case was given to Owen Haw, a senior Crown in Wellington County, who prosecuted the case diligently. One of the offenders was ultimately sentenced to nine months in jail. Two Nawash youth received some small compensation for their injuries through the Ontario Criminal Compensation Board.

Mr. Haw conducted the case with grace and courtesy, qualities that were not lost on our community. Although the disposition of the case was less than we had a right to expect, Mr. Haw had the courtesy to come to our community to discuss it.[106]

In addition, Mr. Haw was instrumental in bringing together our community with the regional Crown, Mark Garson, local OPP detachment commanders, the Owen Sound police and the area Crown attorney. This was the beginning of a number of conversations and meetings that led to a better understanding between Nawash and local police forces, at least for a while.[107]

Requests for Inquiry Denied

We wrote several letters to both the Ontario and the federal governments requesting an inquiry into this incident and the other attacks against our people during the summer of 1995. Our supporters[108] held a press conference in Toronto to demand an inquiry and to release a number of questions we all felt needed to be answered. For example:

1. Why have the OPP laid no charges in all the incidents of theft and vandalism reported by Nawash fishermen to the police and to the MNR?

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[105] As it turned out, one of those arrested did not stab anyone. A third person, also suspected of doing the stabbing, was removed from the scene by the police after he was identified by a Nawash band member.
[106] Before he came into our community, he was advised by the Owen Sound police he was working with not to go to Nawash, because they could not protect him once on the reserve. Personal correspondence.
[107] The problem was the rapprochement did not necessarily filter down to the rank and file. Band members still encountered discriminatory treatment from individual officers, including the Native liaison officer with the OPP detachment in Wiarton. It seems that more than "sensitivity training" is required; perhaps it requires the exchange of adoptees (in the old tradition, of course).
[108] Principally, Michelle Swenarchuk (ED, Canadian Environmental Law Association); Clayton Ruby (Toronto lawyer); Bruce McLeod (former Moderator, United Church of Canada); Bob Kellerman (ED Law Union of Ontario).

2. What is the source and nature of opposition in the Grey-Bruce region to Native fishing rights and did it have any effect on the progress and outcome of MNR and police investigations?
3. What has been the role of the Ontario Ministry of Natural Resources in implementing the spirit and intent of the *Jones-Nadjiwon* decision and in calming non-Native tensions around Nawash fishing rights?
4. What is the role of the federal government in this affair? Generally, what responsibility does Canada carry for ensuring its delegate, Ontario, acts in a manner that best serves conservation *and* the Crown's fiduciary obligations to First Nations?
5. What process (that will involve the First Nation, Ontario and Canada) can be put in place to resolve competing claims to the Bruce fishery without compromising First Nations rights or the Nawash urge to develop a self-sustaining economy?
6. To what extent has Ontario re-vamped its laws in the light of the 1982 Constitution, *Sparrow* and other cases that recognize Native rights?
7. How has Ontario responded to the process laid out in various court decisions (especially *Sparrow*) for negotiated agreements based on aboriginal and treaty rights?
8. How do Ontario bureaucrats and politicians view key aboriginal issues such as hunting and fishing rights, land claims, claims to resources, Native jurisdiction, comanagement, self-government, and how are these views reflected in policies and practice?[109]

We received no response to our letter to Premier Harris and a refusal of our request from Indian Affairs Minister Ron Irwin. Mr Irwin, however, did encourage us to "liaise" with his Department.[110]

In the fall of 1995, the CBC's *Fifth Estate* did a segment on the fishing dispute and the violence of the past summer. We were occasionally successful in placing op eds in the *Globe and Mail* and the *Toronto Star*. Columnist Michael Valpy picked up the story, as did an editorial in the *Ottawa Citizen*.[111] However, none of this seemed to have any effect on the government's intransigence.

Aside from the *Fifth Estate*, it was difficult, in 1995, to get the major media out of Toronto and into the community. Now it is nearly impossible. When we take our concerns to them by holding briefings or press conferences in Toronto, they are usually sparsely attended, no matter how thorough the advance notification. There may be a number of reasons for this:

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[109] From "Background to Chippewas of Nawash call for an Inquiry", March 25, 1996 (in Appendix F). Attached to letters from Chief Akiwenzie to Premier Mike Harris and Indian Affairs Minister Ron Irwin, 9 April 1996. We asked the federal government to call an Inquiry under s. 2 of the Canadian *Inquiries Act*.
[110] Letter from Hon. Ron Irwin to Chief Ralph Akiwenzie, 17 June 1996.
[111] Michael Valpy, "Bullying the Chippewas over Fish", *Globe and Mail*, July 9, 1996. "Fishing for Trouble", *Ottawa Citizen*, editorial August 17, 1996.

- concern for the cost of doing stories outside Toronto (the August 2005 over-coverage of the Air France crash at Pearson shows the networks are not shy about covering events close to home-base);
- it is not easy to sort out where to place the blame for an incident since everyone points at everyone else.
- blame, more and more, is being placed on First Nations themselves by the authors of books such as *Our Home Or Native Land?* and *First Nations, Second Thoughts*[112] who represent only a portion of the backlash journalism against Native rights and claims that began to express itself in 1995.
- inability to grasp the complex issues involved in unravelling the tangled roots of Native disaffection with Canada: many of the issues
- most mainstream, non-Native newsrooms do not have long-time Native journalists or editors and so there is no in-house perspective.[113]
- fatigue over a seemingly unsolvable issue that set in after Oka and the Royal Commission on Aboriginal Peoples—a fatigue exploited by the backlash writers and broadcasters
- the criminalization of Native rights by, among others, stakeholder groups of natural resources and, in some cases, government officials and enforcement personnel.

In any event, the lack of good, mainstream media coverage of Native stories (not just about our claims and rights, but also about our successes and the many talented people on our reserves) has left a vacuum of information that is being filled by the backlash journalists. This, coupled with a drastic un-reporting of incidents of hate crimes against Native people means sympathy for Native rights and claims is evaporating. The result is a public misinformed and now apathetic, and a media captured by writers opposed to "judicial activism" and "race-based policies"—not exactly a recipe for change.

m) MNR Intransigence (1995-present)

> Seemed like we were charged with everything even after the Fairgrieve decision. Seemed like every time we landed our boat, the MNR would be there and charge us for some reason or other, even though we had the right.[114]

Notwithstanding the *Jones-Nadjiwon* decision in 1993 and the hours of meetings we had with the MNR and the assessment *anookeewin* we were doing, Minister Chris Hodgson informed us in October of 1995 that Ontario would not discuss our fishing rights except under the terms of an Aboriginal Communal Fishing Licence. He would not discuss comanagement at all.[115]

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[112] Melvin Smith, *Our Home OR Native Land?*, Stoddart, 1995 and Tom Flanagan, *First Nations? Second Thoughts*, McGill-Queen's University Press, 2000.
[113] CTV's *W5* for example has hired the odd Native intern, but they never seem to stay, says Anton Koschany, Executive Producer in an interview on CHFN, Nawash community radio, 2001.
[114] Marshall Nadjiwon, Nawash fisherman to Hon. Sidney Linden, at the Nawash Community Forum Sept. 8, 2005.
[115] Letter from Minister of Natural Resources Chris Hodgson, October 25, 1995.

In June 1996, a licence was issued to both Nawash and Saugeen under the Aboriginal Communal Fishing Regulations[116], but it was still a licence—the very thing that Nawash had fought for so long. Some of the terms of the licence had already been ruled unconstitutional in Judge Fairgrieve's decision. For example:

- The licence prohibited Native fishermen from fishing in areas around the Bruce that Fairgrieve clearly found were the traditional territories of the Nawash and Saugeen First Nations and in which the Bands have always had aboriginal and treaty rights to fish for trade and commerce.
- The licence subjected Native fishermen to arbitrarily set quotas of fish—a difficulty with the "management regime" which J Fairgrieve found discriminated against the Chippewas of Nawash.
- The terms of the licence were not negotiated; rather they were imposed on the Chippewas of Nawash without their consent—as were the licences that J Fairgrieve had found were unconstitutional.

Both Nawash and Saugeen refused the licence and kept fishing. Nawash said that their Bylaw 13-96 (previously passed by Chief and Council and duly ratified by the federal government) met the objectives of the licence and, in any event, superseded Provincial regulation. The bylaw continues to govern their fishermen and requires them to take part in the Band's fisheries assessment program. Compliance is high and it puts the lie to the claim that our fishery is unmanaged and our fishermen uncontrolled.

Rather than negotiate a fishing agreement that would meet the objections raised by the court in *Jones-Nadjiwon* and enable the MNR and the SON to cooperate on conservation, the Ontario government spent the next 3½ years (from the Fall of 1995 to the Spring of 2000) harassing and charging Native fishermen.

In August 1996, MNR Conservation Officers raced a Native tug piloted by Francis Lavalley to where Francis had set his nets. The Conservation Officers, without cause or charges, lifted his nets and those of another fisherman. The Band and Francis demanded they be returned. Eventually they were, but not before Francis was forced to go to Owen Sound to be questioned and vide-taped by Conservation Officers. They told him they never intended to charge him; they were issuing a warning about not complying with the imposed licence. When his nets were finally returned to him, they were shredded and tangled nearly beyond repair. The fish were given to the Salvation Army's food bank.

In April 1997, at a public meeting organized by the Sydenham Sportsmen's Association in Owen Sound, Dave McLeish, the Lake Huron Manager for the MNR, released data we had been seeking for months, and alleged that the Native fishery was threatening the MNR lake trout rehabilitation efforts. Our biologists told us his allegations are not

[116] A federal program that was used by Ontario in the early 1990s to accommodate the FNs of the Williams Treaty area when their rights were deemed to have been extinguished. When that licence was issued, Ontario said it would not apply it to another FN without full consultation. The Harris government reversed that policy and tried to impose it on the Saugeen Ojibway Nations, who refused to accept it. The licences have since been placed on other First Nations.

supported by his facts; and that the MNR stocking programs were failing for other reasons, one of them being the hybrid "splake" was not reproducing in the wild enough to develop a self-sustaining population. [117]

The MNR, in June 1997, laid charges against a Saugeen fisherman and two Nawash fishermen (one of them Francis Nadjiwon, of the *Jones-Nadjiwon* decision) for not adhering to the licence the Bands had rejected. At trial, the MNR balked at disclosure and Judge Fairgrieve threw the case out.

What Judge Fairgrieve wrote in his decision in the *Jones-Nadjiwon* decision nearly 10 years previously was coming true:

> A high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals with it seeks. [118]

Our expertise in fisheries Management and research had increased in the years since the Jones-Nadjiwon decision recognized our rights to a commercial fishery. While the MNR was dragging its feet on negotiations, charging our fishermen, lifting their nets and prohibiting fish buyers from purchasing our fish, we were building our knowledge of fisheries science and our expertise in fisheries management. We now had the information and the expertise to critically evaluate the MNR's fisheries management practices.

A review by Dr. Crawford of the MNR's Lake Huron commercial fisheries management program concluded that the Ministry had failed to identify and adequately monitor the fish populations being harvested. In addition, the MNR disregards important scientific principles, collects inadequate information and bases its commercial total allowable catch limits on information that has less to do with science and more to do with politics. [119]

On August 25, 1997 the Chippewas of Nawash released a report, also written by Dr. Stephen Crawford, on the effects of stocking pacific salmon in the Great Lakes. His major conclusion is that the stocked, non-indigenous salmonines are beginning to out-compete species native to the Great Lakes and are disrupting millennia-old ecosystems. [120]

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[117] "MNR-OFAH Blame Nawash for Trout Stocks at SOS meeting" http://www.bmts.com/~dibaudjimoh/page27.html 1 Aug 2005

[118] *Regina v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182. (Prov. Div.)

[119] Stephen Crawford, "A Biological Review and Evaluation of the Ontario Ministry of Natural Resources Lake Huron Management Unit Commercial Fisheries Management Program: A Report for the Chippewas of Nawash First Nation," 1996. In his report of 1998, the Provincial Auditor, Erik Peterson, found much the same thing. Among the MNR's faults: inadequate information to allow measurement of the MNR's success in sustaining fish and wildlife resources; its lack of current fisheries data; its lack of success measures for its stocking programs; its way of practicing science was deficient. At http://www.gov.on.ca/opa/en_h98/309.htm. 26 Jan 00.

[120] Ironically, a paper by MNR's own biologists had indicated the same thing. Miller and Powell found that stocked Chinook salmon were competing with indigenous lake trout populations on traditional trout spawning beds in the north channel of Lake Huron. "Shoal Spawning by Chinook Salmon in Lake Huron", *North American Journal of Fisheries Management*, 10:242-244, 1990.

Dr. Crawford's report shows that there is little or no biological rationale for stocking exotic salmonines in these ecosystems and the potential for ecological harm far outweighs the benefit to the recreational fishing industry. Dr. Crawford's review shows the MNR has disregarded scientific evidence of the negative effects of salmon stocking and has failed to conduct essential pre and post-introduction ecological evaluations of the stocking programs, some of which are carried out by sportsmen's clubs around the Bruce Peninsula.[121]

By 2000 there were ten major research projects being done by scientists from various universities in Canada, all in association with the Saugeen Ojibway Nations and the University of Guelph.[122] Because of our scientific knowledge of the fisheries, we were able to assess the MNR's claims that they could not agree to this or that proposal because of concerns for conservation. We did not have to accept the MNR's vision of the fisheries or their portrayal of us as a threat to conservation.[123]

Finally, in July 1997, the MNR agreed to a federal government suggestion that all parties try mediated negotiations.[124] Judge Stephen Hunter of Belleville was accepted by everyone and his involvement was crucial to reaching the first Fishing Agreement in 2000. However, the MNR continued to harass us, even as negotiations toward the first Fishing Agreement were taking place.

The MNR was watching developments from all over the country in its search for any lever to exert management control over our fishery. In September of 1999, the Supreme Court of Canada handed down its ruling in *Marshall*. It was very clear in saying that the Mi'kmaq had a treaty right to fish commercially and that the DFO's regime had discriminated against them with its management regime. It was very like the *Jones-Nadjiwon* decision.

But, incredibly, in response to a re-hearing motion from the Fisheries Coalition (a group who opposed the entry of Natives into the fishery), and perhaps in horror of the vicious backlash against Mi'kmaq fishermen on the water, the Supreme Court took the unusual step of issuing a "clarification" of its first decision (known as *"Marshall 2"*). The Court said that the Minister of Fisheries and Oceans had the ultimate power and control to regulate the fishery and if he wanted to close it, he could.

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[121] Press release, 25 August 1997 at http://www.bmts.com/~dibaudjimoh/page15.html, 2 Aug 2005. Dr. Crawford's report was peer reviewed and published as: *Salmonine Introductions to the Laurentian Great Lakes: An Historical Review and Evaluation of Ecological Effects*, NRC Monograph Publishing Program, Ottawa, 2001. See also: http://www.bmts.com/~dibaudjimoh/page31.html. Accessed 3 Aug 2005.

[122] "Nawash forges academic partnerships to study fishery", http://www.bmts.com/~dibaudjimoh/page97.html, 2 August 2005.

[123] This is, as our 2005 survey of First Nations indicates, a tactic the MNR uses in dealing with First Nations who assert their rights and try to negotiate for management dollars. See section on "Potential for Future Confrontation: Around Resources."

[124] The MNR finally came to the table after John Snobelen took over from Chris Hodgson in 1998.

Twenty-four hours after that ruling was released in November 1999, the MNR closed our fishery—illegally, it tuned out, because they did not issue a proper variation order. Our fishermen had to scramble to remove their nets by the deadline. Patrick McDonald, a Native man who had married into the reserve set out on Lake Huron in a small open boat, and in bad weather to retrieve his nets and fish. He was thrown overboard in the rough water, but managed to tie himself to a buoy. He perished from hypothermia.

Even after the first Fishing Agreement was signed in 2000, difficulties persisted. The Saugeen Ojibway Nations and the MNR differed in their management approaches. Nevertheless, the MNR and SON biologists were able to establish a working relationship. However, at one point, the MNR balked at the transparent exchange of data that was a cornerstone of the Agreement. At another, the Lake Huron Manager, Dave McLeish, who has the lead in plenary talks with the Saugeen Ojibway Nations banned the First Nations' biologists from a Lake Huron Technical Committee meeting to which they had been invited.[125] US tribes have long been members of the Commission, along with state departments of natural resources; however, the Ontario MNR remains opposed to First Nations being members of this Commission.

4. Potential for Future Confrontation

There remains potential for future confrontation, not only in the Bruce Peninsula, but in many other areas of he Province as well, since both the federal government and the Ontario (particularly the Ministry of Natural Resources) continue to discount the importance of Native claims and rights.

a) Around Resources

There is no "text book" on how to respond to the actions of a government obviously unwilling to give full expression to rights we had already proven in court, or to address the hostilities we encountered locally.

Our communities resisted the almost overwhelming official and unofficial pressure to give in. Our fishermen continued to fish, sometimes at risk to their lives and property. Chief and council steadfastly refused licences we deemed to be derogations from our aboriginal and treaty rights. Staff worked under the direction of Chief and Council to resist the pressure.

Four things seemed to come together:

- An unwavering determination on the part of the community to continue to fish in the way we knew we had a right to.
- An aggressive legal response pursued when negotiations failed,

[125] Andrew Muir, fisheries biologist for the Chippewas of Nawash Unceded First Nation, was the Nawash staff person asked to leave. Personal correspondence, July 2005. The Lake Huron Technical Committee is a committee of the Great Lakes Fisheries Commission, a Canada-US body that meets to discuss lake-wide management issues.

- An aggressive communications response in the face of stubborn misinformation,
- A vigorous scientific response as part of our value of responsibility,

But the single most important factor in getting to a Fishing Agreement everyone could live with was the determination of our leaders and our fishermen not to accept anything less than a resolution we had an equal hand in shaping and one in which we could safely and freely practice our rights and our responsibilities.

We wish we could say all the hard work of the last decade has paid off and now we can look forward to the peaceful and productive exercise of our rights; but we do not see the massive change in direction by the Crown that is needed. Without deep systemic change in the way Ontario and Canada do business with First Nations (including coming to terms with the past) we see only more conflict in the future.

There remains potential for confrontations all over Ontario. For example, the people of Grassy Narrows in northern Ontario felt they had no other option but to blockade logging roads in order to protect the fish and animals in their traditional territories. As the timber industry moves ahead with the Northern Boreal Forest Initiative, First Nations in the far north of Ontario are trying to prepare for the impact on their hunting and fishing grounds.

In the meantime, MNR Conservation Officers are laying a myriad of charges against Native hunters and fishers in the North. For example, charges were laid against a Native man hunting with his wife's father. The man was not from the local reserve, but his wife was. He was charged with hunting without a licence. He and his father-in-law argued that it was customary practice for a wife's husband to hunt with his father-in-law to provide food for the winter. But the constitutional and traditional practice arguments were well beyond the Justice of the Peace who heard the case and the man was found guilty.[126]

The Nawash Fisheries Assessment Unit, in September-October 2005, conducted a telephone survey of First Nations in Ontario regarding their fishing activities.[127] Relatively few (given the fact that so many First Nations in Ontario traditionally relied on fishing for their economy) have commercial fisheries. Those that do are subject to the terms of licences issued under Aboriginal Communal Fishing Regulations. To date, most of the First Nations surveyed report some sort of recent or on-going conflict with the Ministry of Natural Resources or sportsmen organizations.

Common among complaints are:

- quota allocations imposed by the MNR are inadequate for making even a modest livelihood (or no allocation for the Native fishery at all);[128]

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[126] Personal correspondence with Lorraine Land and Roger Townshend. Relevant cases: Naponse (2002), 61 O.R. (3d) 46 and a similar case called Meshake, which has reached the first appeal level—[2003] 2 C.N.L.R. 252.

[127] Muir et al, "TEK and Western Science: A Toolbox for Aboriginal Fisheries Management" presented at the American Fisheries Society Conference 2005 (unpublished at time of writing).

[128] Quotas, especially for First Nations are dangerous for a number of reasons. They ignore ancient ways of assessing and managing harvests. They can be used to restrict Native harvest while ignoring a large sport harvest. If a First Nation does not use its quota (perhaps because of old harvesting or spiritual traditions)

- virtually unregulated (and certainly unassessed) sports fisheries;
- control of Native commercial fisheries through control of off-reserve buyers;
- harassment from non-Natives (*eg,* cutting of nets);
- refusal on the part of the MNR to share fisheries information with First Nation fisheries managers.

At least one First Nation reports that the MNR comes to meetings with its lawyers and its biologists and essentially:

- discounts the importance of the First Nation's rights and aspirations for the fisheries;
- bullies the First Nation with Canadian law and science, discounting the traditional knowledge and experience brought to the table by the First Nation.

This "discounting" or "nullification" shows the contempt the MNR has for First Nations and is an early warning sign of impending confrontation.

Another First Nation reports that this was the way the MNR treated them in meetings until they finally brought their own biologists. When they did, the First Nation discovered the MNR's science was being poorly done.

Yet another First Nation reported that neither the federal government nor the Ontario government would fund its fisheries management program so they were forced to collect bottles to help pay for it. Given the strong, culturally central need to exercise responsibility as well as rights, failure on the part of government to welcome First Nations as resource and environmental managers also demonstrates contempt. It is also a violation of the Convention on Biological Diversity which calls on Canada, and other signing parties, to engage First Nations' traditional knowledge in their environmental management schemes. And it puts the Crown to shame next to the US which funds tribal fisheries management organizations such as the Great Lakes Indian Fish and Wildlife Commission and welcomes them on international planning bodies such as the Great Lakes Fisheries Commission.

And nowhere, including on the Bruce Peninsula, is the Crown compensating First Nations for putting them out of the fishery. The commercial fishery around the Bruce is worth over $1 million a year. Yet because of actions of the Crown, which Judge Fairgrieve in *Jones-Nadjiwon* found to be discriminatory, Nawash had been prevented from earning even a subsistence living since 1984—longer if you count the time since the Crown allowed commercial fishing interests take over our fishing grounds in the mid-1800s. And Saugeen has been prevented from even having a fishery.

Although non-Native commercial fishermen around the Bruce were instant millionaires after the MNR bought out their quotas, there has been no compensation for the First Nations for being put out of a fishery that was recognized by the Crown itself, in the 19th

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the "unused" fish or animals are given to non-Natives, as was the case in the late 1980s when the MNR unilaterally allocated the trap lines of the Michipicoten FN to non-Native trappers. (in David McNab, *Circles of Time*, op cit, p 113).

Century as ours and which we had never surrendered. The lack of compensation is a failure to deal properly with the past; it is identified in this paper as one of the ingredients of confrontation.

After the *Jones-Nadjiwon* decision, the Ontario Ministry of Natural Resources purchased quotas from non-Native commercial fishermen to make way for our people—as they should. The federal Crown (the Department of Oceans and Fisheries) did the same for Mi'kmaq fishermen on the east coast after the Marshall decision. However, there, the Crown also purchased equipment that it turned over to First Nations' fishermen, and it provided training. Here, the Crown did neither. The lack of equipment and proper training, combined with a suspicious downturn in the market[129] for whitefish is driving many of our people out of the fishery we fought so hard to win.

In our own traditional territories, we are still concerned about a repeat of the troubles of 1995. Although a second Fishing Agreement has been signed between the Saugeen Ojibway Nations and the Province of Ontario, the federal government has not signed and seems to be trying to remain aloof from its implementation.

In addition, there is a very active backroom lobby opposing the Agreement as it stands. Local sportsmen's groups have recruited the area's MPP, Bill Murdoch (PC), and MP Larry Miller (Con) to elicit expressions of opposition to the Agreement. For example, the County of Grey passed a resolution on August 2nd, 2005 that reads, in part:

> NOW THEREFORE BE IT RESOLVED THAT the County of Grey advise the Minister of Natural Resources of its opposition of entering into an agreement which would extend the fishing rights of the First Nations without first providing an opportunity for consultation by other interested stakeholders;
>
> AND THAT he Minister of Natural Resources be requested to ensure that any non compliance issues related to the fishing agreement with the First Nations be dealt with;
>
> AND FURTHER THAT this resolution be circulated to William Murdoch MPP, Jim Watson MPP, John Tory MPP, Larry Miller MP, Helen Guergis MP, the County of Bruce and the lower tier municipalities within the County of Grey and the County of Bruce.[130]

Note the misinformation in the first resolve: the Fishing Agreement did *not* extend the fishing rights of the First Nations—those rights existed since before contact. The *Jones-Nadjiwon* decision and the Fishing Agreement merely recognize our rights to fish anywhere around the Bruce Peninsula. And the second resolve implies we are not in control of our fishermen. Both points are offensive, wrong and tend to nullify the true nature of our rights and our responsibilities in exercising them.

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[129] The price per pound of whitefish is, for some reason, the lowest in the past several years. Some of our fishermen believe that it is the result of discriminatory practices on the part of local, non-Native fish-buyers; however, it is very difficult to get hard evidence of this.

[130] Letter from David Fawcett, Warden Grey County to Hon David Ramsay, Minister of Natural Resources, August 3, 2005. The First Nations were not invited to present their view and they were not copied on this correspondence. The MNR represented the interests of third parties, including municipalities, very well at the negotiating table that produced the 2005 Fishing Agreement. If third parties win a place in negotiations between the Crown and First Nations, even less will be accomplished than has been—and that is not a lot.

The resolution (only one of a number of similar communications to and from local government in 2005) is one of the early warning signs for possible confrontation listed below. Another is the attitude of law enforcement personnel who come into contact with Native people.

On March 22, 2003, Nawash fisheries biologist Andrew Muir (a non-Native) was fishing on the Sydenham River in Owen Sound when he was approached by an MNR Conservation Officer who, as a routine check asked to see his fishing licence. As he was getting it, the CO expressed his opinion that the rainbow trout fishing was slow because of the "Indians" and that he had seen "them" come into Meaford with boxes of rainbow trout. Mr Muir informed him that he knew this was not true, because he worked with the Nawash First Nation, that the fishermen neither set for rainbow nor do they catch rainbow trout.[131]

Chief Akiwenzie complained to the area MNR management unit. Their response was that the Conservation Officer's opinion did not reflect the position of the Ministry of Natural Resources and he had been told that. However, we do not know whether other Conservation Officers share this point of view or whether there was any internal education of COs regarding our fishing rights and practices. Mr Muir made some inquiries but could find no mandatory educational programs on First Nations rights in institutions used for training Conservation Officers.

Conflicts between MNR Conservation Officers and First Nations' people are not uncommon in most areas in Ontario. Earlier, we related how they ran sting operations against the Delaware of the Thames, the First Nations of Manitoulin Island and ourselves. Currently, COs are charging Natives with all manner of minor fishing and hunting infractions in lower courts, under the radar of the MNR's Interim Enforcement Policy. Most Natives can't afford to fight the charges—many can barely afford the low fines that result when they plead guilty.

Not only are these practices demeaning and contemptuous of Native people, they tend to derogate, legally and psychologically, from aboriginal and treaty rights. They create a fog in the mind of the non-Native public, officials and, unfortunately, in mind of some Natives as well, that leads people to believe that Native hunters and fishers are outside the law; or, if they are seen as practicing rights at all, those rights are second class, unimportant or even a threat to conservation.

Why are Conservation Officers so antagonistic to Native rights? There are undoubtedly a lot of reasons, but one of them is training. A young Nawash man describes what he was taught in the Fish and Wildlife Course at Sir Stanford Fleming (the course potential Conservation Officers must take) as being inimical to what he learned from his father growing up on the reserve. He felt he was being asked to choose whether he was a "preservationist" (apparently someone who would exclude humans from the wild) or a wise-use "conservationist" (someone who uses resources, but who agrees to stiff

[131] Memo from Andrew Muir to Nawash Chief and Council, 28 March 2002.

regulation). In reality Natives are neither … and both. To exclude humans from the wild makes no sense. But regulating harvesting, at least under the Euro-centric laws and regulations governing the taking of fish and wildlife, is culturally foreign as well.

He described it this way:

> There was about an hour and a half during the whole first year devoted to aboriginal and treaty rights to fish and hunt. We were taught that the terms of the *Fish and Wildlife Conservation Act* were over here and it was our job to enforce those. But we had to keep in mind aboriginal and treaty rights, which were over there. There was no discussion of constitutional law.[132]

In other words, Native rights are outside the law these students would be sworn to enforce. Natives are to be given "special consideration". It's not a big leap to say, as we have indeed heard and read, that: "Government policy is race-based." "Native rights will lead to the decimation of fish and wildlife stocks." Natives are fishing and hunting outside the law." "Native people are criminals."

There is no question that this psychology exists within the enforcement section of the Ministry of Natural Resources and that it works to exclude Native people from working in the Ministry. Nathan Keeshig is a Nawash Band member respected for his hunting ability and for his ability to manage the Band's Tent and Trailer Park and its sustainable forestry operation. He once worked for both the MNR as a fisheries technician and the National Park as a warden.

He remembers the attitudes he encountered in the MNR office in Owen Sound. When a Native man was killed in Owen Sound. One of the Conservation Officers, poked his head into the office where Nathan was working at a desk and said, in a loud voice and with a grin, "So, I hear they got another one eh?" Nathan, flabbergasted, said, "What?". And the CO responded, "Don't have to worry about him no more", still grinning. The exchange was treated as a joke and the comment made in passing; as if the death of a Native man was of no consequence.

Nathan said that not all Conservation Officers were bad, but the good ones, the ones that "got it", that understood Native rights were transferred out of the area. As Marshal Nadjiwon told the Ipperwash Inquiry:

> There have been some reasonable game wardens who have tried to deal with us. But they all go and the MNR hires new strong arms. I still run into many of the better ones in the stores. They say to me: "I thought they [their MNR co-workers] were our friends all these years, but they end up firing us and then won't even speak to us. Many a time I didn't want to charge you. It came down from head office. All of the charges that were laid, came down from head office. I didn't feel you deserved that charge for this or that. I didn't want to charge you, but the orders came down.[133]

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[132] Personal correspondence, August 2005.
[133] At the Nawash Community Forum Sept. 8, 2005.

Nathan Keeshig also recalls the attitudes he encountered from local sportsmen who had volunteered to help fish over Denny's dam on the Saugeen River. They complained loudly about some Native children dipping nets into the water just below the dam to catch rainbow trout jumping, trying to get over the dam. The area was a sanctuary, but people from Saugeen had fished that area of the river for thousands of years. The dam itself and the sportsmen's handling of fish were killing a lot more fish than the Native children. Further downstream a small army of anglers were fishing too. In the bushes lining the stream were dozens of dead female fish, cut open for their roe and left on the banks to rot. And yet, all the sportsmen could see were the nine fish the Native children took away with them.[134]

These attitudes still exist. As elder John Nadjiwon told the Ipperwash Inquiry Commissioner during the Community Forum, September 9, 2005:

> I have a scanner at home and am very upset with what I hear out on that water from people using hand-held radios. We're always known as "f'n" Indians out on that water. "We should cut their f'n nets." It isn't any wonder that we become angry about what they do to us. Yet they blame us. We get the blame for taking "their" fish. They dump these alien fish in the water … what they call the sports fish. But they eat up all the natural fish. There's no perch; there's no herring. Why? Because they planted these alien Coho salmon. When they get caught in our nets we can't sell them because they are a sports fish." We always seem to be hanging on to the dirty end of the stick.

b) Around Burial Grounds

> When I found out about the story of the burial ground, it took my feet away from me. What happened attacked my own spirituality. I'm glad it went the way it did, because if it had gone any other way, we would have seen higher suicide rates, higher rates of youth in trouble … all things negative because it attacked our spirituality … who we were.[135]

Unfortunately, the *Cemeteries Act* does not recognize this central, cultural fact, and that is why the *Act* and the very administration of the *Act* hold the potential for further conflict over Native burial grounds.

As it happened, the current Registrar of Cemeteries in Ontario, Michael D'Mello and a Provincial archaeologist, Neil Ferris, attended the Community Forum on the day we were dealing with burial ground issues. He described the process the legislation allows him to follow:

1. The site, once discovered, cannot be disturbed.
2. A Provincial archaeologist must determine the origin of the remains (aboriginal, Euro-Canadian or no cultural context at all).
3. The Registrar issues a declaration (as an "unapproved aboriginal peoples' cemetery" or an "irregular burial site").
4. The Registrar sends his declaration to the landowner and the Chief of the closest First Nation asking them to work out a site disposition agreement. If the remains

[134] Personal correspondence with Nathan Keeshig, 31 August 2005.
[135] Sheena Smith to the Ipperwash Inquiry at the Nawash Community Forum, 9 September 2005.

are moved, they must be interred in a registered cemetery. If they are to stay put, the area must be surveyed and registered as a cemetery so the remains will not be disturbed again.

5. If no agreement can be reached, and there is no hope of reaching one, then the Registrar refers it to arbitration. Each party picks one representative and those two choose a third.
6. If the parties still cannot reach an agreement, the Director will appoint an arbitrator and his or her decision will be final. As long as there is some hope for a settlement, the Registrar will not refer it to arbitration.

However, as Paul Jones, a Nawash Councillor, told the Commissioner, (to applause from community members):

> The legislation does not allow for who we are as aboriginal people and how we see protecting our ancestors in the ground. … Arbitration means remains may be removed anyway, regardless of the First Nation's wishes. We have a different tie to the land than someone who came 100 or 200 years ago. Going to be trouble without Natives in control.

More specifically, as Darlene Johnston pointed out at the Community Forum, the *Act* is a catch-22. It is a sacrilege to disturb an aboriginal burial; but the only way the ancestor can be protected is to disturb the burial.

There are other problems as well; for example:

- In spite of the admonition that remains not be disturbed, police often remove the remains from the site, destroying evidence of cultural affinity. It is hard to determine the cultural context if they are in a box in a police station. Darlene Johnston, during a training session for police in the Bruce-Grey area, asked that they not touch remains, but leave them *in situ*. Nevertheless, a week later, the police removed the remains of another aboriginal person.
- There is nothing to compel an owner to investigate areas suspected to be aboriginal burial grounds. In spite of sound historical research that suggests Mary Miller Park contains a burial ground, the City of Owen Sound has refused requests from Nawash even for ground sonar studies.
- Burials pre-contact often meant the deceased was first placed on a scaffold. Then the remains were interred. That is why some remains are found on the surface of the ground. But because the *Act* deals only with "interments", past Registrars have not recognized that these are, indeed, burials. In the case of Nochemowenaing, the circular pits are recognized as burials and so are protected by the *Act*, but remains found on the surface of the ridges are not and so are not protected.
- The rush to development often forces Native communities into the untenable position of having to prove an area is a burial ground by disturbing the burials. Again, in the case of Nochemowenaing, the landowner went ahead and applied for a permit to develop from the Niagara Escarpment Commission (NEC). The elders, who had said they would not take part in disturbing the remains of their ancestors, were forced to do so. They reluctantly gave their permission for medicine people to open the capstones over the burials and view the remains with Neil Ferris, a government archaeologist present. The site was then declared a

burial ground and therefore protected. Only the flexibility of the elders averted a certain confrontation. But it always seems to be Native people who must bend to rules made by others without our consultation that are completely at odds with our values and customs.

- It seems that greed has taken over the negotiations concerning Nochemowenaing, with the Municipality of North Bruce Peninsula in particular seeking ample compensation for loss of revenues from the protected land. It is abhorrent to First Nations that those who sought to destroy the burials at Nochemowenaing are now seeking to profit from its declaration as a burial ground. We saw the same thing at work at 6th Avenue West, where the homeowners sought "compensation" well in excess of the market value of their properties. The Crown, in that case, was prepared to compensate the homeowners (too well, in our opinion); and in the case of Nochemowenaing, it has already offered compensation to the landowner and the Municipality. And yet, when the Crown comes to us to talk about the settlement of land claims or the recognition of rights, it expressly excludes compensation for our losses.

To underscore the differences between our ways and Canadian ways, especially as they are articulated in the *Cemeteries Act*, Chief Paul Nadjiwan gave the Registrar the gift of an insight into ancient Anishinaabe burial practices. His instruction underscores one of the reasons Native people hold a special bond with the earth—our ancestors and our history are, literally, inseparable from it, The earth is imbued with the spirit of the ancestors.

> Not all our dead are in one place. Sometimes a place is given to an individual. His or her relatives would mark the place with the trunk of a tree, usually cedar. The stump would be set in the ground upside down and on it they would carve that person's clan. You can tell such a maker because it is larger on one side and the grain runs differently. You would then look around, for the burial could be in the ground or in a crevice, or under piled stones. Most markers have decomposed now. But they exist all over the place.
>
> All those burials were done with ceremony and in Anishinaabemowin. Whenever these sites are uncovered, we have to conduct proper ceremonies because we believe the remains of our ancestors are active throughout all time. This is why we did traditional ceremonies. These traditions are still done today. But there is nothing in the *Cemeteries Act* that respects that. To do a traditional burial, it may take someone over 20 years to learn the ceremonies to properly see someone into the spirit world.[136]

Eric Johnston, a Councillor at the time of the Owen Sound burial ground vigil, explained how the frustration of Native people over matters such as this can lead to confrontation. Speaking to Michael D'Mello, the Ontario Registrar of Cemeteries, he said:

> [At 6th Avenue] were people who fought [in the War of 1812] so that you could pass legislation that would not protect them from being made into bricks. We carry a lot of

[136] Nawash Chief R Paul Nadjiwan at Nawash Community Forum, September 9, 2005. George Blondin says more or less the same thing in "My Life in the Sahtu," his presentation to the Royal Commission on Aboriginal Peoples (June 1993): it takes a long time to learn the ceremonies and the old protocols and acquire the wisdom to employ them.

> resentment that your laws are made to apply to us. Governments and these laws have done a good job to characterize us as being just like everyone else. ...
>
> We could talk to you about our burial practices and you could come away with a pretty good understanding of that. But that doesn't entitle you to feel that you have any legitimacy to make rules about our ancestors on our behalf. ...
>
> It really is the conviction of what we are born with and we die with. When we sing our songs, our ancestors come to us because they love us and they have never left this land. We have to be exempted from this legislation.
>
> There is a lack of recognition, and respect, of where the Canadian identity ends and where ours begins.[137]

There is another problem as well—the way in which heritage assessments are carried out. We have found (and reported to the Provincial Archaeologists in the Ministry of Culture) that the consulting firms that carry out such assessments are not as diligent as they should be. In addition, the criteria set down by the government for the assessment of sites seems to be inappropriate for the Bruce Peninsula. Compounding the problem is a nearly total lack of government oversight of these assessments—as long as the consultant appears to have met the basic criteria, the Provincial Archaeologists will sign off on their work.

We are concerned about the fate of Nochemowenaing, a burial site on private property slated for development. We are also concerned with the graves of our ancestors under Mary Miller Park in Owen Sound. Negotiations around both these sites have stalled, at least in part, because of the Crown's lack of determination to settle the disputes and the contemptuous way in which local governments are treating our strongly held beliefs.

As a result, we must rely on the discretion of Owen Sound officials and Council to leave Mary Miller Park as it is. Nochemowenaing has ended up at the Niagara Escarpment Commission. At its May 2005 meeting, to their credit, NEC Commissioners refused the landowners' request for a permit, recognizing that cultural values needed to be taken into account in the planning process. They referred the matter back to the Province for a political solution. However, to his discredit, the Minister of Natural Resources has tossed the matter right back to the NEC, saying, in effect, "You deal with it."[138]

For his part, Andy Scott, the Minister of Indian Affairs, has washed his hands of the affair: "As the Hunter's Point Subdivision is not part of an Indian reserve, Indian and Northern Affairs Canada has no jurisdiction in this matter."[139] The Crown (both Ontario and Canada) have now rejected alternative or parallel processes and, instead, are relying on "established legislative mechanisms"[140] to resolve Native cultural and heritage issues that those very mechanisms are clearly not designed to address.

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[137] Eric Johnston at Nawash Community Forum, September 9, 2005.
[138] Letter from Doug Carr, Assistant Deputy Minister, Secretary for Aboriginal Affairs to Don Scott, Chair, Niagara Escarpment Commission, August 9, 2005.
[139] Letter from Hon Andy Scott, Minister of Indian Affairs and Northern Development to Don Scott, Chair, Niagara Escarpment Commission, July 27, 2005.
[140] To quote from Doug Carr's letter of August 9, 2005 (op cit). The phrase is being parroted by both Crowns in their correspondence to the NEC and the Chippewas of Nawash Unceded First Nation.

The Niagara Escarpment Commission does not want to be put into the position of having to decide the matter. And they sent the Minister of Natural Resources, David Ramsay another message to that effect on October 20, 2005. At their meeting in Tobermory, the Commissioners rejected the applications of Mr. Hunter (the land owner) and Mr. Renchko (a lot owner) for development permits for areas at Hunter's Point. In doing so the Commissioners said that they were not satisfied that heritage matters had been properly addressed because the Crown had not resolved the burial ground matter.

The Commissioners recognized the concerns of Nawash for their ancestors and the desire of others for financial compensation are beyond the ability and the mandate of the Niagara Escarpment Plan to resolve. Now that the NEC has rejected the applications, they may well end up on Minister Ramsay's desk, where we and the Commissioners are saying they belong.

The fairest and most efficient way to resolve matters such as this is through fair parallel procedures that include negotiations between the Crown and First Nations. That may well prove inconvenient to beleaguered Crown officials who must try to balance opposing interests; but as the UN's Draft Declaration on Indigenous Peoples states:

> Indigenous peoples have the right to … maintain, protect, and have access in privacy to their religious and cultural sites … **States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.**[141]
>
> Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.[142]

The lesson the Crown has not yet learned, despite numerous confrontations and court decisions, is this: when the usual enforcement mechanisms or environmental approval processes are used to deal with First Nations' claims, rights and religious beliefs, the result is that our rights and claims and beliefs are ignored or discounted and we are discriminated against. For, as we have seen, "equal treatment" of people who are not the same always results in discrimination against them.

A new way of doing business is required—one that, as Eric Johnston told the Inquiry, allows for the full expression of Native rights, responsibilities and beliefs:

> You will never know us well enough to do these kinds of things on our behalf. You have to give us that job that has always been ours since before you came here. … We have to be accepted as a cognisant and moral people. We see our ways as our responsibilities.[143]

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[141] UN Draft Declaration of Indigenous Rights, Article 13.
[142] Ibid, Article 39.
[143] Eric Johnston at Nawash Community Forum, September 9, 2005.

c) Around a Failure to Consult

Ontario is currently (2005) engaged in two major legislative environmental initiatives. The first, Source Water Protection, came out of Justice O'Connor's recommendations from the Walkerton Inquiry. One of his recommendations was to involve First Nations in the development of source water protection plans. However, the Ontario Ministry of the Environment has not properly consulted with First Nations in whose territories these plans are being made now. The Supreme Court, in *Haida* and other decisions has given governments a relatively clear guide of what consultation should look like.[144]

One would think that the court-recognized fishing rights of the Saugeen Ojibway Nations and our extensive land and aboriginal title claims would qualify us to a high degree of consultation. However, even after repeated letters to the Ontario Minister of Environment, and phone calls to her political staff, we have been ignored.

Similarly, Ontario has not properly or adequately consulted with First Nations regarding the Great Lakes Annex agreements on water diversions that have already been drafted by US and provincial governments.

The Supreme Court said that First Nations need to be involved at the strategic planning phase of such initiatives; however, we are being asked (as usual) for our comments at the 11th hour of deadlines. Governments that pay only lip service to court decisions are nullifying our legitimate rights and claims and betting that our concerns will disappear after the initiative is implemented.

We understand that Ontario Ministries are currently (Fall 2005) besieging the Attorney General with requests about their legal obligation to consult First Nations in the wake of the *Haida* and *Taku* decisions. Although Ontario and the Chiefs of Ontario have established a Round Table to discuss items of mutual concern, and this Round Table includes Cabinet Ministers, there appears to be no serious effort on the part of Ontario to learn what First Nations think consultation should look like.

Source water protection, the Annex, the new *Farm Nutrient Act,* policies on stocking exotic species, policies on stocking any species, amendments to the Niagara Escarpment Plan, Ontario's Class EA for Municipal Projects. These are just some of recent policy and legislative initiatives which will impact First Nations rights and claims (certainly the extensive rights and claims of Nawash and Saugeen).

Yet, if our opinion is asked at all, it is asked after the strategic planning phase and it is lumped with all the other "special interest groups" who comment on government policies and practices. This too shows contempt for First Nations and discounts the unique constitutional position aboriginal people have in Canada.

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[144] See the section "The Importance of the Honour of the Crown" for a list of what consultation should look like according to various court decisions.

Now that the Ontario Aboriginal Affairs Secretariat has returned to the Ontario Ministry of Natural Resources,[145] some special attention should be focused on that Ministry. It currently houses responsibility for fish and wildlife matters and is responsible for the administration of the *Fish and Wildlife Conservation Act*. It also has responsibility for the Niagara Escarpment and for the management of Ontario's forests. The MNR also has the Ontario lead for the Annex agreements with the US Great Lakes' states and Québec. As we have seen, these responsibilities (and the legislation he must administer) put the Minister on a collision course with First Nations unless there is a concerted effort to find a parallel way of dealing with First Nations.

The ground has already been broken on this—the Fishing Agreements singed between the Saugeen Ojibway Nations and the Ministry of Natural Resources. These (the first in 2000, the second in 2005) establish a protocol for doing business with us that is parallel to the Ministry's current regulatory scheme. And because of the land claims, the MNR passes requests for shoreline development to us to review before issuing permits. Why would the Ministry not want to talk to us about alternate ways of working on heritage matters, development along the Niagara Escarpment, and Great Lakes water quality.

As for the Ministry of the Environment, the Minister has, to date, not even responded to our suggestions for a meeting to discuss a new way of doing business. We understand that the new source water protection legislation may contain a little money for First Nations to take part in the same process open to certain "stakeholders". If this means sitting as a representative on a source water protection committee made up of representatives of municipalities that have opposed our claims, rights and beliefs, we will have no assurance that that any of our interests or concerns will be treated seriously.

Indeed our rights and claims will be at the mercy of the discretion of stakeholders who have opposed the very rights and claims we need to protect. As we point out in the section "The Importance of Law and Order: the Need for Legislative Reform", this runs contrary to the opinion of the Supreme Court of Canada when it said, in *R v Adams* (1996):

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.

In other words, our constitutional position in Canada entitles us to recognition that we are not the same as the "stakeholders" around a planning table. If our unique status is ignored and we are treated the same as them, we will be discriminated against. How can we participate in such a process? The bit of money the Ministry of the Environment plans to throw at First Nations to participate in the Crown's regular source water protection planning process may entice some First Nations desperate for *any* resources to care for their traditional territories. But their participation (which we view as coerced) does not justify an inherently discriminatory practice.

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[145] It was, in the early 1990s a branch of the MNR. Then it moved to the Attorney-General's office. It returned to the MNR in the summer of 2005.

Instead, what we propose is simply that we have enough resources to evaluate *for ourselves* the impact of projects and planning processes (such as source water protection) on our claims, rights and beliefs. For us, this entails research (an important factor in improving the relationship between the Crown and ourselves) into the environmental impact of projects, policies and practices being proposed for our traditional territories. It seems a small price for the Crown to pay to ensure its honour and our rights are protected.

How the Crown consults with a First Nation says a lot about the state of the Crown's honour. Right now, it is looking very tarnished. Below, in the sections on the Importance of the Honour of the Crown and our Recommendations to the Ipperwash Inquiry, we suggest some ways Ontario and Canada can polish it a little brighter.

d) Early Warning Signs of Confrontation

We know the process of nullification well now. And we can almost predict future confrontations if the following conditions (listed roughly in order of escalation) exist:

- Governments are ignoring Native claims to rights or lands or burial grounds and are underestimating or discounting (nullifying) their importance.[146]
- A First Nation is determined to assert its rights and claims, as indicated by past submissions to the Crown of their grievances, the degree of community participation at demonstrations, blockades and vigils, and the extent to which they disobey provisions unilaterally put upon them.
- The Crown ignores First Nations concerns before implementing initiatives or persists in "consulting" them at the last minute on its proposals or even later, in the operational phase, when plans are already being implemented.[147]
- During talks between a First Nation and the Crown, the Crown's representatives give no recognition of the history behind the matters under discussion, or they convey an underestimation of it.
- An unwillingness of the Crown's negotiators to address the legacy of unfair treatment; more specifically, a refusal to discuss compensation.
- An active backroom lobby that is successful in obtaining official condemnation of Native actions or goals from municipal and county or regional councils.
- There exists, in the non-Native community, an atmosphere of racism or hostility that is never addressed. The toxicity of the atmosphere might be gauged in the press by examining reports, editorials and letters to the editor and counting the denials of history, the belittling of claims, the examples of junk scholarship, and

[146] As Chris Hodgson did when he was Minister of Natural Resources when he compared Native hunting rights to allowing farmers to kill deer that raid their orchards and then said Native hunting is "illegal" (see section on Political Opposition, above). This is a major sign of trouble for John Borrows as well (who is by the way, a Nawash band member), "History and Comparison Aboriginal Land, Treaty and Rights Occupations," Draft Ipperwash Inquiry Research Paper, July 26, 2005.

[147] This is, of course, a violation of the Supreme Court of Canada in several decisions and yet it remains government practice to avoid the kind of consultation demanded by the *Haida* decision of 2004.

assessing the reactions of local politicians, MPs and MPPs. On the streets, the atmosphere can be tested by the number of assaults against Native people.

- There exists, among enforcement personnel, a misunderstanding or under appreciation for the importance and legality of Native rights.
- Law enforcement personnel are laying unwarranted charges against First Nations' people. In the case of a dispute over resources, this may include: the laying of fish and wildlife and firearms charges against Native hunters and fishers in lower courts, harassing Natives hunting and fishing, or otherwise showing contempt for Natives' own ideas about their rights.[148]
- Law enforcement personnel do not move swiftly to investigate and lay charges against those who commit crimes against Native people or their property.
- Government officials, police and Crown Attorneys discount such crimes as "drunken brawls" or "expressions of frustration with government policy".

A confrontation may not erupt when you think it might. We Anishinaabek are very patient, but you can nullify a people for only so long.

[148] There is no recognition of Native aboriginal and treaty rights anywhere in Ontario legislation, so there is no reconciliation between Native rights and the laws of Ontario and no guide, outside the Interim Enforcement Policy, for officers of the Provincial Crown to exercise discretion.

C. CONNECTING THE DOTS: LESSONS LEARNED

Past Imperfect, Present Tense[149]

by Chief Ralph Akiwenzie

Many of you may have heard the story of the desecration of our burial grounds near Owen Sound. The news was first broken by a *Sun Times* reporter who interviewed one of the owners of a house that had been built on sacred ground. That homeowner made the comment that this was 1992 and it was time Indians stopped living in the 1700s.

This comment reminds me of something a certain William Gibbard, a fisheries officer for Lakes Huron and Superior said in the 1860s. He said that Indians dwell too long on past grievances and "are all grumblers and fault-finders by nature."

Well, maybe and maybe not. One thing's for sure though. We don't see a lot of difference between the "grievances" of the past and what goes on today.

By the treaty of 1857, we surrendered our Nawash Reserve (now Sarawak Township). By that treaty, one acre was reserved specifically as a burial ground because our people refused to contemplate the sale of the final resting place of their grandparents. Three separate sites, totalling one acre, were laid out.

The move to Cape Croker (which we call Neyaashiinigamiing) was a wrenching one. We had good, productive farms at Sarawak, but at Cape there is very little good growing soil. We were restricted by the Indian agent in what we could do to survive. At the same time our fisheries were being invaded by Canadian and American fishing fleets.

By 1862 starvation was visiting our people. Nevertheless William Gibbard (the same fisheries officer who found us grumblers) was selling leases to our fishery for $4 each. The effect was to squeeze us out of our own fishing grounds which drastically affected the band's food supply and income. Protests to our "fiduciary," the Department of Indian Affairs, had no effect.

Our neighbours from the Wikwemikong Reserve on Manitoulin Island took things into their own hands and removed some non-Native lessees from Lonely Island. Gibbard responded with a force of 22 armed constables from Toronto.

He and his force sailed into the harbour at Wikwemikong on July 24, 1863 with a warrant for the arrest of those involved. He was faced down by the band. Gibbard left empty-handed, but arrested one of the leaders of the expulsion at Bruce Mines and took him to court in Sault Ste Marie. There the judge scolded Gibbard for overstepping his authority and let his "prisoner" out on bail pending a trial.

Everyone headed back eastward on the same steamer. Somewhere around Killarney, three days after he marched into Wiki, Gibbard went over the rail in the night.

We recently went through a three-day ordeal of our own. We had been negotiating a fishing agreement with the Ontario Ministry of Natural Resources. If we had been able to sign it, this agreement would have opened the way for management of our traditional fishery in partnership with the MNR.

Negotiations broke down. About three months ago, the MNR imposed a ban on the purchase of our fish in order to pressure us into signing something we didn't want to. The

[149] In *Bruce County Market Place,* August 1992. This was written the summer before the burial ground vigil in December 1992 and one month after the MNR banned the purchase of our fish in June 1992.

> ban effectively shut off what little money our fishermen had been able to bring their families.
>
> We refused to negotiate with such a gun to our head. Eventually MNR lifted the ban so we could try again. We came close, but then they sent us a draft with new provisions we had never seen before. We wanted to talk to the Government face to face and we tried to get a meeting for most of the week of June 16.
>
> We succeeded on June 22 and at 8:30 am we were in the Deputy Minister's office, talking again. We came very close, but when we asked for a couple of days to work out details they told us they had to re-impose the ban.
>
> In fact, when we got home again, we discovered that MNR had *already* re-imposed the ban. They had done it three days earlier—on Friday, June 19 at 4:30 pm.
>
> Once again our fishermen have been forced onto welfare because they cannot sell their fish. It's as if the ghost of William Gibbard were stalking our people into the 1990s.
>
> Let's go back in time again. After we moved up to Neyaashiinigamiing in 1857, it was nearly impossible to visit the graves we had to leave behind in Sarawak. It was entirely impossible for us to stop the desecrations that followed.
>
> The sacred grounds were sold. Graves were looted. Skeletal remains were unearthed and sent off to museums. Earth from the 6th Avenue site was used to manufacture bricks for the construction of buildings in Owen Sound.
>
> In the 1980s, the Provincial Government was asked to OK the 6th Avenue site for the construction of houses. Without consulting us, the Government hired an archaeologist who summarily declared that the old burial ground contained no remains. Construction of two large houses started soon after.
>
> You have to know our traditions to understand how we feel about all this. We did not bury our people in coffins. We wrapped them in blankets and buried them with their personal effects. They became part of the soil, as it should be. For us the *ground itself* is sacred. It was sacred when we committed our dead to it and it is sacred today.
>
> Do you see what I'm getting at? It's not that we dwell on the past. It's that the past, for us, is inseparable from the present. These days, when we sit down at the negotiating table with MNR, or when we honour our dead, we cannot help but recognize the past.

The article was written to get the message across to both the public and to the government. We have long memories and you cannot sit down with us and hope to come to a resolution of our differences if you do not know the history of our relationship with you. For we bring that to every negotiating table and we will not move forward until the past is satisfied.

If you want to resolve the present crisis, you must address the past; and when you have addressed the past, we can plan for the future together.[150]

Earlier we had recognized that to be successful, a First Nation had to have four things in place:

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[150] A paraphrase of George Orwell's "He who controls the present controls the past; he who controls the past controls the future" used to good effect in John Borrow's "History and Comparison of Aboriginal Land, Treaty and Rights Occupations", Ipperwash Inquiry Research Paper, Draft, July 26, 2005. But the paraphrase holds a message for the Crown.

1. Community—support, determination and cooperation over a long time.
2. Legal Strategy—grounded in research, rooted in culture, and successful in court.
3. Responsibility—long-term, culturally relevant management plans based in western science and rooted in traditional knowledge.
4. Communications—wide ranging, inclusive, aggressive and successful in muting opposition.

This section discusses these in more detail and adds some lessons learned for the Crown and non-Native allies.

1. The Importance of Community

The single most important factor in our successful assertion of our rights and claims is community. Every single initiative, from the blockade for Oka, to the burial ground vigil, to the assertion of our fishing rights, was undertaken with the knowledge and consent of the entire community. In some cases, the leadership for the initiative actually came from the community, expressed during community meetings. In this regard, we had one great advantage over some others who were asserting claims and rights in the summer of 1995—an infrastructure and full community support.

With respect to the assertion of our fishing rights, the primary source of success was Chief and Council's refusal to accept high-handed behaviour from the Crown, in particular the imposition of fishing licenses. This, coupled with our fishermen's determination to continue fishing in the face of harassment meant Ontario had a choice: either throw everyone in jail or negotiate a resolution.

This determination held firm over the 10 years it took us to get to a Fishing Agreement. Obviously, if this kind of strategy is to succeed for that length of time, it must reflect the will and character of the entire community. We believe it does, for this community has, for nearly 200 years, refused to relinquish its rights to fish in the face of the most incredible pressure to do so.

2. The Importance of Legal Strategy and Historical Research

As Sheena Smith said during the Community Forum on September 9th 2005, "If Darlene never found those papers [revealing the presence of a burial ground in Owen Sound], it would have been brushed aside." And as Ross McLean noted, it helped that there were no tricky legal or historical questions to iron out during negotiations to resolve the burial ground confrontation.

Good historical and legal research make good communications, another of the four pillars of success we have identified. Communications can then focus on getting the facts to the public (and officials of the Crown) rather than on rhetoric or posturing or spin

doctoring—the kinds of things Ross McLean identified as working against the resolution of confrontations in the burial ground section above.[151]

When legal and historical research is done well and presented in a quiet, authoritative and determined voice, it is most persuasive especially in negotiations and during confrontations. Good research:

- helps to break down the "walls of self-deception" erected by government officials when they are confronted with their departments' mistakes or wrong-doing;
- fosters better relationships during negotiations or a confrontation—people can more quickly agree on the historical reasons for the problem;
- helps to dispel "public disbelief"—the current opinion that First Nations are too powerful and asking for too much, or are inflating historical wrongs for present gain.
- might even help get public support for the Native position which translates to public pressure on the Crown to resolve a matter fairly;
- allow negotiators and all the parties during a confrontation "cut to the chase"—to get quickly to the practical ways the problem can be resolved.

Good historical research also makes good legal strategy. Darlene Johnston and Peggy Blair, the trial lawyer for the First Nations filed some 800 documents for the fishing rights trial (*Jones-Nadjiwon*, 1993). The legal argument (that Nawash and Saugeen had never given up their rights to fish to make a livelihood) fit the ideas, the collective memory, and the values and beliefs of the community. The oral testimony and the written record validated one another.

But there is a problem with the common law. It is easy to misunderstand the Native point of view, let alone find room, in the common law, for traditional aboriginal laws and customs. John Borrows has done much good work on this problem, which even affects the Supreme Court of Canada.[152] When the Supreme Court of Canada makes that sort of mistake (as they have on occasion, and most recently in *Marshall-Bernard*), there is no recourse for First Nations.

Chief Justice Allan McEachern of the BC Supreme Court is perhaps only the most famous example of judges who have had difficulty grasping the complexities of the full and true expression of First Nations' culture and the quality of our life before Europeans redefined us. He redefined our life on Turtle Island as "nasty, brutish and short."[153] Once a bad decision (*ie,* one which is rooted on cultural misunderstandings) is made, it enters

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[151] See section 2(c) above: "Why the burial Ground Vigil was successful".

[152] See, for example, John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *American Indian Law Review*, Vol. 22.

[153] Delgamuukw v Regina 1991, in Boyce Richardson, *People of Terra Nullius*, Douglas & McIntyre, 1993, op cit (see footnote 7). The best rebuttal of this characterization of Native life before contact comes from George Blondin in his brief to the Royal Commission on Aboriginal Peoples, "My Life in the Sahtu", June 1993 in which he describes the history and life of the Dene ca 1850. People commonly lived past 80, sometimes to 100, disease was nearly unknown, people behaved civilly and enjoyed a spiritually rewarding life.

the common law and infects future decisions. It is extremely important that lawyers acting for First Nations to get it right the first time.

Now we need the academic lawyers and historians—the ones who have taken the time to research the Native reality in Canada—to respond to the backlash journalists that have so effectively altered the public's perception of Native rights and claims and Native people themselves. Even Supreme Court Justices are not immune to approbation or condemnation in the editorial section of the *Globe and Mail*.

3. The Importance of Responsibility

As we said at the beginning of this paper, wrapped up in our ideas of work, *anookeewin,* are our notions of rights and responsibility. If we have rights to fish or hunt, we also have a responsibility to do no harm, to plan ahead for seven generations, to take only what we need, and to allow the earth to heal itself. Today, that translates into developing fish and wildlife assessment and management plans, and to the removal of invasive and exotic species. As we have pointed out, we have done this for our fisheries on very limited funds by forming partnerships with university-based researchers to conduct leading-edge research into our territorial waters.

A First Nation's leadership is important here. Chief and Council must be prepared to make the case for First Nation fisheries management to their own people before we can take it to the government. They must also be prepared to devote scarce revenues to fisheries research. With the help of our biologists we are able to:

- better assess our catches
- talk the same language as the government biologists
- build networks with other scientists
- better evaluate the government's fisheries programs
- add to the growing scientific knowledge of the fishery.

Government leadership is important here as well. It seemed strange and particularly self-defeating when Minister Hodgson told us he would not consider anything like a comanagement relationship between Ontario and ourselves. In the United States, government-to-government relations between fishing tribes and state departments of natural resources are benefiting both the bands and conservation.

The Great Lakes Indian Fish and Wildlife Commission is an umbrella group for a number of tribes in Wisconsin. Enforcement and assessment personnel collect data on Native harvests of fish and wildlife and share that information with State authorities. The Chippewa-Odawa Resources Authority (CORA) does the same in Michigan. CORA is represented on the Lake Huron Technical Committee of the Great Lakes Fisheries Commission.

It defies understanding why the Ontario Ministry of Natural Resources is so opposed to Ontario First Nations serving on these sorts of international management committees.

One would think that with so many threats to the Great Lakes, the MNR would be glad of any help it can get.[154] It was CORA who invited Saugeen Ojibway Nations biologists to join them in a meeting of the Lake Huron Technical Committee of the Great Lakes Fisheries Commission in January 1994. But it was the MNR Lake Huron manager who insisted they leave.[155]

This kind of action is mean-spirited and irresponsible and it is denying us our ability to assert our responsibilities, which we consider part and parcel of our rights.

We also feel a deep sense of responsibility to the ancestors who are buried all over our traditional territories. Non-Natives fail to appreciate the depth to which we feel attached to the land because our ancestors are buried there. They are part of the earth from whence they came. They nourish the plants and trees that nourish us. Even after thousands of years, we feel their presence still. It is a great sorrow if remains are disturbed, and if they are, they must be re-buried quickly.

Our responsibility for the land derives, in part, from our responsibilities to our ancestors.

Research is part of exercising our rights and responsibilities. Research is necessary in order to recover our rights and to justify our claims. And research is necessary to take the proper path in assessing our harvests and managing our fisheries. Our research must now include work from the Western scientific tradition as well as our own.

The acquisition and application of traditional knowledge is as much "science" as the Western tradition. For "science" is just a Greek word for knowing and there are lots of things we know that Western scientists don't.

Although we cooperate with the Ministry of Natural Resources by sharing assessment data and research information, the funding we receive from the Crown is inadequate and given reluctantly. Incredibly, even though our work includes fisheries habitat, the federal Department of Fisheries and Oceans (who retain responsibility for fisheries habitat in the Great Lakes) has declined to recognize and contribute to our *anookeewin*.

Even more ironically, Canada has signed and ratified the Convention on Biological Diversity which calls on all the signing parties to engage indigenous peoples and their traditional knowledge in the environmental management schemes of their country. This is not happening. Environment Canada holds the responsibility for the implementation of the Convention and although they have money for going to meetings, they have no money for First Nations to apply traditional knowledge to the stewardship of their traditional territories.

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[154] And fulfil its obligations under the Convention on Biological Diversity in the bargain (by engaging First Nations' traditional knowledge in the development of environmental management schemes).
[155] Andrew Muir, personal correspondence, op cit, July 2005.

4. The Importance of Communications

Good research makes good communications. We were most effective in our responses to the backlash when we had the better biological or historical or legal research. Media coverage of our actions and claims in the Grey-Bruce area of Ontario was relatively balanced overall.

But that didn't make it easier. Communications is a lot more than getting a press relapse into the local paper. Good communications is speaking in schools and at service clubs, it is monitoring the media and building networks of allies. It is constantly sending out information packages and "backgrounders". It is lobbying in the back rooms. It is responding to every bit of misinformation and disinformation that makes its way into the press. It is a long, slow haul that is made slower and longer if you have to work on a shoestring budget.

Even balanced media coverage of aboriginal issues, especially resource issues, can be misleading. Seldom is there time during a news clip or space in a newspaper report for the context of culture. We have a different understanding of land use, hunting and fishing than do most Canadians and this difference is only rarely reflected in the media. We are forced to talk in culturally foreign terms of "quotas", "total allowable catches", fisheries "management", "conservation" and "constitutional rights" to make our side of the story understandable to non-Native reporters and audiences.

It was difficult, in 1995, to get the major media out of Toronto and into the community; now it is nearly impossible. There may be a number of reasons for this:

- The cost of doing stories outside Toronto (the August 2005 over-coverage of the Air France crash at Pearson shows the networks are not shy about covering, from every angle possible, events close to home-base).
- It is not easy to sort out where to place the blame for an incident since everyone blames everyone else.
- Inability to grasp the complex issues involved in unravelling the tangled roots of Native disaffection: many of the issues become clouded in "process"—who has responsibility for what; who said what to whom.
- Most mainstream, non-Native newsrooms do not have long-time Native journalists or editors and so there is no in-house perspective.[156]
- Fatigue over seemingly irresolvable issues set in after the Royal Commission on Aboriginal Peoples—a fatigue exploited by the backlash writers and broadcasters;
- Stakeholder groups of natural resources and, as we have seen, sometimes political leaders and law enforcement personnel have managed to criminalized Native people who assert and practice their rights.

In any event, the lack of good, main-stream media coverage of Native stories, not just about our claims and rights, but also about our successes and the many talented people on our reserves, has left a vacuum of information that is being filled by the backlash

[156] CTV's W5 for example has hired the odd Native intern, but they never seem to stay, says Anton Koschany, Executive Producer in an interview on CHFN, Nawash community radio, 2001.

journalists. This, coupled with a drastic under-reporting of hate crimes against Native people, has shifted public sentiment away from First Nations and weakened a national resolve to settle First Nations' claims and rights. The result is a badly misinformed public, including otherwise responsible journalists who, for example, think the *Marshall-Bernard* decision is actually good for Native Canadians.[157]

Throughout this paper we have incorporated examples of our public responses into our claims and rights and dealt with the resulting backlash. If First Nations are not afforded a fair hearing in the media (and, as we have described, we had to work hard to get one) there is a real danger our rights and claims will be discounted and our people criminalized. If this happens, it makes it much easier for the Crown to dismiss the legitimacy of First Nations' rights and claims and then to ignore them. From there it is easier to ignore the people themselves (they are after all, only "grumblers" or criminals or both).

To add insult to injury, blame, more and more, is being placed on First Nations themselves by the authors of books such as *Our Home Or Native Land?* and *First Nations, Second Thoughts* who represent only a portion of the backlash journalism against Native rights and claims that began to express itself around 1995.

This is of course, a process of nullification. Once First Nations' rights and claims and even our people are so nullified, a kind of psychological *terra nullius* (empty land) is created. The land is now emptied of people who matter and so it does not matter that trap lines are drowned by hydro projects, or hunting grounds clear-cut, or that fishing nets are stolen out of the water.

Every time a Conservation Officer says the way we hunt or fish is illegal, or an editorial writer says we are taking too much, or a politician says, "So they were here first, so what?"[158] we are "disappeared" a little bit more. As you can see from the stories we related in this paper, there were many attempts to make us and our claims and rights go away.

Some in our community feel that the disappearance of two of our youths,[159] in October 1993, was related to the recognition and assertion of our fishing rights. If this is true, there is a much darker side to the creation of a *terra nullius* than we care to contemplate here: if you can't make a people disappear metaphorically, the only other way is to do it literally.[160]

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[157] John Ibbitson, "Making Sense of Native Rights", Globe and Mail, July 21, 2005.
[158] As Bill Murdoch, MPP for this area said regarding our right to a commercial fishery. On the CBC's Fifth Estate item, "A Fish Story", aired 28 November 1995.
[159] Leslie Jones and Shawn Jones went missing after reportedly being seen hitch-hiking on area roads. Their descriptions are at http://www.bmts.com/~dibaudjimoh/page126.html.
[160] All violence against Native people might be looked at this way.

Of course a people will take any kind of nullification for so long before they re-assert themselves. Sometimes that takes the form of occupations and blockades, which in reality, are assertions of rights and claims in the face of incredible opposition.

Looked at this way, the primary goal of our communications during the events described in this paper was to prevent the nullification of our rights and claims and the disappearance of our history. The objectives for achieving this were:

- to get our side of the story out before someone else could nullify it;
- to remind people (our own people and Canadians) of their history;
- to inform our allies of our positions so they could work against the misinformation in their own communities;
- to respond to every attack as another opportunity to put our case to the public—to talk over the heads of the government and the backlash journalists, directly to the people.
- to keep public pressure on the Crown to negotiate a resolution;[161]
- to test for prejudice and bigotry.

The last point needs some explanation. As Chief Akiwenzie indicated in an article quoted above, the persistence of misinformation in the face of fact is a test for prejudice and bigotry. If, after we strip away the illegitimate and illogical arguments against the recognition of our rights, and those arguments persist, then we know we are dealing with prejudice and we can call it for what it is. Even more important, fair and reasonable people in the non-Native community know it as well and begin to distance themselves from our opponents.

The notion that the media can be used as a diagnostic tool does not end with the outing of bigots. Watched carefully, local media can be used as an early warning system for confrontation.[162] We haven't done this, but a test of this hypothesis would be to examine the reports, editorials and letters to the editor that appeared in the Mount Forest paper and the Sarnia media in the year prior to the summer of 1995. Ask the following questions:

- How many articles on the take-over of the army base and then the Park did not include quotes from Stoney-Pointers?
- What were the letters to the editor saying about the take-overs? What were they saying about the Stoney-Pointers?
- Was there any response to inaccurate reports or erroneous accounts of history?
- How many well-researched, in-depth articles about Aazhoodena (Stoney Point) appeared in the media?
- How many positive profiles of Kettle Point or Stoney Point people or programs appeared in the media during the year before the summer of 1995?

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[161] This is one reason why the mainstream media is so important. A FN issue can be thoroughly reported in local and regional press, but unless a story in Ontario makes the pages of the Globe and Mail or the nightly news, Ottawa and Queen's Park can afford to ignore it. In order to catch the attention of the national media, and therefore the policy makers who can make necessary changes, every effort must be made to take the story to Toronto.

[162] This was used to predict, in July 1995, the backlash of August and September 1995: David McLaren, "Angry Anti-Native Backlash Coming," memo to Nawash Chief and Council, 26 July 1995.

- What were local politicians, especially the MPP and MP, saying about the take-overs? They may not be saying anything in the media, but they might in municipal council meetings and in resolutions passed by local councils.
- How many negative comments about the situation? How many negative comments about Natives, in general? How many contemptuous comments? How many positive comments?
- Was there an observable increase in reports of charges against Native people in the months leading up to and after September 1995?
- Was there an increase in "nullification" as the summer of 1995 wore on?

The ignoring, or the discounting, or the criminalization of Native rights and claims is a nullification of our existence in Canada. It is a denial of history—both ours and Canada's. When you deny someone's past, you deny them a future, no matter how in your face they are today.[163]

5. The Importance of the Honour of the Crown

The response of the federal government to our vigil of the burial ground at 6th Avenue in Owen Sound, prompted though it was by our actions, was, once the right people were at the table, in good faith. The arrival of Ross Reid, an MP and Parliamentary Secretary for the Minister of Indian Affairs, meant that the federal negotiator had the mandate to speak for Canada.

Research is vitally important in all matters between the Crown and First Nations. If we can't agree on the past, there will be no point negotiating a resolution to the present issue, for it will unravel or breed discontent and uncertainty in the future. One of the reasons the burial ground confrontation was settled quickly was that we had done our research so well, that the parties had to agree with our view of the past. If there is no agreement, ways must be found to research the matter to the point where we can at least agree on what got us to the current impasse.

In this light, the *Jones-Nadjiwon* trial was really a long argument about the past. Forcing matters of claims and rights to trial is an expensive, time-consuming and ultimately divisive way of researching history. The losers at trial are not forced to agree with the victor's version of history and that disagreement is carried into the negotiations that come after trial. Disagreements about the past infect the future. It was one of the root causes behind the long and tortuous path to the first Fishing Agreement and the problems affecting the new one.[164]

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[163] Orwell restated again. Canada tried, but could not curb the hatred of Ernst Zundel. It took Germany, which has a law against the denial of the Holocaust to do it.

[164] Of course there are other reasons—the dishonourable and high-handed actions of Ontario, as described earlier were one major reason.

But the Crown must not behave honourably at the negotiating table and dishonourably away from the table. In other words the honour of the Crown in dealing with First Nations must extend to its legislation, policies, and practices. Given the history related in this paper, the Ontario Ministry of Natural Resources has much work to do to polish up its honour.[165]

It has been our experience that the relationship between ourselves and the Ministry of Natural Resources leaves a lot to be desired. Psychologist John Gottman from the University of Washington has identified what he calls the "Four Horsemen" of doomed relationships: defensiveness, stonewalling, criticism, and contempt. Of these, contempt is the most corrosive.[166] Its effect is to discount or nullify the other person. It would be safe to say all four of these Horsemen plague negotiating tables across the Province.[167]

In our view, the refusal of the Crown to address the need for compensation for past injustice and financial loss is to show us contempt. As we have seen in this paper, the past is important if we want to move ahead into the future. To refuse to discuss compensation for fault by the Crown is to discount the hardship of lost lands and loss of access to revenues we had a right to enjoy. It is a complete dismissal of our past, indeed of our whole history as a people tied so tightly, economically and spiritually, to the land. The lack of compensation for the past is a denial of historical fact. It is a nullification of the existence of a people.

We do not see this same nullification of others in Canada. When wrong is done to non-Natives they are compensated. The Crown sees fit to compensate those displaced by a recognition of our rights—as it did the non-Native commercial fishermen here and on the east coast and the people who lived in the houses on our burial ground in Owen Sound. All were well compensated, often in excess of the market value of their losses. But we are not.

This has the natural effect of building resentment that contribute to confrontations which, in turn, makes it harder to negotiate fair and lasting reconciliations. As Francis Lavalley told the Ipperwash Inquiry:[168]

> When MNR took my nets, I said to them: "If you're going to kick me out of here, where's my blankets, my beads, my whiskey. You compensate non-Natives, where's mine. How can you call this a restricted area? We've always fished here. How can you

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[165] Not only in this paper, but in Jean Teillet's "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario", Ipperwash Inquiry Research Paper, January 31, 2005.
[166] In Malcolm Gladwell, *Blink: the Power of Thinking Without Thinking*, Little, Brown & Co. 2005, p 32.
[167] They plagued our negotiations on land claims and fishing (even after the *Jones-Nadjiwon* decision). They (especially contempt) appear in our surveys of other First Nations fisheries issues. And they pervade David McNab's chronicle of his time as an Ontario negotiator with the Ontario Native Affairs Secretariat (*Circles of Time*, op cit).
[168] At the Nawash Community Forum September 8, 2005. Francis is talking about an incident in August 1996 when the MNR lifted his nets "as a warning" and ruined them in the process. He was not compensated for the loss of his nets or the loss of his fish. The incident is described in the section on the "Fishing Rights: MNR Intransigence."

> kick me out without compensating me? … I can see what you're taking away, but I can't see what you're giving me."

Even a cursory look at the MNR's legislation, policies and practices is revealing of the contempt with which Ontario, and that Ministry in particular, regards First Nations. The *Fish and Wildlife Conservation Act, 1997*, for example, contains not one reference to aboriginal rights, not even to say the *Act* must not abrogate or derogate from our rights. The brief analysis of MNR policy that we did in 2001 makes it clear just how little the MNR regards First Nations' rights and claims.[169]

For example, the MNR, at the same time it refused to negotiate a comanagement agreement with the Saugeen Ojibway Nations, was beginning to talk to the Ontario Federation of Anglers and Hunters and the Commercial Fisheries Association (CFA) about comanagement. By 2001, about the time the MNR was refusing to share lake-wide data with the Saugeen Ojibway Nations, the CFA was working with MNR staff in collecting data and sharing information. At OFAH Annual General Meetings, MNR Ministers and staff regularly reported on some new program or initiative they had instituted at the request of the OFAH. The word most used to describe the relationship between the MNR and the OFAH is "partnership."

Another "comanagement" initiative of the MNR was the establishment of Resource Stewardship Agreements (RSAs) in 2000.

> In practice, RSAs will function as a scheme for industry (here, timber, mining and tourism) to share management responsibilities for natural resources. Although the Ministry of Natural Resources is placed in an overseer role, the Agreement is between industries and most practical aspects will be left to industry.
>
> … RSAs (and Ontario's Living Legacy) will certainly not further the recommendations of the Royal Commission on Aboriginal Peoples which say that the land and resource base of First Nations need to be *expanded* if aboriginal peoples are to survive. The more Ontario is carved up to satisfy the competing interests of third parties and industry, the less will be left for First Nations to re-build economies shattered by the long suffocation of their rights and self-governance.[170]

The irony of downloading management responsibilities to anyone but Natives seems to escape everyone in government. The more completely rights are recognized, the more self-sufficient FNs will become. It's really just a matter of sharing the resource or at least the revenue the Crown derives from resources. But, for whatever reason … the anti-Native rights lobby perhaps, the resource extraction industry's hold on the land, a fear of losing jurisdiction … the Crown seems to be incapable of sharing. One result of this policy of stinginess is poverty and dependence. Canada's standard of living may be

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[169] David McLaren, "Analysis of Current Policy of Ministry of Natural Resources," Chippewas of Nawash Unceded First Nation, 2001 at http://www.bmts.com/~dibaudjimoh/page111.html. 2 August 2005. The discounting of Native rights and claims by the Crown is, as discussed above, one of the early warning signs of trouble.

[170] Ibid, p 7.

ranked eighth in the world (in 2003; first in 1999), but when you to visit most reserves, you slip to somewhere around 48.[171]

The per capita income at Nawash is less than half of that of our neighbours in Bruce and Grey Counties. Yet expenditures of our fishermen alone in outside communities, on equipment, supplies, etc are roughly $500,000 or half of their revenues.[172]

In "Encountering the Other" clues to a new way of conducting business with First Nations are teased from the old protocols around the Covenant Chain. The councils held by the British with the Haudenosaunee and then the Anishinaabek were essentially meetings to work on their relationship ("polishing the Chain"). The elaborate protocols used during the Councils were based on customary practices. Wampum was exchanged to remind one another of the kind of relationship that had been agreed to. The Crown today needs to find more William Johnsons to improve their relationships with First Nations.[173]

The Crown should construct a check-list of things that should be in place before beginning negotiations with any First Nation. Here's a start:

1. First, research the history and current struggles of the First Nation you will be sitting with to the point where you learn respect for the people and their traditions.
2. Know the people that you will be sitting at table with. This may necessitate pre-negotiation visits to the community to meet people and to hear the stories of the old days that they choose to tell you.
3. If you are the provincial Crown, insist the federal Crown be part of the discussions; if you are the federal Crown insist the province be at the table. (But don't allow the refusal of one to come to the table scuttle discussions entirely.)
4. Understand that the matters on the table are between you and the First Nation. You may be obliged to represent the interests of third parties, but they must not be at the table and you must respect the confidentiality of the table—third parties must not know the details of negotiations.
5. Where there are disagreements between you and the First Nation regarding history, be prepared to fund research that will allow you to agree on the history (as long as the First Nation has at least an equal role in doing the research and that research include oral history and the old stories).[174] Although progress at the table

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[171] "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen," UN Commission on Human Rights, April 2005, para 33. "When the Human Development Index (HDI) is calculated for Registered Indians."

[172] Kimberly Rollins, "Economic Benefits from the Lake Huron Commercial Fishery and Co-Management Program to the Chippewas of Nawash and Saugeen First Nations" University of Guelph, 1999, p iii.

[173] William Johnson, an officer in the British army, had the lead in dealing with tribes and First Nations for the British in the late 1700s and early 1800s. He knew the protocols and ways of the Haudenosaunee and the Anishinaabek and was trusted by both Natives and the British. More of this discussion is in "Encountering the Other."

[174] Some of these points (and the need for research is certainly one) are fleshed out in John Borrow's paper, "History and Comparison of Aboriginal Land, Treaty and Rights Occupations", page 70f. Peggy Blair (SON counsel on *Jones-Nadjiwon*) has written an excellent paper that, among other things, demonstrates

will probably stop until the history is settled, once it is, it may have the added bonus of resolving matters such as what rights the First Nation retains without having to go through an expensive and time-consuming trial.

6. Make sure the people who are representing the Crown at the table have enough authority to commit the Crown to the promises you make and the to understandings you agree on.
7. Understand the protocols in use at the First Nation and employ them during negotiations. Consider seconding members of your negotiating team to the First Nation for a few weeks or months before the talks begin; and accepting secondments from the First Nation to your offices during the same time.
8. Be prepared to deal with legacy issues by for example, agreeing to negotiate compensation. For, when the grievances from our history are satisfied, the present will be easier to deal with and the future more certain for everyone, including the stakeholders not at the table.
9. Do not let your current legislation, policies and practices stand in the way of a good agreement with First Nations.

Alan Grant, who has been the facilitator for several negotiations between First Nations and government (including the Owen Sound burial ground vigil described above) says that negotiation is a better solution than litigation. And it is a much better solution than the use of police, courts and corrections for dealing with issues in dispute. He offers a number of points about facilitating negotiations:

1. It is essential that an independent facilitator with experience [in First Nation claims and rights], and who is agreeable to all of the parties, should chair the negotiations and be responsible for the independent written record of the negotiations.
2. This independent record must be circulated to all parties before the next meeting is held giving all parties the opportunity to study the record and make representations to the independent facilitator on any matters of concern that may arise.
3. The independent facilitator must give all parties good notice of the negotiation meetings, circulate the minutes of the last meeting and provide the parties with a written agenda for the consideration of the parties at the next meeting.
4. Early on in the negotiations, it is important for the general area of dispute to be identified and then for the problem to be partialized into segments that can be addressed in manageable portions.
5. Where necessary, it is essential that independent researchers, agreeable to all parties, undertake background research on the factual issues in dispute and provide written reports to the parties for their consideration and response.

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the courts still require white documentation to back up Native oral history. This defeats the stated intention of the courts to accept oral history on its own merits and, once again, discounts our way of remembering and understanding history. Oral history has been vindicated too many times (*eg,* the presence of a burial ground at Ipperwash Park) for it to remain as an appendage to written history. Peggy Blair, "Prosecuting the Fishery: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fsihing Cases," *Dalhousie Law Journal*, 20, 1, Spring 1997, pp 17-77.

6. Negotiations should deal not only with the particular issues in dispute but also with the expectations of the parties on future negotiation meetings including who will be responsible for moving items forward and the dates by which such actions are to be taken. Further, it is essential that media relations be agreed in the sense of who is to communicate with the media and the content of any disclosures approved by the parties.
7. Successful negotiations will not only clear away relationship problems and factual misunderstandings among the parties but will also assist in improving future relations and negotiations. Peaceful resolutions have been achieved in hundreds of matters by these means.
8. Even if no negotiated solution is possible, the process will have greatly helped in clarifying the issues that the parties may or may not wish to litigate at some time in the future.
9. The worst solution is to leave the resolution of the matter to enforcement personnel (police, Conservation Officers) which might (and often does) make matters worse.

   The saddest fact of the last several decades (some would say 500 years) is that governments do not seen to learn from past experiences that have gone wrong. This only leads to further inappropriate police actions that are crying out for alternative-negotiated solutions among the parties.[175]

If, in this paper, the Ministry of Natural Resources seems to receive more than its fair share of criticism, part of the reason for this is surely because the aboriginal right to *nookeewin* as it finds expression in aboriginal and treaty rights to fish is so central to Native culture and economy. As a result, the Ontario Ministry of Natural Resources has become as significant an influence in the lives of First Nations as the Department of Indian Affairs. The same can be said of the Department of Fisheries and Oceans on the east and west coasts.

In the recent past, Ontario policies and practices, implemented without consultation with First Nations have done much to derogate from our rights and have resulted in much hardship for our people. For example, the failure to regulate the fisheries in Lake Huron resulted in the collapse of native trout stocks in the 1950s and the disappearance of a staple of our livelihood. The Crown's decision to open the Great Lakes to international shipping has brought a plague of exotic species into our waters at great cost to our fishery. Ontario's decision to stock Pacific coast salmon in Lake Huron is affecting our rights to fish. Crown policies and practices regarding settlement, development and resource extraction in the Bruce have destroyed animal habitat and many of the plants we gather for food and medicine. All of these decisions were made without consultation or accommodation of First Nations environmental concerns or of their rights and claims.

Perhaps the MNR's and the Ministry of the Environment's new Statements of Environmental Values will help:

> The Ministry of Natural Resources [the Environment] recognizes the value that Aboriginal people place on the environment. When making decisions that might significantly affect the environment, the ministry will provide opportunities for

[175] Personal correspondence, Alan Grant, Professor of Law Emeritus,

> involvement of Aboriginal people whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered.[176]

There is no doubt, in our minds, that new initiatives, such as source water protection and water diversions under the Annex will impact on our rights and claims. And yet, a representative of the Ministry of Environment told us that she didn't see how source water protection would. Just because the Crown can't see how they will does not mean they won't—after all, they did not think (if they thought of it all) that salmon stocking or the opening of the St Lawrence Seaway would affect us in such profound ways. And no one thought we even *had* fishing rights until 1993.

Both the federal and the provincial Crowns need to polish their honour in the area of consultation and they have been instructed to do that by the Supreme Court. *Haida* is over a year old and still the Crown, at least in Ontario, ranks First Nations below "stake holders" when it seeks opinions on its policies and legislation.

Here, to help the Crown along, are some principles (from *Haida* and other judgments) governments must keep in mind when considering how to consult with First Nations.[177]

> The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Consequently, the duty to consult is on going. The Crown is not able to unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to the resource. The duty to consult must be carried out in good faith, based on full recognition of the rights, title and interests of First Nations. ...

(a) There is always a duty of consultation and the requirements of that consultation vary with the circumstances, such as the nature of the Aboriginal right and the potential infringement of the right (*Delgamuukw, Taku, Haida Nation*).

(b) The Crown's duty to consult and accommodate Aboriginal interests founded in the honour of the Crown is a continuing duty. The Crown is obliged to honour its duty each time it makes a decision or deals with a license if it has not fulfilled its duty when previously making a decision or dealing with a licence. (*Gitanyow First Nation* v. *British Columbia (Minister of Forests)*, 2004 BCSC 1734)

(c) There is a duty on the Crown to ensure that a First Nation is provided with full information on the conservation [or any other] measure and its effect on the First Nation and other user groups (*R.* v. *Jack* (1995) 16 B.C.L.R. (3d) 201 B.C.C.A.).

(d) The Crown is required to explain the need for a particular conservation [or other] measure (*R.* v. *Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C.C.A.).

(e) The Crown has a duty to fully inform itself on the fishing [or other] practices of the Aboriginal group and ascertain the First Nation's views of the conservation [or other] measures (*R.* v. *Jack*).

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[176] "Consideration of Aboriginal Peoples", Draft Statement of Environmental Values, Ministry of Natural Resources (2005), No. 7. In fact all Ontario's ministries have the same, no. 7 statement, except for Energy which adds: "The Ministry of Energy meets with First Nations to discuss matters on energy development that may impact their communities."

[177] The following list is taken from material presented at a Department of Fisheries Workshop at Tsa-kwa-Luten Lodge May 10 to 13, 2005 and prepared by Rod Naknakim, Legal Counsel.

(f) The Crown's duty to consult is not fulfilled by merely waiting for a First Nation to raise the question of Aboriginal rights (*R.* v. *Sampson*); there is a positive duty on the Crown to inform and consult (*Halfway River*).

(g) The fact that a First Nation receives adequate notice of an intended decision does not mean that there has been adequate consultation (*Halfway River*).

(h) The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have the opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action (*Halfway River*).

(i) The Crown has a legally enforceable duty to First Nations to consult with them in good faith and it must endeavour to seek workable accommodations between the Aboriginal interests and the short term and long term objectives of the Crown and other parties, and that obligation extends to both the cultural and economic interests of First Nations (*Haida Nation*).

(j) Consultation must be undertaken with the genuine intention of substantially addressing the concerns of First Nations (*Mikisew Cree First Nation* v. *Canada*, [2002] 1 C.N.L.R. 169 F.O.T.D.).

(k) Non-Aboriginal economic concerns or "economic forces" alone will not be sufficient for the Crown to justify an infringement and do not remove the Crown's duty to consult (*Haida Nation*).

(l) There is a reciprocal duty on First Nations to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means available to them (*Halfway River*).

(m) Providing "standard information," which is of the same form and substance as the information being given to all interested stakeholders taken alone, does not constitute consultation within the meaning of section 35(1) (*Mikisew Cree First Nation*).

(n) First Nations are entitled to a distinct consultation process apart from public forums or general public or stakeholder consultations (*Mikisew Cree First Nation*).

(o) The concept of reasonableness applies to the duty to consult (*R.* v. *Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.).

(p) The Crown cannot delegate its consultation duties to third parties (*Mikisew Cree First Nation*), although third parties may well have their own legally enforceable duty to consult with First Nations (*Haida First Nation*).

(q) The shortness of time or the economic interests of non-First Nations are not sufficient to obviate the duty of consultation (*Gitxsan and other First Nations* v. *British Columbia (Ministry of Forests)*, 2002 BCSC 1701.

(r) The first step in any consultation process is a discussion of the consultation process itself (*Gitxsan and other First Nations*)."

6. The Importance of Law and Order

a) Law

The Constitution of 1982 with its sections 25 and 35, opened a door that had been closed for too long. Faced with the constitutional recognition of Aboriginal peoples and their rights on the one hand, and the reluctance of the Crown to recognize our aboriginal and treaty rights on the other hand, Canada's courts have had no alternative but to try to adjudicate some sort of reconciliation.

Whether the courts, including the Supreme Court, have opened the door wide enough is a debate we will not argue in this paper. However, we have noticed that, notwithstanding court decisions recognizing our rights, the Crown does not seem to be willing or able to countenance the full expression of those rights. The Ontario Ministry of Natural Resources' response to the *Jones-Nadjiwon* decision, as we have chronicled it here, is just one example.

It may be that the courtroom is not the best place to settle these matters. They are out of the financial reach of most First Nations in Ontario for it is expensive to mount a competent defence affirming aboriginal and treaty rights. The alternative is equally appalling for it means that First Nations are forced to defend themselves in lower courts against fish and wildlife charges levelled by Conservation Officers whose ideas of aboriginal and treaty rights seem defined by the narrow rallying cry of the backlash lobby, "one law for everyone."

Even fighting a minor charge (*eg,* for non-registration of a rifle when the Courts have ruled that they are a necessary tool for practicing hunting rights) is out of reach. A lawyer in our traditional territories wanted $10,000 up front to defend one of our Band members on a similar charge. The result? Native hunters and fishers plead guilty, pay a small fine, and the case law gathers, undermining rights-based defences in the future.

Until the Crown comes to the negotiating table in good faith, with an open mind, with respect, and with adequate resources, First Nations' peoples will be forced to choose between going broke trying to have their rights recognized in court or their rights narrowly defined by law enforcement.

Regardless of the choice, Ontario must find a better way to deal with the backlash to Native rights and claims that has gripped its citizens. For the backlash, with its narrow idea of "equal rights" and its urge to criminalize our people for practicing their rights, continues to do us great harm. For a public that does not understand our rights and claims will not be able to balance the pressure being put on the Crown to ignore them and to criminalize those of us who assert them.

While it existed, the Ontario Anti-Racism Secretariat was a source of funds for dealing with the backlash locally. First Nations must have the resources to protect themselves against the backlash that always forms when we assert our rights and claims. However, aside from communications work, we believe that it is the responsibility of the Crown to

deal firmly with the hateful interference of some of its citizens during negotiations around our rights and claims. And, when those negotiations are completed, the Crown must help deal with their peoples' interference in the practice and enjoyment of our rights.

Curiously, people who recognize racial slurs and actions against other people of colour do not recognize them against Native people. An example of this is the editorial in the *Markdale Standard*, discussed previously. A corollary of this is that people will say or do clearly racist things regarding Native people that they might not against other groups. Canadians seem to forget that Native rights are human rights. For example, the Manitoba Justice Inquiry singled out the treatment of Betty Osborne's body in the morgue:

> The manner in which people were brought to the morgue to view the victim's body, and the use of photographs of her, showed lack of respect for the deceased. It would appear that because the victim was Aboriginal, the police believed that no one would object to such treatment. This amounted to racism.[178]

b) Order

An often overlooked role of law enforcement is the maintaining of order *before* confrontations occur. We have seen, in this paper, that First Nations people in general, but especially those of us who insist on practicing our rights in an atmosphere of hate, must swallow a lot of indignities and endure a great deal of frustration. When, on top of all that, we see law enforcement personnel unable or unwilling to enforce the law against those who do us harm, our frustration ratchets up a few more notches.

This was certainly the case when our fishing boats were being vandalized (and sunk and burned) in 1995 and our fishermen's nets were being cut and stolen from the waters. These are all criminal offences, and not a single person was charged. They identified a couple of likely suspects in the case of the burning boat, but not before they *first* investigated the possibility that Francis Nadjiwon had burned his own boat!

In the case of the disappearing nets, the OPP simply refused to take any action to follow-up on leads we gave them or to mount patrols of the water to protect our fishermen's property.

The Ipperwash Inquiry Commissioner, Hon Sidney Linden, heard, during the Community Forum at Nawash, September 8th, eye-witness accounts that the Owen Sound police simply stood by and watched during the brawl that resulted in the stabbing of three Nawash youth on Labour Day weekend, 1995.

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[178] Report of the Aboriginal Justice Inquiry of Manitoba, Volume II, Chapter 9, 1991. Other examples include the midnight rides given Natives by the Saskatoon Police Department; also emails exchanged by OPP officers and staff with MNR officers and staff that incorporated racist comments and photos of Native crime victims (CBC News Online, July 4 & 5, 2001; Toronto Star, July 9, 2001).

And, as we have chronicled above, MNR Conservation Officers actively harassed our fishermen, sometimes without the proper authority, as the fishermen practiced their rights, before, during and after we signed the first Fishing Agreement.

For some reason, the behaviour of law enforcement personnel during the fishing disputes was markedly different than the calm, reasoned presence they maintained during the Owen Sound burial ground vigil.

The failure to maintain order when crimes are being committed against Native people and property increases tensions and frustrations in Native communities and encourages some people to turn their hatred into physical acts of violence. We believe these acts are indeed fuelled by hatred and should be prosecuted as hate crimes.

When confrontations do occur, all parties must foster an atmosphere of orderly calm so that trust and communications develop. The way the RCMP and the Owen Sound police behaved during our burial ground vigil in Owen Sound is a good example of that. The police kept a low-profile, calm, constant vigil. They were supplemented by police officers from both Nawash and Saugeen. No doubt the communications with the Band police forces tended to reassure the Owen Sound police about who was involved and their motives. Cam Cole of the RCMP detachment in Owen Sound (since moved to Kitchener) did a good job of keeping all lines of communications open.

The goal should be to diffuse the tension in such situations. Therefore, police officers and commanders who are cool, calm, open-minded and ready to negotiate over a long period of time play an important role. Such people are not inclined to take a leading role in the drama unfolding in front of the media. They are not inclined to engage in wars of words and disinformation campaigns or to react to rumours or unsubstantiated reports.

Such people are important to have on the Native side of the confrontation as well—as we did at both our Oka blockade and at the Owen Sound burial ground vigil. In addition, the presence of Chief Akiwenzie and Darlene Johnston, our land claims researcher, at the burial ground site was of great assistance. The Chief was the voice of the community when talking to officials and the media. Darlene was able to present well-researched fact to clear away the misinformation that was circulating in the non-Native community and hangs like a fog around any confrontation, but especially ones involving Native peoples.

Patience, research and open communications are vital. During confrontations over resources or land claims, there are usually tough constitutional or historical questions to sort out and the research will take some time. And, if the research has been done, it takes time for police, officials, the media and the public to digest the information the First Nations have on the matter.

Both sides must not only keep order, they must be seen to be keeping it. It is sometimes difficult for non-Natives to understand that order is being kept when a confrontation drags over several days, weeks or even months. All parties, but especially the police and non-Native politicians must be prepared to maintain a calm, optimistic tone in the media

and to emphasize the progress being made in negotiations. It should be remembered that no violence is progress.

List of things law enforcement should have in place:

- Patience.
- Cool, calm commanders with an appreciation for the complexity of Native rights and claims and the authority to use discretion and a talent for striking up relationships with leaders on both sides of the dispute.
- Frequent briefings with officers on the line to ensure they have the same understanding.
- Willingness to bring together the right people from both sides of the dispute.
- Open access to media, but a low profile themselves.
- Open communications (no jamming of cell phones or Internet access).
- Open communications between First Nations police forces (if any) and municipal or provincial forces.
- Unobtrusive and continuing presence at the site to ensure the peace is kept. No unnecessary shows of force.
- Frequent discussions with leadership on both sides, especially with the peacekeepers in the Native camp. Quietly pressing for peaceful resolution.
- A plan for the quick deployment of backup and medical services.

If a dispute takes place over resources and over a long period of time, as it has over the assertion of our fishing rights, the qualities we have been describing are just as essential:

- Leaders on both sides must be calm and reassuring.
- They must strive, in good faith, to reach long-term agreements on disputed issues.
- Reports of "violations" of laws or protocols must be substantiated before reacting to them.
- Protocols for dealing with infractions and the crises that always arise must be developed and followed.
- Clear and timely lines of communications with all levels on both sides must be kept open.
- Those who would stir up trouble or divisiveness must be dealt with.
- Order must be maintained and seen to be maintained by both sides, as we did with our own by-laws. Just because Native fishing boats are not being boarded by MNR Conservation Officers does not mean we are not regulating our fishermen.

c) The Need for Legislative Reform

This paper deals primarily with our experiences of conflict with our non-Native neighbours and the Ontario and Canadian governments and what we have learned from those experiences. Most of our recommendations (below) deal with process—how the relationship between Natives and non-Natives can be repaired by acts of good faith and political will. That does not mean, however, there is no need for legislative reform. In

fact, that is required, otherwise First Nations will be left to the mercy of the whims of the government of the day. And that was one of the causes for the confrontations of 1995.[179]

In the Criminal Law to deal with Hate

The impacts on Nawash of violent racist actions in the summer of 1995 are recounted above. So is the background, which contributed to an atmosphere in which these specific acts became thinkable and do-able. This background included a sustained campaign by the OFAH and others. Although these organizations maintained they were opposing the policies of governments trying to accommodate aboriginal and treaty rights, the impact, intended or not, was to interfere with the recognition of our constitutional rights. This campaign and related events included misinformation, inflammatory statements, and comments that we believe encouraged the public to view Aboriginal people with ridicule and contempt. And, in that atmosphere, some felt it permissible to violently attack our people and their property.

We consider those attacks to be hate crimes, although they certainly weren't investigated (if they were investigated at all) as such. If those who said they opposed, not our rights to fish but government policy, why did they steal our nets and burn Francis Nadjiwon's boat? Why didn't they vandalize the local MNR office? And why did they attack our Band members and not MNR staff? No, we believe their so-called opposition to government policy was a smoke-screen for hate.

In light of the harm that flowed from the atmosphere of racism that had been created, the Crown should consider whether the civil or criminal law should address the actions which helped to create such an atmosphere. And if it doesn't, whether it should. There are a number of avenues to consider.

The hate propaganda sections (ss. 318-20) of the *Criminal Code* are perhaps the most obvious place to start, since they are aimed at the kind of harm which Nawash members experienced. However, these sections have a high threshold: s. 318 applies only to promoting genocide; s. 319(1) only applies to inciting hatred in a public place, where this incitement is likely to lead to a breach of the peace; and s. 318(2) requires that hatred be promoted "wilfully", which means either that a person intends to promote hatred or foresees this result as virtually certain.

Being reckless as to whether one is encouraging hatred or not is not sufficient to come within the actions forbidden by section 319(2) [180]. Given this, convictions under this section are rare. The mischief outlined above might not come under this prohibition—defendants would only need to demonstrate that their purpose was to change law and government policy so that Aboriginal rights would not be recognized, not to encourage hatred of Aboriginal people. Nawash asked a member of the OPP hate crimes unit about

[179] This rest of this section was contributed by Roger Townshend, of Olthius, Kleer, Townshend, Nawash counsel, Memo to David McLaren, October 6, 2005.
[180] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 774-5.

whether some of the more egregious examples of the OFAH's propaganda met this threshold, and was told they did not.[181]

There are also criminal prohibitions concerning defamatory libel.[182] They, however, require that the reputation of "any person" be likely to be injured. This individual focus makes it hard to apply these sections in cases where an entire group is libelled, since it could be argued by the defence that the reputation of any specific individual person was not likely to be harmed.[183]

There is a "false news" prohibition in s. 181 of the *Criminal Code*, which would seem to apply to some of the mischief noted above, but this section was declared unconstitutional in *R. v. Zundel*.[184]

Human rights legislation is intended to combat certain expressions of racism, but it applies to discrimination in contexts such as the provision of goods, services, or facilities, in accommodation, and in employment. It does not seem to apply to political statements made at large, as in the mischief noted above.

There are also civil causes of action in defamation and injurious falsehood. They suffer the difficulty of an individual focus which makes them hard to apply to cases of statements made about groups[185], and also require considerable resources for a plaintiff to prosecute.

Any kind of legislative prohibition aimed at statements which are made raises issues about freedom of expression. The *Charter* guarantees freedom of expression independently of the content of the expression, and so applies to false statements and even hate speech. Any restriction on expression must be justified under s. 1 of the *Charter*.

The hate propaganda sections of the *Criminal Code* were found to be so justified (by a closely split decision)[186], as were the defamatory libel provisions[187]. The civil tort of defamation was also analyzed with a view to *Charter* values (although the *Charter* did not apply directly), and was found to be consistent.[188] However, the false news provision of the *Criminal Code* was struck down as an unjustified infringement of freedom of

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[181] Personal correspondence between David McLaren and Pat McVicar, OPP Hate Crimes Unit, April 15, 1992.
[182] *Criminal Code*, ss. 297-317.
[183] See *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 723.
[184] [1992] 2 S.C.R. 731. The case started in the courts in the early 1980s and the Supreme Court's decision was delivered in late August 1992 (Warren Kinsella, *Web of Hate*, Harper Collins, 1994, p255). The OFAH campaign began in earnest in 1991.
[185] Generally an ordinary reader would have to identify the plaintiff as a subject of the libel – if the group is large and the allegations general this is considered unlikely. See L.D. Rainaldi, ed., *Remedies in Tort*, (Toronto: Carswell, 1987, updates to 2005 rel 5), Chapter 6, § 73-4 and § 245.
[186] *R. v. Keegstra*, [1990] 3 S.C.R. 697.
[187] *R. v. Lucas*, [1998] 1 S.C.R. 439.
[188] *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130.

expression.[189] The false news provisions were struck down because they were thought to be too broad—had they instead required the likelihood of injury to fundamental constitutional values, the analysis might have been different.[190]

There are also more practical limitations of what the criminal law can do. It is possible that criminal prosecution could bring additional publicity to hateful statements, causing further harm, and perhaps even creating sympathy for persons making such statements. This was indeed part of the public debate about enacting the present hate propaganda laws, but the harm of unchecked racism was thought to be greater.[191]

There are also issues of a "chilling" effect on politically valuable speech if too broad a provision were enacted. It would not be appropriate or desirable, for example, to discourage speech advocating constitutional change.

Nevertheless, we feel the Criminal Code should be amended, in ways we recommend below in the section, "Recommendations from the Chippewas of Nawash Unceded First Nation" (no. 15).

In the *Cemeteries Act* to Accommodate Native "Burials"

At the Nawash Community Forum, the Inquiry heard of the limitations of the *Cemeteries Act (Revised)* in dealing with Aboriginal burial sites in an effective and culturally appropriate way. New legislation regarding cemeteries and burials has been enacted, but is not yet in force.[192] However, this would make no change to the existing burial site provisions.

The problems identified by Nawash are as follows:

1. The Registrar of Cemeteries applies a very narrow interpretation of the trigger for the burial site provisions. Apparently human remains must be physically uncovered before the Registrar is willing to act.
    a. The result of this is that burial sites have to be disturbed before they can be accorded any protection under the *Cemeteries Act*. Such disturbance is culturally offensive to the Chippewas of Nawash.
    b. It is not logical that human remains must be disturbed before any protection can be given to the site, or even any further investigation done. It should be possible to demonstrate from other evidence that a particular site contains burials without physically disturbing the burials. For example, consider the following:
        i. There may be documentary historical evidence of burial sites.

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[189] *R. v. Zundel*, [1992] 2 S.C.R. 731.
[190] See *R. v. Zundel*, [1992] 2 S.C.R. 731 at 771 per McLachlin J. and at 806 per Cory and Iacobucci JJ (dissenting).
[191] See the discussion in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 768-70 and 852-4.
[192] *Funeral, Burial and Cremation Services Act*, S.O. 2002, c. 33.

ii. There may be archaeological evidence short of finding actual human remains. For example, in the context of a European-style grave, consider an archaeological report based on a near-surface excavation, that there were undisturbed grave shafts. In an Aboriginal context, consider a finding that a cultural feature is very similar to a nearby feature that is known to be a burial.

iii. There may be traditional knowledge of burial sites in a location.

iv. It may be possible to use non-invasive means of detection, ground sonar for example.

c. Without either the consent of the landowner or an order for an investigation by the Registrar, a suspected burial cannot even be investigated on the ground. The Registrar will not order an investigation until human remains are uncovered, so a landowner can block any investigation. This is so even if such an investigation could be done without disturbance to the landowner's property, such as by the use of ground-penetrating sonar. In fact, apparently a landowner could even pave over a suspected but unproven burial site as long as in doing so, he or she does not disturb a burial.

d. It is questionable whether an interpretation as narrow as that used by the Registrar is required by the *Act*, the wording of which is less categorical than the above interpretations. Nonetheless, the little case law that does exist interpreting the relevant legislative provisions suggests a fairly narrow interpretation.[193] In any event, it is suggested that legislative reform is required if only to specifically mandate a broader interpretation.

2. When a burial site is confirmed to the satisfaction of the Registrar, it is treated in isolation from its context, and only the very immediate location receives protection. This cannot accommodate situations where suspected, but not confirmed, burials are located nearby, or where a larger site is considered a sacred site more broadly.
3. The procedure of the police and coroner being the first to investigate burials can result in the loss of evidence of cultural context, since these persons often lack the expertise required in this regard.
4. The interpretation of burial site as requiring an in-ground burial does not account for cultural practices such as tree or scaffold "burials"—human remains may end up on the ground, and this may have been intended as their resting place, but the site cannot be treated as a burial site.

In the *Fish and Wildlife Conservation Act, 1997*

The Inquiry has heard much about attitudes and practices of MNR staff which lead to confrontations with Aboriginal people in relation to their rights. Paradoxically, although Aboriginal rights do have constitutional protection, the fact that the *Fish and Wildlife Conservation Act, 1997* makes no reference at all to Aboriginal rights, seems to cause

[193] See *Poplar Point Ojibway Nation v. Ontario*, [1993] O.J. 601 (Div. Ct.)

MNR staff to treat Aboriginal rights as an afterthought, and not part of their core mandate.[194]

In fact, the Supreme Court of Canada has stated that it is not sufficient to require only that such an Act be administered in a way consistent with treaty and Aboriginal rights, if it makes the exercise of treaty or Aboriginal rights subject to a pure act of discretion in administering the legislation. The Act or regulations themselves must contain an accommodation for Aboriginal rights:

> 53 In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1078-79; *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 1010-11; and *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.
>
> 54 I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982.* In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[195]

The *Fish and Wildlife Conservation Act, 1997* contains no reference to Aboriginal or treaty rights whatsoever. On its face, it treats Aboriginal people as having no more rights than other citizens (and in fact, as having lesser rights than farmers and trappers, who enjoy special exemptions from the licencing provisions of the *Act.*[196]) As such, the *Act* on its face requires Aboriginal people to obtain provincial licences. These may or may not be available in practice since the demand for some licences vastly exceeds the supply. If licences are available, they often have limitations and conditions (closed seasons, bag limits) included which also do not respect Aboriginal and treaty rights.

It is only discretion in enforcement of the *Act* that prevents confrontations over Aboriginal rights from happening on a daily basis. The Supreme Court has said that such discretion is not enough. In enacting the *Fish and Wildlife Conservation Act, 1997* in its

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[194] A perception borne out by those Natives who attend courses geared for Conservation Officers at Sir Stanford Fleming College (see section on "Potential for Future Conflict: Around Resources").
[195] *R.* v. *Adams*, [1996] 3 S.C.R. 101 at para 53-4.
[196] *Fish and Wildlife Conservation Act, 1997*, S.O. 1997 c. 41, s. 6(2) and 6(3).

present form, Ontario has flouted the constitution, as interpreted by the Supreme Court of Canada.

Besides being required by the constitution, changing legislation to explicitly accommodate treaty and Aboriginal rights might begin to change the culture of marginalizing Aboriginal rights now present among MNR staff.

In Police Complaints Procedures

The Inquiry has also heard of an incident of lack of response by Owen Sound city police to violence directed at certain Nawash Band members. In addition, neither the OPP nor MNR Conservation Officers took action to investigate the theft of Nawash fishermen's nets from the waters of Georgian Bay and Lake Huron or even to protect them. Although these offences took place in 1995, it clearly remains a serious bone of contention for Nawash members in general, not to mention the individuals involved.

Under the system now in place, and which was in place for most of the time between 1995 and the present, the procedure available for complaints about police conduct was to complain to the police, and such complaints normally had to be made within six months of the event in question.[197]

In the context of the Owen Sound brawl in which three young Nawash men were beaten and stabbed, it is very understandable that those persons involved did not choose to take this complaint route. In addition, the victims were seeking the cooperation of police in bringing their attackers to justice, so this was a further discouragement to lodging a formal complaint.

Nevertheless, the memories of this event linger and continue to be a sore point with many members of Nawash, who felt and feel, with considerable justification, that there is no reasonable forum for resolution of the matter.

Former Chief Justice LeSage earlier this year released a report on the police complaint system in Ontario[198], and he recommended "significant systemic changes".[199] These changes included civilian intake and oversight of complaints about the police, and a relaxation of the six-month limitation. Our recommendation 17, below, encourages these changes.

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[197] *Police Services Act,* R.S.O. 1990, c. P.15 as amended, ss. 56-80.
[198] Hon. Patrick J. LeSage, Report on the Police Complaints System in Ontario, April 22, 2005, at www.attorneygeneral.jus.gov.on.ca/English/about/pubs/LeSage/en-fullreport.pdf.
[199] Ibid, at p. 58.

7. The Importance of Allies

First Nations need allies, especially when they feel under siege. It was especially important in Wisconsin during the fisheries wars there, particularly during the summer of 1989 when Anishinaabek fishermen were being harassed, their lives threatened and their property vandalized.[200]

For us, it was helpful to know that there were some people in Ontario who understood what we were trying to do and were sympathetic. The odd letter to the editor or opinion piece not only gave us a bit of a boost but it showed government that not everyone agreed with the noisy backlash lobby.

Occasionally someone in our network received a response from a government official that was useful to us. For example, in a letter to Glennys Hughes of the United Church the Minister of Natural Resources, Bud Wildman, wrote: "The Ontario Government does not contest the Native claim to an aboriginal right to a fishery, nor the Native claim to an aboriginal right to fish commercially." The letter was used at the *Jones-Nadjiwon* trial to show the government had not extinguished our rights.

It is very difficult to maintain the network of supporters, for the more credible the supporting organization, the busier they are with their own work. The churches, who have been traditional allies of First Nations in recent resource rights and land claims struggles, have an infrastructure they can lend to First Nations to develop and maintain networks. However, they are not wealthy organizations and many have been compromised by their involvement with residential schools.

Environmental Non-Government Organizations (ENGOs) are important, especially in disputes over natural resources, to convey the message that First Nations are not going to destroy fisheries or forests. However, some ENGOs have made common cause with First Nations only to desert them when First Nations began to assert their rights to harvest natural resources. In addition, ENGOs tend to follow their own environmental agendas. Only a few (for example the Wildlands League, the Coalition On the Niagara Escarpment in Ontario) have aboriginal policies or agreements with First Nations setting out how they will work with First Nations. Too many ENGOs espouse First Nations' environmental values in their literature but do not seek partnerships with them or amend their own agendas to accommodate First Nations' aspirations.

Unions and other social action groups have access to international networks that can help bring pressure on the government. However Canada and Ontario seem to be relatively immune to such pressure and these Non-Government Groups are often more focused on social justice issues in other countries than in Canada.

With all of the qualifications we've mentioned here, allies can be most helpful, although largely it's the work of dedicated individuals within their organizations who do the most good. Such individuals are needed when a specific expertise is required. It was relatively

[200] Walt Bresette, in *Walleye Warriors*, New Society Publishers, pp 108-112, 1994.

easy for us to find summary, *pro bono* advice and help on legal and environmental matters. Locally, a support group of individuals is perhaps the most useful because they can help blunt the impact of those who oppose our rights and claims. In rural areas, credible and outspoken individuals will have a greater effect than in urban areas.

We hired an anti-racism coordinator, Ojibway author and educator Lenore Keeshig-Tobias, in 1992 and began to build up our network of supporters and to research and re-define racism. We took draft resolutions to the Hamilton Conference of the United Church and the Ontario NDP convention that pledged the support of those groups. We struck up a relationship with the Canadian Auto Workers through Peter Bellefeuille and Ken Luckhardt and we were frequently invited to speak at the CAW Educational Centre in Port Elgin. We had the active support of the United Church of Canada, the Friends (Quaker, especially under Phyllis Fischer), certain individuals in the Catholic Church (Diane Baltaz in particular), and local ministers. The Mennonite Central Committee has had a long relationship with our First Nation and, under Rick Bauman, assisted the Bands in our protest fish buys and in providing forums for us to reach people all over southwest Ontario.

Any list of our allies must include Ethel Fuhr, the Wiarton resident and member of Project North (precursor to the ecumenical Aboriginal Rights Coalition, now called KAIROS). Ethel was a staunch ally for years, helping to organize the Sacred Assemblies, holding events in Wiarton that brought us together with our non-Native neighbours and speaking up, often at the expense of relations with her own neighbours.

A group of citizens in Owen Sound, calling themselves the Neighbours of Nawash organized to offer their support in the mid-1990s. Linda Thomson, Marilyn Struthers, Bill Proud, and Hanns Skoutajan were the core members of the Neighbours. They organized forums in the non-Native community so we could present our view of things. They were front and centre during the demonstration at the Owen Sound Farmers Market in 1995 and they tried show solidarity with our fishermen who lost nets and equipment that summer by raising funds to alleviate the hardship our fishermen were suffering.

The Neighbours helped secure a trial for the young men who stabbed our youth in Owen Sound by protesting the Crown's decision not to prosecute. Their work was much appreciated by our community. At the Nawash Community Forum in September 2005 Band members took the opportunity to thank Marilyn Struthers and remember Linda Thomson who had passed away, but her daughter Morgan attended the Forum.

As Marilyn Struthers told the Ipperwash Inquiry at the Nawash Community Forum on September 8, 2005:

> When we formed the Neighbours of Nawash, we didn't know what else to do. If we didn't do something out loud then we would be understood to be the same as the anglers. There are lots of people who do not think themselves the same as the anglers. …
>
> Bill, Linda, Hanns and I started to think of how we should react [to the thefts and vandalism in 1995]. In a rural community, when a barn burns, the community responds. Same with a fishing boat. It was almost unbearable to do nothing. We went to bank

> managers to ask them if they would open the fund. We were denied by several banks because they were afraid they would end up with dead fish on their steps. There was a huge amount of intimidation from Sydenham Sportsmen's Association at that time. People who did put money in did so under pseudonyms. There was a pervasive feeling of fear, even among whites.

For its part, the Mennonite Central Committee was instrumental in leading a "Listening Team" consisting of biologists, church people, a historian and a lawyer from the Law Union of Ontario. The group heard from us, from local Ministry of Natural Resources people and from sportsmen's groups. Its recommendations were widely publicized in the region's media.[201] The Team made several recommendations that would have (if they had been implemented) helped alleviate tensions and lay the groundwork for resolution.

Briefly stated they are:

1. Negotiations between the Saugeen Ojibway Nations and the MNR should not include third parties.
2. The Department of Fisheries and Oceans should be a party to negotiations.
3. One of the goals of negotiations should be comanagement of the fisheries.
4. A public inquiry should be called into the attacks against Native property and persons in 1995.
5. All schools, churches and the MNR recognize that racial tensions are at the heart of the fishing dispute and therefore sponsor workshops and public education to foster understanding; the churches in the area should be a vehicle for this.
6. An Environmental Assessment should be conducted on the impact of the Native and recreational harvests and that it should include an assessment of current stocking practices, including the stocking of pacific coast salmonids.
7. That the corporate sponsors of the Salmon Spectacular fishing derby (especially the media sponsors, CFOS and the *Sun Times*) withdraw their support as long as the derby's publicity "makes use of anti-Native propaganda."
8. That neighbouring communities explore, with Nawash, the possibility of diversifying the local economy away from a concentration on fishing and tourism.
9. That everyone refrain from using inflammatory language in the media.

We welcomed the support and advice of scientists such as Dr. Henry Regier, Professor of Biology (now Emeritus) at the University of Waterloo and Dr. Mart Gross, professor of Zoology at the University of Toronto. Support from the scientific community was enhanced greatly when we hired Dr. Stephen Crawford from the University of Guelph in 1994.

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[201] "Report of the Fisheries Listening Team Visit to the communities of Wiarton, Cape Croker and Owen Sound," Sept 5-6, 1996. Members were: Rick Bauman, Mennonite Central Committee; Dr. Henry Regier Biologist, Prof. Emeritus U of T; Dr. Don Jackson, Freshwater Ecologist, U of T; Dr. Reginald Good, historian with MCC; John Asling, Hamilton Conference United Church; Katharine Edmonstone, President Hamilton Conference United Church; Phyllis Fischer, Canadian Friends; Rob Labossier, Law Union of Ontario; Diane Baltaz, Hamilton Diocese Roman Catholic Church.

Two "Sacred Assemblies" were organized by Jemelda Johnston and others in the community in the early and mid-1990s that brought to Nawash high-profile people such as Elijah Harper and Daniel Berrigan.[202]

In the Environmental non-Government Community, we sought and received active support from the Canadian Environmental Law Association, the Sierra Legal Defence Fund and Greenpeace. Their support was helpful in showing that First Nations' fishing was not endangering conservation.

Peace Brigades International (PBI) visited us in 1992 and brought a small degree of international profile to the issue. PBI people attended and reported on the Fisheries Conference we held in 1995.

The network we built was kept informed by phone, fax and publication. We began publishing *Dibaudjimoh Nawash*, first as a fax that was sent to key supporters, then as a 6-8 page printed newsletter. When resources for this kind of work became scarce in the mid and late 1990s, we switched to the Internet. Regular updates of *Dibaudjimoh* on the Web were conveyed to an email list of over 1000 supporters, politicians and key media people.

One of the more important things we accomplished with our network was a re-examination of what racism against Native peoples looks like. The current definitions did not reflect the manner and degree to which Native peoples experienced racism. In other words, anti-Semitism and racism against African-Canadians and other racial minorities are more readily identifiable that the racism against First Nations peoples.

The group came up with a new definition of racism that recognizes much of the hate directed at Native peoples seems to revolve around our rights and land claims:

> Racism is any communication, action or course of conduct, whether intentional or unintentional, which denies recognition, benefits, rights of access or otherwise abrogates or derogates from the constitutionally recognized rights and freedoms of any person or community on the basis of their membership or perceived membership in a racial group. The fostering and promoting of uniform standards, common rules and same treatment of people who are not the same constitute racism where the specificity of the individual or community is not taken into consideration. The public dissemination of any communication or statement which insults a racial, ethnic or cultural community or which exposes them to hatred, contempt or ridicule also constitutes racism.[203]

We feel that this definition should be adopted by organizations whose mandate it is to address occurrences of racial hatred and discrimination.

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[202] For a brief report of the second Assembly see, "Mnaadenmowin Sacred Assembly, Sept 19-21, 1997", http://www.bmts.com/~dibaudjimoh/page37.html, 2 August 2005.

[203] Saugeen Ojibway Nations, "Toward a definition of racism", September 12, 1993. The whole paper, plus a checklist for racism appears in Appendix E.

8. The *Impotence* of Official Institutions for Redress

It has been our experience that the official avenues of redress were not very helpful. Although the Ontario Human Rights Commission helped to reach an accommodation with the hateful editorial in the *Markdale Standard*, it was less well equipped to deal with a much more complex complaint against the Ministry of Natural Resources.

In March 1998 we prepared a complaint for the Ontario Human Rights Commission regarding the high-handed manner with which we were being treated by the Minister of Natural Resources. However, the Commission was slow to process the complaint and, frankly, had a hard time trying to fit our complaint regarding collective rights into their mandate of dealing with individual rights. For them we were a bit of a round peg in a square hole. To make matters worse, it was clear their staff did not understand First Nations or their rights and claims. As it happened, the beginning of mediated negotiations with Judge Stephen Hunter held promise, and we did not want anything to interfere with that. So we shelved the complaint.

The Canadian Human Rights Commission was not helpful at all. We sent the Commission our demands for an inquiry into the hateful events of the summer of 1995 along with copious background information. However in spite of statements by the head of the Commission, Max Yalden, about the "lamentable" treatment of Native people in general,[204] the Commission did not seem ready or able to pursue our specific complaints or support our call for an inquiry.

We found the Ombudsman's office to be a paper tiger. We spent some time talking with staff there and forwarding much of the same documentation we had sent to the Canadian Human Rights Commission and the Ontario Human Rights Commission. We believe the Ombudsman (at that time, Roberta Jamieson, from Six Nations) was disturbed by what we sent her, but she seemed unable to hold the MNR to account. This was probably due to the specific and narrow mandate of her office.

The Canadian Race Relations Foundation was also sympathetic and they had made Native issues a priority about the time we approached them. Although they had done a number of good reports on Native peoples' access to Canadian society, they seemed unappreciative of the problems First Nations were facing regarding their rights and claims and the depth of the backlash against us.

The usual political avenues (through the area MPP and MP) were completely closed. The MPP for Grey-Owen Sound had clearly sided with the sportsmen and the Bruce-Huron MPP was in the same party (Progressive Conservative). The MP for the area (a Liberal) had joined his colleagues in Ottawa in viewing the dispute as a Provincial matter.

Freedom of Information legislation is, for us, a kind of forum for redress because it may be the only way we can discover the real intent and actions of the Crown and the impact

[204] "Native treatment a disgrace says report [of the Canadian Human Rights Commission]," Southam News in *Owen Sound Sun Times*, March 18, 1994.

of third parties on our rights and claims. However, changes in how the government deals with these requests, particularly in the charging of fees and the recovery of costs, are making it more difficult for First Nations to access information vital to their claims and rights. Transparency between the Crown and First Nations at all times, but especially during negotiations, is vital to establish a trusting relationship. Freedom of Information legislation should be amended to permit a broader range of requests from First Nations, including enforcement information, when the request is relevant to First Nations' claims and rights. There should be no charges levied against First Nations for this information.

In short, there was, and still is, no official forum in which we can be sure our complaints will be heard, understood and effectively acted upon.

And yet there is a desperate need for an effective forum, especially in rural Ontario. In our case, one of our allies, the Neighbours of Nawash, did what they could to deal with the hateful backlash of the mid 1990s. This is important work, for if successful, it relieves much pressure from First Nations who already have enough to deal with when they are asserting rights and claims. Marilyn Struthers offered this insight to the Ipperwash Inquiry at the Nawash Forum about the dynamics of small communities:

> In our community there is an informal structure of relationships that work alongside the "official" ones as defined by peoples' jobs. When the Sydenham Sportsmen's Association marched on the market, the MPP was there and a lot of others who were businessmen in Owen Sound.
>
> The solution isn't really in this room, because the problem isn't in this room. The Inquiry has an ability to speak to this in its report. It mustn't be that the police can look away because they can borrow power from the MPP or those who commit hateful acts can take comfort because the local newspaper shows support.

D. RECOMMENDATIONS

1. From other Inquiries

The Donald Marshall Inquiry in Nova Scotia and the Alberta Justice Inquiry focussed on justice system issues. So did the Manitoba Aboriginal Justice Inquiry and the Stonechild Inquiry in Saskatchewan. However, the Manitoba and Donald Marshall Inquiries also made some recommendations pertinent to our situation. So did the Saskatchewan Report of the Task Force on Multiculturalism (1989), the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform (2004), and, of course the Royal Commission on Aboriginal Peoples, whose recommendations, if implemented, would probably mean the end of expensive Inquiries.

a) The Manitoba Aboriginal Justice Inquiry[205]

The following is a selection of recommendations most relevant to our experience.

Land Rights

1) A moratorium be placed on major natural resource development projects unless, and until, agreements or treaties are reached with the Aboriginal people in the region who might be negatively affected by such projects in order to respect their Aboriginal or treaty rights in the territory concerned.
2) The provincial government develop a policy that respects the desire of Aboriginal people to retain a role in the management and conservation of their traditional territory.

Natural Resources

3) The federal government amend the Fisheries Act and the Migratory Birds Convention Act to clarify that Aboriginal and treaty rights prevail in cases of conflict.
4) The Province, if it wishes to exercise any influence over the regulation of this resource [wild rice] off-reserves, negotiate co-management agreements with the Aboriginal peoples concerned.
5) The provincial government pursue the development of co-management agreements with the First Nations and Métis peoples regarding timber resources off reserve in the Aboriginal people's traditional territory.
6) In keeping with provincial fiduciary obligations and to assist in the economic advancement of First Nations, the Province of Manitoba formally renounce its half interest in minerals within Indian reserves.

Statutes in Conflict with Aboriginal and Treaty Rights

- The government of Manitoba invite the Assembly of Manitoba Chiefs and the Manitoba Métis Federation to designate representatives to work with senior provincial officials to review all relevant legislation that may conflict with Aboriginal and treaty rights. This review should identify specific areas of conflict and propose

[205] From, Hamilton, A.C., and Sinclair, C.M. (1991). Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg, 1991, Appendix I: Recommendations.

concrete solutions and statutory amendments. The Manitoba Aboriginal Justice Commission that we propose should be utilized to assist in this process if any of the parties wish.

- The federal and provincial governments establish a process to review all proposed legislation for its potential effect on the rights of Aboriginal peoples.

b) The Report of the Task Force on Multiculturalism in Saskatchewan, 1989[206]

In 1994, the Saskatchewan government set up a Committee on Multiculturalism to help implement the recommendations from the Task Force on Multiculturalism. However, in 2004, the Saskatchewan Commission on First Nations and Métis peoples and Justice Reform said that, in spite of the race and cultural relations policies of the Province and the work of the Committee, racism was still prevalent.

Here are some of the pertinent recommendations from the 1989 Task Force.

6.1 that the multicultural policy of Saskatchewan recognize the Aboriginal peoples as the original multicultural society in this province.

6.2 that government departments and agencies consult with the Aboriginal community when developing programs that will affect this community.

6.4 that the Department of Education [now Saskatchewan Learning] provide adequate financial and human resources for the development and production of materials suitable for use in northern schools.

6.5 that the Aboriginal community be encouraged to promote a positive image of its people by documenting and disseminating information on its successes and contribution to the development of Saskatchewan.

9.1 that the Government of Saskatchewan recognize the importance of meaningful employment to all individuals and vigorously support employment enhancing programs.

10.1 that multicultural components be integrated into training programs for media personnel.

14.1 that provincial and local governments ensure that the multicultural diversity within their jurisdiction be reflected in their appointments to boards, commissions and committees.

c) Saskatchewan Commission on First Nations and Métis peoples and Justice Reform 2004

Policing

Recommendation 5.1

This Commission recommends the implementation of a strategy to eliminate racism in policing by the Saskatchewan Police Commission. This strategy shall contain:

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[206] "Eliminating Racism, Creating Healthy Relationships in Saskatchewan", in Report of the Commission on First Nations and Métis peoples and Justice Reform, Chapter 7, Saskatchewan, 2004

5.1.1 Police recruitment screening strategies specifically to prevent candidates with racist views on ethnic or religious groups from being offered employment.
5.1.2 A complaints process that requires allegations of racist language or behaviour against individual officers to be reported to the officers' immediate supervisor and the chief of police.
5.1.3 An intensive remedial training program for police officers who exhibit racist attitudes. This program must be successfully completed to the satisfaction of the officer's supervising officer and the program facilitator.
5.1.4 The tools which would allow the immediate supervisor or chiefs of police to respond immediately to allegations of racism.
5.1.5 A pro-active First Nation and Métis candidate recruitment strategy.
5.1.6 Employment assistance counseling for First Nations and Métis candidates that will assist them with the pressures of working within a police service that has traditionally been dominated by non-Aboriginal people.

Recommendation 5.2

This Commission recommends that all police services invite members of the First Nations and Métis communities to evaluate the effectiveness of existing cultural awareness programs and implement changes as required.

Recommendation 5.3

5.3.1 This Commission recommends that urban police services have a First Nations and Métis staffing component that is equal in percentage to the respective populations.
5.3.2 This Commission recommends to the RCMP that Community Police Boards and Police Management Boards participate in the selection, posting and orientation of RCMP members to detachments that serve their community.

Recommendation 5.4

This Commission recommends that the Government of Saskatchewan, in view of the fact that it invests in community policing initiatives, conduct province wide surveys every two years to monitor the degree of public satisfaction regarding community policing within all communities.

Recommendation 5.5.3

This Commission recommends that police officers working in First Nations and Métis communities, including urban neighbourhoods with high First Nations and Métis populations, be required to meet regularly with Elders and other community leaders in order to learn more about the culture of the people they are working with.

Recommendation 5.6

This Commission recommends that all police services be required to prepare reports to justify any decisions that do not divert matters extra-judicially.

Recommendation 5.9

5.9.1 This Commission recommends the increased use of video recording equipment by RCMP and municipal police services.

5.9.2 This Commission recommends that an Aboriginal liaison worker or volunteer individual be available for First Nations and Métis people upon their arrival at a police station or detachment office.

Recommendation 5.10

This Commission recommends that representatives of the Federation of Saskatchewan Indian Nations, Métis Nation-Saskatchewan, governments of Canada and Saskatchewan work together to develop an independent complaints investigation agency that will meet the needs of First Nations, Métis and non-Aboriginal people with the objective of having such an agency in place by April 1, 2005.

Recommendation 5.11

This Commission recommends that the Implementation Commissioner monitor and oversee the establishment of a complaints agency that will reflect and respect the spirit and intent of the existing Special Investigations Unit.

Eliminating Racism

Recommendation 7.1

This Commission endorses the report *Multiculturalism in Saskatchewan: Report to Ministers' Committee on Multiculturalism*. This Commission recommends that the Executive Director of Saskatchewan Culture and Heritage, report in writing to the Implementation Commissioner and shall clearly indicate progress made in carrying through the recommendations put forward in this Multiculturalism report.

Recommendation 7.2

This Commission recommends that the governments of Canada and Saskatchewan, specifically Indian and Northern Affairs Canada and Saskatchewan Government Relations and Aboriginal Affairs, in consultation with representatives from the Federation of Saskatchewan Indian Nations and Métis Nation – Saskatchewan:

a) create a directory for Saskatchewan of First Nations and Métis people who are recognized and respected as trainers/facilitators on cultural awareness and the promotion of healthy relationships between the First Nations and Métis cultures and the non-Aboriginal population;

b) that the directory be made available to organizations, government departments, and members of the justice system wishing to provide culture awareness training to their employees; and,

c) that the list be reviewed and updated on an annual basis.

Recommendation 7.3

This Commission recommends that media outlets in Saskatchewan create an external community editorial board, including First Nations and Métis representatives, to review stories in the media and provide feedback to the producers and editors of stories on the portrayal of First Nations and Métis people.

Recommendation 7.4

This Commission recommends that the Department of Culture, Youth and Recreation take a lead role and work with other relevant government departments, agencies, and non-governmental organizations, along with representation from the First Nations and Métis communities, to coordinate and host an anti-racism conference to coincide with March 21, 2005, the annual day on which Saskatchewan supports the Elimination of Racism and the centenary of Saskatchewan. This conference should be offered by videoconference, wherever possible, to ensure northern communities can participate.

Recommendation 7.5

This Commission recommends that the Saskatchewan Association of Rural Municipalities and Saskatchewan Urban Municipalities Association, along with representatives from the Government of Saskatchewan, Federation of Saskatchewan Indian Nations, and Métis Nation - Saskatchewan establish a committee to coordinate anti-racism activities in the year 2005.

Recommendation 7.6

This Commission recommends that the Government of Saskatchewan design and implement a media campaign which includes the use of public service announcements, as much as possible, September 2005, with the assistance of First Nations and Métis people, to achieve the objectives below:

- provide all citizens of Saskatchewan an opportunity to reflect on the contributions of First Nations and Métis peoples over the last 100 years of this provinces' development;
- establish a broad-based understanding of how to build and maintain constructive and positive relationships among First Nations, Métis and non-Aboriginal people; and
- assist individuals and communities to identify and eliminate inequities and barriers based on racial and cultural differences.
- This public education strategy must go beyond 2005 and must include an evaluation component.

Recommendation 7.7

This Commission recommends that **every person**, and especially those in leadership positions, make a commitment to eliminate racism where it is present in day-to-day life.

d) Royal Commission on Aboriginal Peoples

The Commissioners are aware of the fact that information heard in the Dialogues and the presentations bears a marked similarity to the information heard by many other Commissions in the past. This pattern has not escaped the attention of either the participants or the Commissioners; many people have said, "Don't just study us again." This Commission sees that the implementation of the recommendations from the Royal

> Commission on Aboriginal Peoples (RCAP) plays a significant role in the development of a First Nations and Métis voice in the Canadian profile.[207]

The main recommendation from the Chippewas of Nawash Unceded First Nation, as it has been from nearly every inquiry, commission and task force since the RCAP handed in its final report, is to implement the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). Following are recommendations pertinent to the matters discussed in "Under Siege."

Access to Resources

The Commissioners clearly felt that expanding the land base of First Nations and their access to resources was a key to meeting Native peoples' needs and to reconciliation between Natives and Canadians.

2.4.2

Federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.

2.4.3

The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have
(a) exclusive or preferential access to certain renewable and non-renewable resources, including water, or to a guaranteed share of them;
(b) a guaranteed share of the revenues flowing from resources development; and
(c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects (for example, negotiated community benefits packages and rights of first refusal).

2.4.4

Aboriginal nations, through negotiation, receive, in addition to land, financial transfers, calculated on the basis of two criteria:
(a) developmental needs (capital to help the nation meet its future needs, especially relating to community and economic development); and
(b) compensation (partial restitution for past and present exploitation of the nation's traditional territory, including removal of resources as well as disruption of Aboriginal livelihood).

2.4.48

(a) the federal government seek the co-operation of provincial and territorial governments in drafting a national code of principles to recognize and affirm the continued exercise of

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[207] J Wilton Littlechild, Commission on First Nations and Métis peoples and Justice Reform, Interim Report, Saskatchewan, November 20, 2003, p25.

traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands; and

(b) the provinces and territories amend relevant legislation to incorporate such a code.

2.4.51

In keeping with its fiduciary obligation to Aboriginal peoples, the federal government renegotiate existing agreements with the provinces (for example, the 1924 agreement with Ontario and the 1930 natural resource transfer agreements in the prairie provinces) to ensure that First Nations obtain the full beneficial interest in minerals, oil and natural gas located on reserves.

2.4.62

The principles enunciated by the Supreme Court of Canada in the *Sparrow* decision be implemented as follows:

(a) provincial and territorial governments ensure that their regulatory and management regimes acknowledge the priority of Aboriginal subsistence harvesting;

(b) for the purposes of the Sparrow priorities, the definition of 'conservation' not be established by government officials, but be negotiated with Aboriginal governments and incorporate respect for traditional ecological knowledge and Aboriginal principles of resource management;

2.4.64

The size of Aboriginal commercial fishing allocations be based on measurable criteria that

(a) are developed by negotiation rather than developed and imposed unilaterally by government;

(b) are not based, for example, on a community's aggregate subsistence needs alone; and

(c) recognize the fact that resources are essential for building Aboriginal economies and that Aboriginal people must be able to make a profit from their commercial fisheries.

2.4.65

Canada and the provinces apply the priorities set out in the Sparrow decision to Aboriginal commercial fisheries so that these fisheries in times of scarcity

(a) have greater priority than non-Aboriginal commercial interests and sport fishing; and

(b) remain ranked below conservation and Aboriginal (and, in remote areas, non-Aboriginal) domestic food fishing.

2.4.67

To establish adequate baseline data for assessing the relative impact of the Aboriginal and non-Aboriginal harvest, and to assist in determining quotas to be allocated in accordance with the principles set out in the Sparrow decision, federal and provincial

governments improve their data gathering on the non-Aboriginal harvest of fish and wildlife.

2.4.69

Public education form a major component of government fisheries policy. This will require joint strategies to inform the public about Aboriginal perspectives on fishing, to resolve differences and to overcome fears that Aboriginal entry into fisheries will mean overfishing, loss of control, or loss of property.

2.4.70

Provincial and territorial governments take the following action with respect to hunting:

(a) acknowledge that treaty harvesting rights apply throughout the entire area covered by treaty, even if that area includes more than one province or territory;

(b) leave it to Aboriginal governments to work out the kinds of reciprocal arrangements necessary for Aboriginal harvesting across treaty boundaries; and

(c) introduce specific big game quotas or seasons for local non-Aboriginal residents in the mid- and far north.

2.4.78

The following action be taken with respect to co-management and co-jurisdiction:

(a) the federal government work with provincial and territorial governments and Aboriginal governments in creating co-management or co-jurisdiction arrangements for the traditional territories of Aboriginal nations;

(b) such co-management arrangements serve as interim measures until the conclusion of treaty negotiations with the Aboriginal party concerned;

(c) co-management bodies be based on relative parity of membership between Aboriginal nations and government representatives;

(d) co-management bodies respect and incorporate the traditional knowledge of Aboriginal people; and

(e) provincial and territorial governments provide secure long-term funding for co-management bodies to ensure stability and enable them to build the necessary management skills and expertise (which would involve cost sharing on the part of the federal government).

Cultural and Historic Sites

Regarding the ownership and management of cultural and historic sites, the Commission recommends that:

2.4.58

Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing:

(a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;

(b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);

(c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and

(d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

2.4.59

In the case of heritage sites located on private land, the federal government negotiate with landowners to acknowledge Aboriginal jurisdiction and rights of access or to purchase these sites if there is a willing seller, so that they can be turned over to the appropriate Aboriginal government.

2.4.60

The federal government amend the *National Parks Act* to permit traditional Aboriginal activity in national parks and, where appropriate, Aboriginal ownership of national parks, on the Australian model. Parks could then be leased back to the Crown and managed jointly by federal and Aboriginal governments.

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include:

(a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;

(b) funding and undertaking heritage resource inventories, documentation and related research, and archaeological and other scientific survey, in partnership with Aboriginal governments; and

(c) carrying out salvage excavation or mitigative measures at sites threatened by development, looting, resource extraction or natural causes such as erosion, and providing for Aboriginal monitoring of archaeological excavations.

3.6.1

Federal, provincial and territorial governments collaborate with Aboriginal organizations and communities to prepare a comprehensive inventory of historical and sacred sites, involving elders as expert advisors…

3.6.2

Federal, provincial and territorial governments review legislation affecting sacred and historical sites to ensure that Aboriginal organizations and communities have access to urgent remedies to prevent or arrest damage to significant heritage sites such as the Mnjikaning Fish Fence, whether they be threatened by human actions or natural processes.

3.6.3

Federal, provincial and territorial governments in collaboration with Aboriginal organizations review legislation affecting historical and sacred sites and the conservation and display of cultural artefacts to ensure that

(a) Aboriginal interests are recognized in designing, protecting, developing and managing sites significant to Aboriginal culture and heritage and in conserving, repatriating and displaying Aboriginal cultural artefacts;

(b) Aboriginal people are fully involved in planning and managing heritage activities relevant to their cultures; and

(c) Aboriginal people share the economic benefits that may accrue from appropriate development of relevant heritage sites and display of cultural artefacts.

Education

Throughout the report the Commissioners made recommendations regarding public education and school curricula. School curriculum is addressed in Chapter 3.5; here we have pulled out only the most significant of the many recommendations in this section.

2.2.1

Federal, provincial and territorial governments provide programs of public education about the treaties to promote public understanding of the following concepts:

(a) Treaties were made, and continue to be made, by Aboriginal nations on a nation-to-nation basis, and those nations continue to exist and deserve respect as nations.

(b) Historical treaties were meant by all parties to be sacred and enduring and to be spiritual as well as legal undertakings.

(c) Treaties with Aboriginal nations are fundamental components of the constitution of Canada, analogous to the terms of union whereby provinces joined Confederation.

(d) Fulfilment of the treaties, including the spirit and intent of the historical treaties, is a test of Canada's honour and of its place of respect in the family of nations.

(e) Treaties embody the principles of the relationship between the Crown and the Aboriginal nations that made them or that will make them in the future.

2.4.42

Public education be a major part of treaty processes and of the mandates of the treaty commissions and Aboriginal Lands and Treaties Tribunal, in keeping with the following principles:

(a) federal and provincial governments keep the public fully informed about the nature and scope of negotiations with Aboriginal peoples and not unduly restrict the release of internal reports and other research material;208

(b) Aboriginal parties participate in educating the general public and ensure that their members fully understand the nature and scope of their negotiations with provincial and federal governments;

(c) the federal government ensure that negotiation processes have sufficient funding for public education; and

(d) treaties and similar documents be written in clear and understandable language.

3.5.9

Provincial and territorial ministries require school boards serving Aboriginal students to implement a comprehensive Aboriginal education strategy, developed with Aboriginal parents, elders and educators, including

(a) goals and objectives to be accomplished during the International Decade of Indigenous Peoples;

(b) hiring of Aboriginal teachers at the elementary and secondary school level, with negotiated target levels, to teach in all areas of school programs, not just Aboriginal programs;

(c) hiring of Aboriginal people in administrative and leadership positions;

(d) hiring of Aboriginal support workers, such as counsellors, community liaison workers, psychologists and speech therapists;

(e) curriculum, in all subject areas, that includes the perspectives, traditions, beliefs and world view of Aboriginal peoples;

(f) involvement of Aboriginal elders in teaching Aboriginal and non-Aboriginal students;

(g) language classes in Aboriginal languages, as determined by the Aboriginal community;

(h) family and community involvement mechanisms;

(i) education programs that combat stereotypes, racism, prejudice and biases;

(j) accountability indicators tied to board or district funding; and

(k) public reports of results by the end of the International Decade of Indigenous Peoples in the year 2004.

3.5.10.

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[208] But First Nations need to be in control of the message. To its credit, the federal government, in the first Fishing Agreement did make funds available to the Saugeen Ojibway Nations for public education.

Aboriginally controlled, provincial, and territorial schools serving Aboriginal youth develop and implement comprehensive Aboriginal youth empowerment strategies with elements elaborated in collaboration with youth, including

(a) cultural education in classroom and informal settings;

(b) acknowledgement of spiritual, ethical and intuitive dimensions of learning;

(c) education to support critical analysis of Aboriginal experience;

(d) learning as a means of healing from the effects of trauma, abuse and racism;

(e) academic skills development and support;

(f) sports and outdoor education;

(g) leadership development; and

(h) youth exchanges between Aboriginal nations, across Canada and internationally.

3.5.18

Provinces and territories require that teacher education programs:

(a) in pre-service training leading to certification include at least one component on teaching Aboriginal subject matter to all students, both Aboriginal and non-Aboriginal;

(b) develop options for pre-service training and professional development of teachers, focused on teaching Aboriginal students and addressing Aboriginal education issues; and

(c) collaborate with Aboriginal organizations or community representatives in developing Aboriginal-specific components of their programs.

3.5.28

Elders be reinstated to an active role in the education of Aboriginal children and youth in educational systems under Aboriginal control and in provincial and territorial schools.

3.5.29

Elders be treated as professionals and compensated for their education contribution at a rate and in a manner that shows respect for their expertise, unique knowledge and skills.

3.5.30

Provincial and territorial education ministries, boards of education and educators recognize the value of elders' knowledge to all peoples' understanding of the universe by

(a) giving academic credits for traditional Aboriginal arts and knowledge whether acquired in the classroom or through non-formal means in cultural activities, camps and apprenticeships; and

(b) collaborating with elders to determine how traditional Aboriginal knowledge can be made accessible in the education of all students, whether Aboriginal or non-Aboriginal, in institutions under Aboriginal, provincial, or territorial control.

3.5.34

An electronic clearinghouse be established to facilitate the free flow of information among Aboriginal communities, education and self-government workers and individuals, the planning and development of this clearinghouse to be carried forward by a working group

(a) established in collaboration with First Nations, Inuit and Métis leaders;

(b) funded by the federal government and given a two-year mandate; and

(c) attentive to the need for Canada-wide and international communication as well as exchange in Aboriginal languages within linguistic communities.

3.6.13

Public and private media outlets, in particular the Canadian Broadcasting Corporation, provide access to Aboriginal media products for Aboriginal and non-Aboriginal Canadians by

(a) purchasing and broadcasting Aboriginal programming from independent Aboriginal producers; and

(b) producing English and French versions of original Aboriginal programs for regional and national redistribution.

5.4.1

Public education on Aboriginal issues be based on the following principles:

(a) Building public awareness and understanding should become an integral and continuing part of every endeavour and every initiative in which Aboriginal people, their organizations and governments are involved and in which non-Aboriginal governments and stakeholders have a part.

(b) Public education should involve both the sharing of information and a process of interaction, leading in time to a shared sense of advocacy and of public support.

(c) Non-Aboriginal organizations and corporations should establish internal mechanisms to make themselves aware of the distinctive needs of Aboriginal people whom they serve or employ and to ensure that they respond to those needs.

5.4.2.

Bodies that represent or serve both Aboriginal and non-Aboriginal people

(a) be proactive and innovative in promoting understanding of Aboriginal issues; and

(b) review their own activities to ensure that they contribute to cross-cultural understanding and enhance relations with Aboriginal people.

5.4.3.

Aboriginal people and organizations participate in the process of public education through direct involvement, by creating opportunities for interpersonal contact and by acting as agents of change in Canadian society.

5.4.5

Canadian media reflect the growing presence of Aboriginal people in their audience or readership by hiring Aboriginal journalists and broadcasters and by giving greater priority to coverage of Aboriginal issues and communities.

5.4.11

Federal, provincial and territorial governments make public education an integral part of all programs that affect Aboriginal people and ensure that it is delivered in collaboration with Aboriginal organizations.

e) From the Royal Commission on the Donald Marshall Jr. Prosecution

The Commissioners, Chief Justice Alesander Hickman, Chief Justice Lawrence Poitras and the Hon. Mr. Gregory Evans found that Donald Marshall Jr. was denied justice *because* he was Native. Their report is a good examination of how racism infects the justice system. Their recommendations focus on making the justice system of Nova Scotia less systemically racist and better equipped to deal with blacks and Natives.

We quote a few of their recommendations that are especially pertinent to our goal to improve the relationship between First Nations and the Crown. In general, the Commissioners recommend that opportunities for education on Black and Native issues be woven into the fabric of the Nova Scotia justice institution. This approach is far more effective than the "band-aid" of short and infrequent Native awareness training.

Recommendation 12

We recommend that Governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members whenever possible.

Recommendation 13

We recommend that the Dalhousie Law School, the Nova Scotia Barristers Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.

Recommendation 14

We recommend that the Attorney General establish continuing professional education programs for crown prosecutors, which would include:
(a) an exposure to materials explaining the nature of systemic discrimination toward Black and Native peoples in Nova Scotia in the criminal justice system; and
(b) an exploration of means by which crown prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotia criminal justice system.

Recommendation 15

We recommend that training for all police officers, both at the intake level and as continuing education, include the content on police/minority concerns insensitivity to the visible minority issues.

Recommendation 22

We recommend that a tripartite forum (Micmac/Provincial/Federal Government) similar to the Ontario Indian Commission be established to mediate and resolve outstanding issues between the Micmac and Government, including Native justice issues

Recommendation 26

We recommend that Nova Scotia Legal Aid be funded to permit them to:
(a) specifically assign lawyers to work with Native clients to develop a specialization with respect to the concerns of Native people; and
(b) hire a native social worker/counsellor to, among other things, act as a liaison between Native people and the Legal Aid service.

Recommendation 27

We recommend that a program of ongoing liaison between the bar-prosecutors, private defence in legal aid—and Native people, both on and off-reserve, be established through the Nova Scotia Barristers Society. The Society must also educate its members concerning the special needs of Native clients.

Recommendation 28

We recommend that the RCMP and municipal police forces, where applicable, take immediate steps to recruit and hire Native constables.

Recommendation 32

We recommend that the Human Rights Commission be provided with sufficient resources to enable it to effectively carry out its present mandate and further responsibilities added by our recommendations, and in particular to enable it:
(a) to retain independent legal counsel; and
(b) to engage in an active public awareness program, particularly in the area of Native and Black concerns.

Recommendation 33

We recommend that the Chief Justices and the Chief Judges of each court in Nova Scotia exercise leadership within his or her area of responsibility to ensure a fair treatment of visible minorities in the criminal justice system.

2. From United Nations' Human Rights Documents

The following are the Articles that most clearly comment on the matters discussed in "Under Siege." We recognize that Canada does not accept the Draft Declaration of the Rights of Indigenous Peoples, probably because it would be on the hook for a great deal

of money in restitution and compensation to First Nations. Nevertheless, we feel it is instructive to compare our experiences and recommendations to the international scene.

a) International Covenant on Civil and Political Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

b) Draft Declaration on the Rights of Indigenous Peoples

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.
States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information. States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.[209]

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

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[209] Note how closely this confirms to the above discussion of the Anishinaabek idea of *nookeewin* and its attendant duties and responsibilities.

4. From the Saugeen Ojibway Nations' "Issues of Jurisdiction"[210]

The following recommendations are from our second submission to the Royal Commission on Aboriginal Peoples. They are made following research and interviews we had done, mostly with tribes in the US. They had gone through much the same struggle in the 1980s as we had in 1995. Their rights were also recognized by the courts before they were by the public. The backlash, particularly in Wisconsin, was ferocious.[211] Nevertheless, governments in the US seem more reconciled to the reality of sharing jurisdiction with Native resource managers than they are in Canada.

1. First Nations have a legitimate claim to jurisdiction over natural resources in their traditional territories, where those rights have not been explicitly extinguished. The Canadian federal government has a clear fiduciary role with respect to First Nations. It is therefore obliged to respond to *First Nations* demands for jurisdiction, not, as it has been doing, to provincial efforts to stall the recognition of that jurisdiction.
2. The federally funded Aboriginal Fisheries Strategy must extend across Canada to include traditional First Nations fishing communities.
3. The federal government must live up to its fiduciary role and actively take the part of First Nations in jurisdictional issues; at a minimum, make it easy for provincial governments to roll back their own, assumed jurisdictions.
4. First Nations must take a more active role in "encouraging" the other governments in Canada to recognize their jurisdiction, especially in the area of natural resources, because, aside from the fact First Nations have never abandoned their jurisdiction here, natural resources is one of the few areas that will provide First Nations with immediate economic gain. The experience in the US has shown us that First Nations benefit directly from taking control of the resources in their traditional areas—and the resources themselves do better when returned into the hands of the original stewards.
5. First Nations must do all they can to encourage the other governments to achieve the goal expressed in recommendation four. We learned that there are three elements to a successful assertion of First Nation jurisdiction:
    a. successful court actions.
    b. good public relations to counter anti-Native rights lobbies and ensure public support (all the US groups emphasized the crucial role of PR --it has been found that the First Nations' agenda of conservation more closely suits the public's concern for the environment, than either the sportsmen's or the commercial fishermen's agendas).
    c. a management plan and infrastructure which includes enforcement—First Nations must not only be able to manage their resources, they must been *seen* to be able to manage.
6. All levels of government, but especially the federal, must assist First Nations to realize recommendation number 4. In Ontario, the government may no longer be charging First Nations for their rightful harvest of fish and game, but it is not

[210] Saugeen Ojibway Nations, "Issues of Jurisdiction", op cit. 1993
[211] The struggle here is well documented in Rick Whaley with Walter Bresette, *Walleye Warriors*, 1994.

making the funding necessary to help impoverished bands to exploit their rights in an economically viable way.

7. In addition, governments must help First Nations to deal with the anti-Native backlash that is rapidly organizing in Ontario. There is no point in negotiating anything without trying to win public support as you go along. After an agreement is signed is too late.
8. Following the lead of the Statement of Political Relationship in Ontario[212] and the public support of the First Nation agenda of the Charlottetown Accord, both federal and provincial governments must sit down in good faith over the issue of jurisdiction and negotiate as "government to government" to quote Ontario's SPR. Both levels of government should be funding these negotiations to the extent that will allow the First Nation across the table to sit as equals. This should include funds for biological research and information gathering, meeting expenses and negotiator fees, and public relations. Governments must realize that the costs of negotiations and the building of First Nation infrastructure are far less than years of grinding poverty and dependence on welfare.
9. First Nations must begin to co-operate more in the dissemination of information and the sharing of expertise in all matters governing jurisdiction. A central clearing house of management plans, negotiation materials and expertise, biological studies, legal research, PR materials, etc. should be set up by Provincial Native organizations; for example the Chiefs of Ontario in that Province, so it can plug into the AFN's communication system.
10. Once negotiations toward the recognition of a First Nation's jurisdiction are launched, all parties must take great pains to ensure the resulting agreement accurately reflects the traditional history and culture of the First Nation. That may mean governments will have to be more open to different ways of "managing" a resource.
11. All governments should address the issue of compensation. The loss of First Nations' rights to access resources they never gave away has left most bands in Canada economically devastated. These bands must be compensated for the loss of use of their principal livelihood and the destruction of their economic base.
12. Non-Native governments must amend legislation that is in conflict with current law.
13. First Nations are going to have to be even more aggressive in demanding a return of their jurisdiction over areas of their lives. Walpole Island may have succeeded in asserting a measure of control over what goes on in their waters, but any real consolidation of jurisdiction as well as the next step -- real self-government -- may have to wait for the other levels of government in Canada to catch up. Bureaucratic stubbornness and the anti-Native lobby will continue to frustrate First Nation's aspirations without continual pressure from First Nations themselves.
14. No jurisdictional drive to self-government will be successful if both Native and non-Native governments do not recognize the importance of culture and language. What is the point of having Natives managing resources in the same fashion as

[212] Completely ignored by the Harris government from when they took power in 1995.

non-Native governments? Natives must insist their traditional ways are recognized as valid at the negotiating table.

5. From the Chippewas of Nawash Unceded First Nation

Let us return to the Anishinaabe ideas of "work", "duty", "right" and "responsibility" with which we started this chronicle[213]. Canadians and First Nations have very different ideas about key concepts and principles central to our respective cultures. But the rooms the Crown has built for ours in its laws, policies, courts and practices are too small for their true expression. And that is a core reason for the on-going tension and frequent confrontations between Canada and First Nations.

In fact, it is safe to say that only when First Nations step outside these rooms that our central values, ideas and institutions find a fuller expression. But when we step outside those rooms, we find ourselves in conflict with Canada.

In our case, the full expression of our central beliefs about our ancestors brought us into confrontation at the burial grounds in Owen Sound and may bring us into conflict at Nochemowenaing. And the expression of our ideas of work, rights and responsibilities regarding fishing have brought us repeated conflict with the sport fishing industry and the Ministry of Natural Resources.

The very fact that *nookeewin* is not a universally recognized aboriginal and treaty right for indigenous peoples in Canada means that rights are being narrowly defined as activities (such as fishing, hunting, etc.). This is contrary to our own way of thinking and to force First Nations into court to prove every aspect of our *nookeewin* and its attendant responsibilities will lead to further confrontations. It is also at odds with international ideals of the rights of peoples that are more broadly defined as self-determining:

> All peoples [including indigenous peoples] have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[214]

We have demonstrated in this paper that Ipperwash and the Fishing Wars on the Bruce are not isolated events. And they will be repeated. The atmosphere of contempt that permeates relations between the Crown and First Nations is systemic and widespread and dramatically impedes all attempts at reconciliation.

Our recommendations, if implemented, are practical ways of dealing with this impediment and enlarging the rooms we find ourselves in. They are protocols to a better relationship with Ontario; for, at a much deeper level, we must re-build the whole relationship between Canada and First Nations. Hence our first recommendation:

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[213] See the section on "Rights and Responsibilities", above.

[214] Article 1 in the UN's International Covenant on Economic, Social and Cultural Rights and the UN's International Covenant on Civil and Political Rights and Article 3 of the UN's Draft Declaration on the Rights of Indigenous Peoples.

1) Implement the recommendations of the Royal Commission on Aboriginal Peoples.

The Commissioners of the Royal Commission on Aboriginal Peoples recognized the vast differences between the cultural imperatives of First Nations peoples and Canadians and that is why they made such wide-ranging recommendations. The Commissioners were trying to alter the relationship between Canada and aboriginal peoples in fundamental ways. They were trying to make more room for the full and true expression of the Native identity.

Too much energy and too many resources are wasted on fighting with the Crown. The amount of time and money spent on protecting our rights and claims diverts energy, resources and time away from the social, health and educational needs of our communities. New ways need to be found to build a better relationship between the Crown and First Nations.

a) Improving the Relationship Between the Crown and First Nations

In the recommendations that follow, "the Crown" refers to both Ontario and Canada. In recent years the Crown in right of Canada has been trying to divest itself of its fiduciary responsibilities with respect to First Nations. And the Crown in right of Ontario has not been taking up the slack. As a result, much that needs to be done (some of it identified by the previous inquiries whose recommendations we quote above) is falling between the cracks of our fiduciaries' jurisdictions. Kashechewan is only a recent example.[215]

Kashechewan, Ipperwash, the Bruce Peninsula are all lessons that teach us that the federal fiduciary cannot be let off the hook. The following recommendations are designed to get both Crowns at the same table with First Nations. Once at the tripartite table, it is reasonable to expect that all three parties would use the lessons of history and past crises, along with the guidance of protocol and trained facilitators, and prodded by legislative amendments, to come up with better solutions than we have to date to the problems that plague our relationship.

2) The Crown (both Ontario and Canada) should meet regularly with First Nations at all levels at least twice a year in "Covenant Councils".

The Crown and First Nations need to re-establish the old protocols of the Covenant Chain and use them to re-define and improve the relationship between them. Tripartite meetings between First Nation Tribal Grand Chiefs and Ministers of the Crown could establish basic principles (*eg,* need to consult and accommodate, establishment of alternate dispute

[215] But certainly not the only example and the jurisdictional ping pong that the two Crowns play when it comes to First Nations is not confined to Ontario. For example, six children died in Waskaganish in Québec a number of years ago as a result of contaminated water.

resolution mechanisms, anti-racism and public education, resource sharing, etc). But these would be more exactly defined at the Provincial Treaty or individual First Nation level by tripartite meetings between chiefs and councillors and senior ministry staff.

At all levels, these tripartite "Covenant Councils" would define the kind of relationship both sides desire, define what constitutes consultation, discover what is working and what needs work, and come to agreement on how to mend any breaks in the relationship.

Each Covenant Council would appoint technical committees that would meet more frequently on specific issues. Resources must be available to the FN to properly research and contribute solutions to problem areas.

This recommendation is consistent with recommendation 6.2 of the Task Force on Multiculturalism in Saskatchewan and the Donald Marshall Jr Commission in Nova Scotia (see "Recommendations" above). It should also help satisfy the criteria for consultation as laid down by the courts, including *Haida* (see list in "The Importance of the Honour of the Crown" and in Appendix H: "For the Honour of the Crown, What Consultation Looks Like").

3) Failing a commitment to recommendation 2, the Crown should appoint an Inquiry in Ontario into the allocation of resources to First Nations, the behaviour of the Crown (both Ontario and Canada) in land claim, heritage and resource rights issues, and the degree to which Crown policies, practices, regulation and legislation derogate from the aboriginal and treaty rights of First Nations' peoples.

An inquiry into the relationship between Ontario and First Nations is long overdue. But it would be an adversarial and costly way to improve that relationship in comparison to the path of "Covenant Councils" in recommendation 2.

4) The Crown (both Ontario and Canada) and First Nations should develop and codify parallel ways of doing business.

We and other First Nations experience a great deal of frustration in our dealings with the Crown due to the "cookie cutter" way the Crown does business with its "clients" and "special interest groups". Even these terms indicate a manner of doing business that is foreign to First Nations and that often results in discrimination or solutions that are prejudicial to our interests, rights and claims.

Earlier we related how the quota system devised by the Ministry of Natural Resources to manage the fisheries was prejudicial and discriminatory (as Judge Fairgrieve found in *Jones-Nadjiwon*). All government regimes, policies and practices applied equally to non-Natives and to us may well discriminate against us.

To avoid discrimination, we recommend the tripartite Covenant Councils described in recommendation 2, above, devise parallel ways of doing business with First Nations. In the absence of Covenant Councils, individual Provincial Ministries and their federal counterparts should negotiate alternative processes with First Nations, starting with those First Nations with the strongest claim to consultation according to *Haida.*

These need not be processes that require separate legislation or bureaucracies or even permit approval systems. They need not cause consternation or spark long legal discussions about jurisdiction. For example, it may be as simple as developing a separate First Nations' protocol for determining if a site is a burial ground. As another example, government initiatives (such as source water protection, or building a pipeline, or a hydro-electric dam) would automatically make resources available for First Nations to research the impact of such proposals on their rights and claims. The degree to which accommodation must be made for First Nations' concerns will, after *Haida* and *Taku*, vary according to the degree of impact on those rights and claims.

This notion of a parallel process has already been implemented in justice. Several First Nations—mostly out west, but some in Ontario, including Nawash—have developed separate systems for dealing with certain kinds of offences committed by their people. These "parallel processes" (mostly diversion programs in Ontario) are being funded by the Crown and are proving to be very effective.

Such parallel protocols are encouraged in the recommendations of the Royal Commission on Aboriginal Peoples and are found in the United Nations' Draft Declaration of the Rights of Indigenous Peoples (Articles 4, 7, 19, 20, above). This recommendation is also consistent with recommendation 6.2 of the Task Force on Multiculturalism in Saskatchewan (see "Recommendations" above) and recommendations from the Donald Marshall Jr. Commission regarding the delivery of justice to Native people in Nova Scotia.

Our recommendation for parallel processes would also help satisfy the criteria for consultation as laid down by the courts, including *Haida* (see list in "The Importance of the Honour of the Crown" and in Appendix H: "For the Honour of the Crown, What Consultation Looks Like").

Here we would emphasize the words of Eric Johnston, who told the Ipperwash Inquiry Commissioner during his visit to Nawash, in the context of the Crown's regulation of Native burial sites:

> We carry a lot of resentment that your laws are made to apply to us. Governments and these laws have done a good job to characterize us as being just like everyone else.
>
> We could talk to you about our burial practices and you could come away with a pretty good understanding of that. But that doesn't entitle you to feel that you have any legitimacy to make rules about our ancestors on our behalf. Our legitimacy comes from you acknowledging that you will never know us well enough to do these kinds of things

> on our behalf. You have to give us that job that has always been ours since before you came here. .[216]

5) The Crown (both Canada and Ontario) and First Nations should develop and codify best practices for negotiations and for dealing with confrontations.

This is another agenda item for the tripartite Covenant Councils introduced in recommendation 2. The Owen Sound burial ground vigil was a case in which failure to negotiate with First Nations in good faith led to confrontation. Happily, the vigil was resolved due to the use of protocols that should have been employed earlier. One of the things that made a difference was the quick involvement of elected members of the Crown who decided to by-pass the bureaucracy to reach a fair agreement with us. That set the tone for later talks with the bureaucracy which also concluded successfully.

In this paper we catalogue several protocols and principles (collected in Appendix H) that worked to preserve the honour of the Crown and resolve disputes between us. For example, identifying the right people early, before confrontations arise, and getting them to the scene quickly when they do, will hasten a successful outcome.

The Saskatchewan Commission on First Nations and Métis peoples and Justice Reform 2004, in recommendation 7.2, said the government of Saskatchewan should create a directory of people recognized as being expert in developing healthy relations between Native and non-Native populations. A similar directory of mutually respected facilitators should be developed by the Covenant Councils.

Another "best practice" is to exchange key people well in advance of negotiations. The First Nation would send someone to work in the Ministry office responsible for negotiations and the Ministry would send someone to work with the First Nation. The government already has a protocol for such a practice: "secondment". So do we; we call it "adoption"[217] and it has been used for centuries to reduce hostilities between different First Nations.

Government officials, especially those with no experience of life in First Nations communities, may not realize that the honour of the Crown is best served by employing strategies that also foster good relations with First Nations—and vice versa: strategies that result in good relations with First Nations protect the honour of the Crown.

As the UN Draft Declaration on Indigenous Rights says, in Article 39:

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[216] See the section, "Potential for Future Confrontation: Around Burial Grounds" for the full context of this important insight.

[217] Early Europeans called it an exchange of hostage, for the practice was usually done during hostilities or after they were concluded. The "hostages" were adopted into the opposing tribe as kind of guarantee that the warring tribes would not make war on one another, the ethos being that one does not make war on one's family. Personal correspondence from Anishinaabe story-teller Lenore Keeshig-Tobias.

> Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

6) *Before negotiations begin*, the Crown (Ontario and Canada) and the First Nation should:

i. **agree on and appoint an independent facilitator to guide negotiations;**
ii. **exchange negotiating staff at least four months before negotiations begin so each party can learn the views, protocols, and concerns of the other;**
iii. **engage the politicians (the Chiefs of Ontario, the appropriate Ministers and/or their Parliamentary Assistants);**
iv. **agree the Crown will fund research as it is required, the parameters of such research to be agreed on by all parties;**
v. **agree that, compensation to the First Nation will be negotiated for losses the First Nation may have suffered (*eg,* due to being unfairly excluded from access to and management of resources, from loss of use of lands unfairly taken from them; loss of burial and other heritage sites; loss of traditional medicines).**
vi. **agree on how communications will be handled and how they should be funded.**
vii. **agree that there will be no requests for blanket surrenders of rights or claims or for blanket assurances that rights and claims will not be pursued.**

This recommendation we consider to be the minimum understanding that must exist between a First Nation and the Crown *before* negotiations start. Its terms are taken from much longer lists of best practices discussed in this paper and gathered together in Appendix H. It is designed to remove, as much as possible, the adversarial nature of most negotiations between the Crown and First Nations.

For example, if there is transparency (through research and good facilitation) and an understanding the past will be laid to rest (through compensation), and the fostering of respect (through an exchange of staff) it might prove easier to avoid the criticism, defensiveness, stonewalling, and contempt that usually doom negotiations. The exchange of staff discussed in the paper and can be viewed as "secondments" or, in our old sense of the practice, "an adoption", which was done to help ensure First Nations in disputes developed a more sympathetic view of one another. It becomes harder to attack the other if you have relatives in their camp.

7) The Crown (Ontario and Canada) should make adequate resources available to First Nations so they can completely and competently research the impact Crown initiatives, projects, legislation, policies and practices have on their claims and rights, economies and culture.

The survey of First Nations we did and to which we refer in the section, "Potential for Confrontation Around Resources" indicates this recommendation should be implemented as soon as possible. Confrontations around resource extraction are already brewing in the north. In particular, forestry companies are moving into the far north of Ontario and de Beers is proposing a huge open-pit diamond mine on the shore of James Bay.

We feel this recommendation is also the most efficient way to implement the *Haida* decision of 2004. The ramifications for this recommendation fall mostly on the Ontario Ministries of Natural Resources and the Environment because, in keeping with the duty to consult and the Crown's commitments under the Convention on Biological Diversity, the current environmental assessment, appeal mechanisms and regulatory provisions used by these ministries will have to be reviewed and re-written.

Good research, done at the treaty organization or First Nation level, will facilitate the resolution of difficult issues. As we found in our vigil of the Owen Sound burial grounds, once the parties agreed on the legal and historical facts, it was easier to get to a solution. Peaceful resolutions, well researched and negotiated, are much easier on the public purse than violent confrontations or protracted court battles. In addition, good research on the issues at hand will form a solid basis for the work of Covenant Councils who can use the research to agree on the facts.

The Crown will have to recognize that a First Nation may use the research if a dispute goes to trial, but that danger should be a good incentive for the Crown to reach honourable agreements with First Nations. It will, of course, require an act of political good faith and will to overcome the natural inclination of people on both sides who prefer to hold their cards close to their chests.

This recommendation is consistent with recommendation 6.2 of the Task Force on Multiculturalism in Saskatchewan (see "Recommendations" above). It should also help satisfy the criteria for consultation as laid down by the courts, including *Haida* (see list in "The Importance of the Honour of the Crown" and in Appendix H).

8) The Crown (Ontario and Canada) should ensure staff in the office of each MP or MPP are familiar with Native issues in her or his riding. In those areas with significant aboriginal populations, at least one staff member should be aboriginal.

A certain per cent of the money and staff time that each MP and MPP receives for staffing should be allocated to research and dealing with aboriginal issues in each riding.

MPs and MPPs must be able to show how this money was spent in improving relations between the Crown and the aboriginal peoples in his or her riding.

9) The Crown (Ontario and Canada) should ensure staff in each Minister's office is familiar with Native issues as they pertain to the Minister's responsibilities. Ideally at least one staff member should be aboriginal.

It would benefit the Crown if at least one senior official in every Minister's office (especially those provincial and federal ministries that deal directly with First Nations) had extensive experience and contacts with aboriginal people and familiarity with aboriginal thought and culture. This expertise would be useful in understanding the protocols, psychology and sensitivities of the First Nations the Minister must deal with.

This knowledge will be important if the Crown is serious about re-establishing good relations with First Nations and it will be critical if a confrontation arises. Every effort should be made to fill this position with an appropriate First Nations person (*eg,* Anishinaabe, Haudenosaunee, Cree), preferably one who has spent a great deal of time living in a First Nation community.

The degree of time such a staff person spends on aboriginal issues will vary with the degree of responsibility the Minister has for First Nations. For example, in the Ontario Ministry of Natural Resources, a minimum one full-time senior political person-year should be devoted to aboriginal issues. In Ministries that do not have extensive or frequent contact with Native people, expertise in related aboriginal issues must at least be developed in the office of the Parliamentary Assistant to the Minister.

10) The Crown (Ontario and Canada) should make it the responsibility of Parliamentary Assistants to develop relationships with First Nations and to liaise with First Nations on matters that pertain to their Ministries. Ideally at least one staff member should be aboriginal.

In addition to developing relationships with staff within a Minister's office, we found that working with the Parliamentary Assistant to Indian Affairs, Ross Reid, on the Owen Sound burial ground matter had some advantages over dealing directly with the Minister:

- There was more time to discuss the issues thoroughly.
- The Assistant's presence did not draw the media attention the Minister would have.
- There was less temptation for grandstanding and adhering too strictly to official Department policy.

In short, there was more room to manoeuvre, politically and bureaucratically.

Again, every effort should be made to employ First Nations people, preferably those who have spent a great deal of time living in First Nations communities.

11) Each Ministry of the Crown (both Ontario and Canada) should be required to develop and submit a Policy Statement with Respect to Aboriginal Peoples and to report annually on how it is meeting its goals.

Ontario now requires each Minister to develop a Statement of Environmental Values (SEV). The current draft Statement of Environmental Values for each Ministry contains a statement regarding aboriginal peoples (no. 7 in all SEVs):

> The Ministry … recognizes the value that Aboriginal people place on the environment. When making decisions that might significantly affect the environment, the ministry will provide opportunities for involvement of Aboriginal people whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered.

As the relationship between the Crown and First Nations is more precisely defined by the tripartite Covenant Councils described in recommendation 2, each Ministry should be required to develop and submit a Policy Statement of Principles with Respect to Aboriginal Peoples.

This recommendation is consistent with recommendation 2.4.48 of the Royal Commission on Aboriginal Peoples (in section D.1.d "Recommendations") which recommends a national code of principles and a review of legislation to incorporate the code.

Currently, the Environment Commissioner of Ontario has the task of monitoring how well the government is living up to its environmental responsibilities under the Province's Environmental Bill of Rights. The Province might consider establishing a similar office to monitor Aboriginal Rights as the next recommendation suggests.

12) The Provincial Crown should establish an independent office of the Legislature (such as the Provincial Auditor or the Environmental Commissioner of Ontario) that would oversee the relationship between the Crown and First Nations. The duties of the two Independent Commissioners (for one should be aboriginal) would include:

i. **monitoring government legislation, policies and practices as they impact on Native rights and claims and on the relationship between the Crown and First Nations in Ontario.**
ii. **monitoring the implementation of recommendations from inquiries and commissions pertinent to aboriginal issues in Ontario;**
iii. **recommending legislative and policy changes designed to improve the relationship between the Crown and First Nations;**
iv. **assisting Ministries in negotiating honourable resolutions to disputes with First Nations (including resource sharing agreements, burial ground agreements, resource management agreements, etc.);**

v. **acting as a clearing house of information for the Crown and First Nations on initiatives taken by First Nations and the Crown across Canada on all matters concerning Native affairs (education, justice, self-government, economy, resource use, belief systems, traditional knowledge in the environment, court decisions, urban populations, lists of facilitators, etc);**

vi. **advising the Crown in the event of a confrontation;**

vii. **reporting to the Legislature, semi-annually at first, then annually.**

The Commissioners must have the stature of other officers of the Legislature to be successful. They must be appointed or dismissed only by the Legislature in consultation with First Nations organizations. Their office must receive adequate funding to carry out the roles assigned to it.

13) The Ontario Crown should make it a high priority to train, recruit and place aboriginal conservation and police officers in areas that serve aboriginal populations, including aboriginal populations in urban centres.

The recruitment of aboriginal officers will do much to show the importance the Crown attaches to aboriginal matters. It will, hopefully, serve as an educative measure for other, non-Native officers. In areas that serve a large aboriginal population, the mix of the force should approach 50-50, and efforts made to pair Native officers with non-Native officers. In all other areas, at least two aboriginal officers should be hired per detachment; single officers may feel isolated and may, in fact, be viewed by others as tokens.

This recommendation matches similar recommendations in the Royal Commission on Aboriginal Peoples and the Donald Marshall Jr. Commission.

For more details on what the Crown should be doing to improve relations between aboriginal peoples and law enforcement personnel, see the recommendation on policing from the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform 2004 (in section D.1.c) "Policing", above).

b) Legislative Reform

Read this section in conjunction with the section, "Connecting the Dots: the Need for Legislative Reform." The following recommendations are consistent with the idea that federal and provincial legislation should recognize the rights of indigenous people and not be in conflict with them. This is the idea behind Article 37 of the UN Draft Declaration on the Rights of Indigenous Peoples (see Section D.2.b) as well as certain recommendations of the Manitoba Aboriginal Justice Inquiry, and of the Royal Commission on Aboriginal Peoples.

14) The federal Crown should make it more difficult for groups and individuals to promote hatred against Native peoples by:

i. **amending the hate propaganda prohibitions in the Criminal Code to include the "reckless" as well as the "wilful" promotion of hatred.**

ii. **amending the defamatory libel prohibitions in the Criminal Code to include libel of a group identified by a criterion specified in s. 15 of the Charter, or by a criterion analogous thereto.**

iii. **enacting a provision similar to, but narrower than the wording of the (now unenforceable) false news prohibition in the Criminal Code by, for example, requiring that the news spread was false and that it either encouraged hatred of an identifiable group, or encouraged the derogation from or denial of a constitutionally recognized right.**

With respect to the last point, we have put forward a definition of racial hatred in recommendation 35, below that should be considered here.

"Under Siege" describes in some detail what we consider to be a campaign against our legitimate rights and claims (see the sections, "the Ontario Federation of Anglers and Hunters" and "Sportsmen's Clubs"). We very strongly feel that this campaign had a direct influence on government policies and practices that derogated from our aboriginal and treaty rights. We also feel it contributed to an atmosphere of hate that infected the Bruce around 1995 which, in turn, made it permissible to attack our fishermen's property and attack our Band members verbally and physically.

In other words, the wilful and reckless publication of demonstrably false information, junk science, and erroneous history subjected us to contempt and interfered with the practice and enjoyment of our constitutional rights.

Legislative reform such as recommended here would help guarantee that aboriginal people have the right not to be subjected to, in the words of Article 7 of the UN Draft Declaration on the Rights of Indigenous Peoples, "(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; … (e) Any form of propaganda directed against them."

It would also be consistent with Supreme Court of Canada statements designed to ensure the Crown does not rely on discretion alone to protect aboriginal and treaty rights.[218]

15) i. The Ontario Crown should revise the burial site provisions of the *Cemeteries Act*, with substantial involvement by First Nations in the revision process, to include respect of Aboriginal cultural traditions concerning burials, and greater flexibility in what circumstances are required to trigger the need for investigation and protection of suspected burial sites.

[218] *R.* v. *Adams*, op cit in "The Need for Legislative Reform".

ii. In the interim, we recommend, consistent with the recommendation of the Niagara Escarpment Commission, in May 2005, that Ontario negotiate in a holistic way with the Chippewas of Nawash concerning Nochemowenaing, where a number of Aboriginal burials are located, and which is considered a sacred heritage site more generally by Nawash and the Anishinaabek of the Great Lakes.

In this paper, we have described, in some detail, how the current *Cemeteries Act* discounts or nullifies our core beliefs about our ancestors. We draw attention to the following from the UN draft Declaration on the Rights of Indigenous Peoples:

> States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected. [219]

Too often, the usual enforcement mechanisms or environmental approval processes are used to deal with First Nations' claims and rights. The result is that our rights and claims are ignored or discounted. That "nullification", as we have seen, breeds the resentment and frustration that can lead to confrontation. Trying to shoe-horn First Nations into the usual regulatory processes, especially post-*Haida* not only discriminates, it is, given events at Ipperwash in 1995 and in the Bruce from 1992-1999, politically foolish.

There is urgency to recommendation 15ii. We have noted elsewhere that both the Royal Commission on Aboriginal Peoples and the United Nations have recommended that the Crown engage aboriginal people in negotiating parallel protocols. We include the second recommendation here because we feel the path on which the Crown has chosen to deal with Nochemowenaing (*ie,* through the usual assessment and development procedures), invites confrontation. This recommendation echoes the RCAP's Recommendation 2.4.59 regarding how to deal with burial grounds on private lands.

This recommendation for legislative reform is clearly the aim of recommendation 2.4.58 of the Royal Commission on Aboriginal Peoples (see section D.1.d, "Recommendations" above). In 2.4.58, the Commission provides details of what the legislation should include and these are very close to our recommendation regarding policy reform (our recommendation 27, below).

16) The Ontario Crown should amend the *Fish and Wildlife Conservation Act, 1997* to respect aboriginal and treaty rights. The precise manner in which this should be done should be decided in consultation with First Nations, including those who have court-recognized rights to the commercial use of natural resources.

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[219] Article 13 of the Draft United Nations Declaration on the Rights of Indigenous Peoples: United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its eleventh session, 23 August 1993, UN document E/CN.4/Sub.2/1993/29, Annex 1.

Indeed, all federal and provincial legislation should be reviewed and revised to make it consistent with aboriginal and treaty rights as defined by the constitution and the courts. However, the need to amend the *Fish and Wildlife Conservation Act, 1997,* is most urgent given the conflicts around hunting and fishing that we have reported in this report and the ones we know are brewing.

It is the purpose of this recommendation to ensure that aboriginal and treaty rights are respected *inside* the legislation, thereby removing the impression that Native rights are somehow *outside* the law. This is a problem identified by several people during the Nawash Community Forum, including Band members who know of the poor legal instruction future Conservation Officers receive. Even including a non-derogation clause in key government legislation would improve the situation.

This recommendation is consistent with recommendations 2.4.62 and 2.4.48 of the Royal Commission on Aboriginal Peoples and the recommendations regarding Statutes in Conflict with Aboriginal and Treaty Rights in the Manitoba Aboriginal Justice Inquiry. (See section, "Recommendations".)

17) i. The Ontario Crown should change the police complaints procedure in a significant systemic way starting with the recommendations of former Chief Justice LeSage. More specifically, complaints about police action (and the actions of other law enforcement personnel such as Conservation Officers) in the past that still infect the relationship between Native and non-Native populations in a community should be investigated by an independent body.

ii. In the interim, to promote reconciliation between Nawash and law enforcement agencies in the area, the Crown should appoint an independent body to investigate the attacks on Nawash youth on Labour Day weekend in Owen Sound and the vandalism and theft of Native fishermen's gear on the waters around the Bruce Peninsula.

The events of 1995 were traumatic for our community. As we have described in this paper, we felt as though we were under siege during that summer. The inability, or unwillingness, of the OPP and Conservation Officers to investigate the theft of our fishermen's nets from the waters of Georgian Bay and Lake Huron, or to protect their gear from damage and theft, meant many of our people suffered real financial hardship.

Similar feelings of frustration, of being "less than white", linger today, long after the brawl in Owen Sound on September 3rd, 1995 that left 2 of our youth stabbed and one severely beaten. Many of those involved still cannot talk about it without feelings of rage. The memories of being assaulted by a mob while the police watched are too painful, even 10 years later. Events such as these and the emotions they produce are part of the psychology of nullification that Native people should not have to endure. They infect the

relationship we would prefer to have with Canada. They have become part of the past that is not dealt with, but must be if we are to work to a better future.

c) Access to Natural Resources

18) The Crown (Ontario and Canada) should negotiate access to resources agreements with First Nations whether or not a First Nation has proven, in court, aboriginal and treaty rights to the commercial use of a resource.

There is a reason First Nation access to natural resources figures prominently in the recommendations of the Royal Commission on Aboriginal Peoples (see the section, "Recommendations"/ "RCAP"/ "Access to Resources" above); of the Manitoba Aboriginal Justice Inquiry (see "Land Rights and Natural Resources"); and in the UN's draft Declaration on the Rights of Indigenous Peoples (see Articles 21, 25). It is a matter of survival, both economically and culturally.

It is safe to say that all First Nations, before contact, utilized the natural resources in their traditional territories in order to live and thrive. It is also safe to say (and archaeological evidence shows it) that trade, barter, buying and selling existed among First Nations long before contact and that such commercial activity contributed to the wealth and well-being of First Nations' peoples.

For the reasons we detail in "Under Siege" third party stakeholders, such as timber companies, mining companies, sports anglers and hunters should not be at the negotiating table. The Crown has a responsibility to balance the needs of other resource users and it must therefore represent their interests at the table. However, to say to First Nations (as the Ontario Crown has been saying in its policies and practices) that natural resources are all allocated and there is no room for First Nations unless they prove they have a right to logging or mining or fishing, will not reconcile First Nations needs with the needs of other users. And it certainly won't avoid conflict.

As the federal Crown continues to cut funding support for First Nations, access to resources—which is simply the modern re-assertion of ancient economies—will become more and more significant if First Nations are to survive and the Crown is to avoid conflicts.

It is, however, fair to demand of First Nations (even though the Crown does not demand it of industry) that they use resources sustainably in order to make a "moderate livelihood", in the words of the Supreme Court's *Marshall* decision. We know, perhaps better that most, that Canadians are not the conservationists they think they are,[220] and

[220] Canadians use water far in excess of their fair share. Ontarians are the fourth worst polluters in Turtle Island (North America) according to a May 2002 report from the NAFTA-based Commission for Environmental Cooperation.

that the forests are being gobbled up at a rate surpassing their ability to regenerate and in a manner that is destroying the biodiversity of the wild.

19) As part of negotiations toward resource access agreements, the Crown (Ontario and Canada) should fund research into a First Nation's traditional uses and practices around the resource being negotiated.

This recommendation comes out of our experiences with fishing negotiations and the Owen Sound burial grounds. Once the legal and historical facts were agreed to, it was easier to negotiate a lasting settlement. The Crown should take the risk that such research may be used in court because good research will:

- enhance the probability of success at the negotiating table;
- provide a public rationale for negotiating access to resources;
- negotiating well-researched agreements are cheaper than dealing with confrontations or court cases.
- provide both First Nations and other resource users with the certainty they need to plan for the future.

20) The Crown (Ontario and Canada) should formally recognize aboriginal and treaty rights in all resource access agreements it signs with First Nations.

We of the Saugeen Ojibway Nations are in the strange position of having court-recognized aboriginal and treaty rights to fish commercially and a Fishing Agreement (negotiated with Ontario based on those rights) in which Ontario specifically does *not* recognize our rights. Instead it says that Ontario considers the Fishing Agreement to be a licence.

The Crown, by right of Canada refuses to view rights-based access to resources as anything else but an economic development opportunity. As a result, Indian and Northern Affairs funds available for governance or other initiatives are not available to us.

If resource access agreements, such as the Fishing Agreement we have signed with Ontario, are negotiated because of court-recognized or agreed upon rights, the text of agreements should reflect that.

We understand the recognition of aboriginal and treaty rights to resources causes the Crown a lot of problems: Who has jurisdiction over what? How will this new relationship work? How do we, who don't trust one another, now start to work together? How to deal with 3rd party users? How is all this going to be paid for?

However, as Judge Fairgrieve said in his decision on *Jones-Nadjiwon*:

> It is self-evident, I think, that s. 35(1) of the *Constitution Act, 1982*, particularly after the judgment of the Supreme Court of Canada in *Sparrow*, dictated that a new approach be

> taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.

We believe many of the Crown's headaches around recognizing our rights to resources are of the Crown's own making. Just as the courts have said the burden of conservation must not fall first on First Nations when there are threats to the preservation of species, so the financial burden for others' mistakes should not fall on us.

Recommendation 2.4.62 of the Royal Commission on Aboriginal Peoples has the same goal—to ensure aboriginal and treaty rights to resources are respected. (See section, "Recommendations")

21) The Crown (Ontario and Canada) should compensate First Nations who have been prevented from accessing resources or practicing their rights to access resources due to government policies or practices or any other form of discrimination.

The payment of compensation will accomplish the following practical objectives:

- It will be to the advantage of the Crown, in the event a First Nation takes the matter to court, for, as Judge Fairgrieve pointed out in *Jones-Nadjiwon* with respect to the fishery resource around the Bruce Peninsula:

  > It seems to me that the transfer of the economic benefit of the fishery [to non-Native users] achieved by the regulatory scheme [of the Crown] is tantamount to 'expropriation', and considering the factors suggested by *Sparrow*, the absence of 'fair compensation' weighs against the Crown.

- It will be a formal recognition of past wrongs. One of the lessons we have learned is that it is hard for the Crown and First Nations to plan for the future until the past is dealt with. Compensation carries an important message from the Crown: "Yes you were wronged; and we want to put right that wrong so we can move into the future together."
- It removes another irritant from Crown-First Nations relations: Native people see non-Natives well compensated when the Crown corrects its mistakes, but we are not.
- It will help to fund present needs, such as gearing up to take advantage of access to resources.

This recommendation is consistent with recommendation 2.4.4 of the Royal Commission on Aboriginal Peoples and Article 27 of the UN Draft Declaration on the Rights of Indigenous Peoples (see section, "Recommendations").

22) The federal Crown should recognize fishing agreements it signs with First Nations in Ontario as qualifying for funds available to coastal First Nations under the federal Aboriginal Fishing Strategy.

Ironically, the licensing provisions of the Aboriginal Fishing Strategy (AFS) apply in Ontario, but the funding available to west and east coast First Nations does not. Although the policy of not extending AFS funding to inland First Nations was unsuccessfully challenged by Nawash in federal court, it nevertheless places First Nations in Ontario at a severe disadvantage. There are simply not the funds available to First Nations in Ontario for training and management. It means that some First Nations are forced to hold bottle drives to help pay for their management schemes.[221]

And, since Ontario did not see fit to supply us with boats, gear and training as the DFO did with First Nations on the east coast after *Marshall*, our need for funding for these necessities is even more critical.

23) The Crown (Ontario and Canada) should pay for the acquisition of quotas from non-Native resource users, and purchase equipment and training for First Nations as part of any resource access agreement.

The federal Department of Fisheries (DFO) bought out non-Native licence holders in order to make room for east coast First Nations to enter the commercial fishery in the wake of the *Marshall* decision. They also made available boats, equipment and training for First Nations fishermen. The Ontario Ministry of Natural Resources bought out the quotas licensed to non-Native fishermen around the Bruce Peninsula in the wake of the *Jones-Nadjiwon* decision, but it did not provide boats or equipment or training.

As a result, it has been very difficult for Nawash and Saugeen fishermen to enjoy the practice of their rights—many who took to the waters could only afford substandard tugs and equipment. And without the proper training, it was difficult for them to make the most of the equipment they were able to patch together.

Surely the Crown can agree that recognizing Native rights must include ensuring First Nations can practice those rights, especially when Natives lost the capacity to harvest resources as a consequence of the Crown's actions.

d) Management of Resources

[221] Nawash survey of First Nations in Ontario (unpublished at time of writing)—see discussion in "Potential for Future Confrontation Around Resources."

24) Resource access agreements signed between the Crown (Ontario and/or Canada) and First Nations should include provisions and funding that welcome the First Nation as managers of the resource in their traditional territories.

As discussed in section, "Our Rights and Responsibilities Are Our Work", the core cultural values inherent in the Native idea of work or *nookeewin* (*ie,* right, duty and responsibility) should be considered as constitutionally protected aboriginal and treaty rights. Therefore, in our case, the full expression of our aboriginal and treaty rights to fish must include our management of the fisheries in our traditional territories.

In fact, there is an expanding body of legal opinion that says First Nations have rights to activities attendant to the proven right to fish or hunt or otherwise use a resource. One of those attendant rights must surely be management.[222] Recognizing this and engaging First Nations as managers of resources has a number of practical advantages:

- It brings another guardian to help protect the wild.
- It brings the Crown into conformity with the Convention on Biological Diversity (*ie,* section 8j which enjoins Canada and the other signing parties to incorporate indigenous traditional knowledge into their environmental management schemes).
- It helps fulfill the Crown's obligations surrounding consultation and accommodation for it will involve First Nations at the strategic planning phase of legislation, policies and practices that would affect aboriginal and treaty rights.[223]
- It will provide a forum for the recognition and amelioration of actions and policies that would derogate from a First Nation's rights and thereby avoid confrontations.

The indigenous ideal of responsibility for the environment is reflected in Article 25 of the UN's Draft Declaration on the Rights of Indigenous Peoples:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

It is also reflected in the recommendations of the Manitoba Aboriginal Justice Inquiry (see recommendations no. 2, 4, 5, in section, "Recommendations"); also the Royal Commission on Aboriginal Peoples (see recommendations 2.4.78 and 2.4.70 in "Recommendations").

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[222] Some lawyers say that First Nations may have s35 aboriginal and treaty rights to environmental management, not only because a healthy environment is necessary for the practice of their rights to hunt, fish etc, but as a right on its own. It can be argued that environmental stewardship is a core cultural value and practice and, as such, should be protected under s35 of the Constitution. Theresa McClenaghan, "Molested and Disturbed: Environmental Protection by Aboriginal Peoples Through Section 35 of the *Constitution Act, 1982*", Canadian Environmental Law Association Brief No. 376, September 1999. Linda Collins, "Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap," Sierra Legal Defence Fund, unpublished draft, 2002.

[223] See the list of principles of consultation in the section, "The Importance of the Honour of the Crown." or in Appendix H: "For the Honour of the Crown—What Consultation Looks Like".

25) The Crown (Ontario and Canada) should institute transfer payments to First Nations for the assessment and management of resources in their traditional territories. Such payments should be:

- **i. generous enough to allow for the full expression of First Nations' responsibility for the natural world that is such a central value of their culture.**
- **ii. derived from revenues the Crown receives from the exploitation of all natural resources, including oil, gas, and minerals.**

A significant portion of the revenues the Crown derives from the exploitation of resources would help fund aboriginal management of those resources. It would also implement recommendations 2.4.3, 2.4.4 and 2.4.51 of the Royal Commission on Aboriginal Peoples as described in the section, "Recommendations".

26) i. In general, the Crown (Ontario and Canada) should recognize the value of First Nation involvement at the strategic planning phase of resource management regimes.

- **ii. More specifically, the Crown should immediately invite First Nations to sit on international management bodies (such as the Great Lakes Fisheries Commission), especially where there is representation from US tribes.**

Early consultation is especially important in the case of First Nations with recognized aboriginal and treaty rights. Resource management decisions that the Crown takes a part in may prejudice the aboriginal and treaty rights of First Nations. Our case is an example. The decision to allow the stocking of pacific coast salmon species in Lake Huron was made without consulting us. And yet that decision has indeed impacted on our rights in a number of ways, not the least of which has been the spawning of sportsmen's salmon derbies that have derogated from our rights to fish in all areas of our traditional waters at any time and put our fishermen in harm's way.

There is no reason this recommendation cannot be considered part of the "parallel process" recommended above (no. 4) and funded according to recommendations 7 and 25.

Involving First Nations early in the planning of environmental management schemes:

- helps to satisfy the Crown's duty to consult and accommodate First Nations.
- helps the Crown avoid discriminatory practices (and potential court action).
- increases the certainty for all parties—Crown, First Nation and stakeholders—that the management regime will be respected.

- helps to fulfill the obligations of the Convention on Biological Diversity as well as other international undertakings.
- provides another "pair of eyes" examining project proposals and regulatory measures that impact on the ecosystems of an area—a pair of eyes that have the benefit of bringing traditional indigenous knowledge into the mix of information and research.

For First Nations it would mean:

- finally being able to take part in the environmental stewardship of their traditional territories.
- being able to say, with some certainty, whether a proposed scheme does or doesn't affect their rights and claims.
- being able to work in partnership with the Crown and agencies of the Crown to better protect the ecosystems of Ontario—something everyone agrees is needed.

Including First Nations on international management bodies will automatically include us in the strategic planning stage of initiatives that will have an impact on our rights and claims. This is in keeping with *Haida* and will go a long way to meet the consultative principles defined by other courts, as we have identified them in the section, "The Importance of the Honour of the Crown" and in Appendix H: "For the Honour of the Crown—What Consultation Looks Like".

This recommendation would also put an end to the frankly discriminatory opposition of the MNR to First Nations having a place on US-Canada management bodies (such as the Great Lakes Fisheries Commission which has representation from US tribes—as described in the section, "MNR Intransigence").

This recommendation is consistent with Articles 19 and 20 of the UN Draft Declaration on the Rights of Indigenous Peoples. Implementation of this recommendation is also consistent with Article 25 of the Draft Declaration. (See section, "Recommendations", above.)

e) Heritage and Environmental Assessments

27) Until legislative change can be implemented, the Cemeteries Branch of the Ontario Ministry of Government Services and all other Ministries that have some responsibility for heritage assessments should review, in consultation with First Nations, all their policies and practices to ensure they accommodate the rights, claims and traditional beliefs of aboriginal peoples. The areas that require immediate attention are:

i. **the criteria and process used by the Ministry of Culture to assess the heritage potential of a site being proposed for development;**

ii. **the definition of what constitutes an "interment" and therefore eligible for protection under the *Cemeteries Act*;**

iii. **the means by which the Registrar of Cemeteries is satisfied that a burial does exist.**

iv. **the development of a negotiation process, parallel to the usual procedures, to ensure aboriginal heritage, culture and rights are properly considered.**

Given the origin of conflicts between the Crown and First Nations in recent years, we would have thought that the Crown would want to give this matter its immediate attention. And yet, as these recommendations are being written, the Provincial Crown is insisting that a burial area at Hunter's Point in the Bruce Peninsula be handled through the usual regulatory processes. That is, the Cemeteries Branch of the Ministry of Government Services will not re-consider its decision that some areas of the site do not contain burials. And the Ministry of Natural Resources has instructed the Niagara Escarpment Commission to deal with an application for development in the area through it's usual approval process under the Niagara Escarpment Plan.

As mentioned in the section, "Potential for Future Confrontation Around Burial Grounds" the techniques authorized by the Provincial Archaeologist for determining ancient habitation and finding artefacts are inadequate for some areas of the Province, including the Bruce Peninsula. In addition, many site assessments for heritage features are done by private firms and we are finding they are not done as diligently as they should be.

Finally, as explained in this section, in "Potential for Future Confrontation Around Burial Grounds" and in "The Need for Legislative Reform" the *Cemeteries Act* excludes what we believe are burials (*eg,* remains found on top of the ground). Indeed, the language of the Act itself is contemptuous: for example, the phrase "unapproved aboriginal burial". As Chief Nadjiwan explained to the Ipperwash Inquiry during the Community Forum at Nawash, it takes years of training to properly see someone into the spiritual realm. It is we who have approved the burial and we did it years before the *Cemeteries Act* was written. In addition, the only method of determining the presence of remains under ground is to disturb them, an action that carries a strong cultural taboo.

In these ways, and others, the legislation and the ways in which it is implemented are deeply offensive. We would prefer to see a parallel process in which our elders are intimately involved in defining what constitutes a burial.

The review of policies and practices we recommend here should be done keeping in mind the recommendations concerning heritage sites from the Royal Commission on Aboriginal Peoples and Articles 12 and 13 of the UN's Draft Declaration on the Rights of Indigenous Peoples (see section on "Recommendations", above).

28) Until legislative change can be implemented, the Ontario Ministry of Natural Resources and all other Ministries that have some responsibility for First Nations

and the environment should review, in consultation with First Nations, all their policies and practices to ensure they accommodate the rights, claims and traditional beliefs of aboriginal peoples. The areas that require immediate attention are:

i. **the reduction of tensions between law enforcement personnel (particularly Conservation Officers) and First Nations;**

ii. **the full accommodation of aboriginal rights, values and beliefs regarding heritage sites, burial grounds and traditional practices (such as the gathering of medicinal plants) during environmental and heritage assessments and approval processes;**

iii. **the development of an alternate process, parallel to the usual procedures to ensure Aboriginal interests are properly considered.**

The draft Statement of Environmental Values for the Ministry of Natural Resources (July 2005) states, regarding aboriginal peoples,

> The Ministry of Natural Resources recognizes the value that Aboriginal people place on the environment. When making decisions that might significantly affect the environment, the ministry will provide opportunities for involvement of Aboriginal people whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered.

The same wording is in the SEVs for other ministries, including Environment. However, if the "opportunities for involvement of Aboriginal people" are the same as for all others, we will continue to find our rights, beliefs and traditions on, as Nawash elder John Nadjiwon told the Inquiry, "the dirty end of the stick."

We note that Article 7 of the UN Draft Declaration on the Rights of Indigenous Peoples states, in part:

> Indigenous peoples have the collective and individual right not to be subjected to … (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures.

It has been our experience that the usual procedures for environmental and heritage assessments, reviews, and appeals are discriminatory and derogative of our rights and beliefs.

f) Education

In general, continuing education about the culture, beliefs, rights and claims of First Nations' peoples should be woven into the fabric of Canadian institutions. We do not think that short term, so-called "Native awareness" workshops or programs are effective in the long term. The recommendations on education and eliminating racism of the "1989 Report of the Task Force on Multiculturalism in Saskatchewan", the "Royal Commission on Aboriginal Peoples", the "Saskatchewan Commission on First Nations and Métis

Peoples and Justice Reform (2004)", and the "Royal Commission on the Donald Marshall Jr. Prosecution" are all useful (see above section D.1. "Recommendations from Other Inquiries"). We endorse all of these recommendations with the following refinements.

29) Ontario should make it mandatory that all school boards spend a certain percentage of their budgets on the development of public and high school curricula for insertion into core courses in all streams.

By "insertion into core courses" we mean, for example: Native literature in English courses; Native history including local First Nations' history in History courses; constitutional law and major Supreme Court decisions in Law courses; traditional aboriginal practices in Sociology or Geography courses.

30) Ontario should make it mandatory that school boards contract local FNs or aboriginal people to contribute to materials & curriculum plans.

For example, we have developed a number of well-researched educational materials that have languished on our shelves because the Bruce County School Board refused to partner with us in their production and distribution. For example our *Illustrated History of the Chippewas of Nawash* is an excellent teaching tool. In 1999, as part of a Trillium grant, Patrick Nadjiwon developed a whole curriculum around plants and their traditional uses. The plan calls for the use of plants as medicines to convey core values of the Anishinaabek.

Similar teachings surround the making and use of traditional tools. For example, the bow contains lessons in the physics of imparting energy. The manufacture of arrows requires knowledge of the physical properties of various woods and the aerodynamics of flight. The efficient use of the bow requires a complex knowledge of the habits and anatomies of various animals, birds and fish. Our spiritual connections with the wild are taught through the often-elaborate protocols used to collect the proper materials and in the taking of life.

Elders should be hired to assist with in-school delivery of local history and Native values as integral parts of the curriculum.

31) A full year course in the traditional practices of aboriginal peoples and in aboriginal and treaty rights as they are expressed in the constitution and being defined by the courts should be mandatory for all students seeking employment in law enforcement, especially for those who would be Conservation Officers.

This is particularly important to ensure OPP, municipal police officers and Conservation Officers understand not only the law but also the people they are serving. Similar training should extend to park wardens in both the Provincial and federal service. The Crown

should also consider offering a similar course to government personnel who meet aboriginal peoples in the course of doing their jobs.

This recommendation is consistent with others by other inquiries. See for example, recommendation 15 of the Donald Marshall Jr. Commission, above.

32) Ontario should make it mandatory that all candidates for the bench receive training in traditional First Nations' ways and views and in constitutional law as it pertains to the rights of aboriginal peoples. In the alternative, any case involving Native rights should be heard in a higher court than Justice of the Peace.

Our experience with JP Forgave, as we have chronicled it in this paper, should make it clear that too many JPs do not have enough training in constitutional law to be able to rule on charges against First Nations people being brought to them by police or Conservation Officers. We know from our own experience and from our own survey research that this is a common source of frustration among aboriginal people and that in many cases, their rights are not being recognized.

This recommendation is consistent with recommendations by other inquiries. See for example, recommendation 13 of the Donald Marshall Jr. Commission in the section on "Recommendations" and recommendation 14 from the Marshall Commission which suggests the Attorney General establish continuing professional education programs for crown prosecutors.

In the case of the alternative, if a constitutional right were raised as a defence with a Justice of the Peace, the matter would immediately be referred to Provincial Court. This would mean the case would be heard by someone with the necessary expertise. However, the barrier of expense would remain.

33) To foster better understanding and to improve the relationship between First Nations and the local justice system, law enforcement personnel, Crown attorneys, other lawyers, and members of the judiciary should meet frequently with First Nations.

This could be another agenda item for local Covenant Councils. It is in line with recommendation 27 of the Donald Marshall Jr. Commission.

Their discussions should be wide-ranging and frank, with the concerns of all participants freely and openly expressed. Such meetings will greatly assist the administration of justice; they may lead to alternative, Native-based justice systems; and the relationships developed here will prove crucial to the swift and fair resolution of confrontations.

We strongly emphasize this kind of long-term relationship building. We have found that short-lived "sensitivity training" and even extended exposure of "liaison officers" to a First Nations' community are of dubious value. In our experience, they are no guarantee the liaison officer will truly understand First Nations values and protocols or be able to impart them to co-workers. Those involved in regular meetings as recommended might even consider adoptions; or, in government parlance, secondments with nearby First Nations.

34) The Crown (Ontario and Canada) should make funding available to First Nations or Provincial Treaty Organizations to run regular and continuing educational workshops in their traditional territories. The Crown should make attendance obligatory for all area government, law enforcement and school board officials who work in the traditional territories.

This recommendation becomes critical during negotiations around contentious issues, such as burial grounds, resource allocation and resource management. We (Nawash and Saugeen) funded our own communications initiatives throughout the 1990s, but we strongly feel that it should not be our responsibility to deal with anti-Native rights campaigns and bigoted statements that sometime pass for fair comment in the media.

Communications based on good research, that is factual and straightforward, is one of the things that led to a successful resolution of the burial ground vigil in Owen Sound. It is in the interests of both First Nations and the Crown to be able to influence the public perception of an on-going dispute. But, in accord with recommendations from other inquiries, First Nations must be able to control public statements and information about them—our history, our culture, our goals in negotiations.

The Royal Commission on Aboriginal Peoples also recognized this, specifically with respect to fishing. In 2.4.69 the Commission recommends that:

> Public education form a major component of government fisheries policy. This will require joint strategies to inform the public about Aboriginal perspectives on fishing, to resolve differences and to overcome fears that Aboriginal entry into fisheries will mean overfishing, loss of control, or loss of property.

g) Redress

Racism is one form of the contempt that impedes reconciliation between First Nations and the Crown. It is more prevalent than most Canadians believe, for we have encountered it in every institution of Canadian society. We believe that the burden of dealing with the racism that too frequently targets our people and infects our relationship with Canadians should not fall on us. Unfortunately, there is now, no adequate forum to address the racism and hate that continue to derogate from First Nations rights in Ontario.

35) A new definition of racism, one which takes into account the constitutional rights of anyone, including the section 35 rights of aboriginal peoples, should inform the work of the Ontario and Canadian Human Rights Commissions and the Canadian Race Relations Foundation. We recommend the following definition:

> **Racism is any communication, action or course of conduct, whether intentional or unintentional, which denies recognition, benefits, rights of access or otherwise abrogates or derogates from the constitutionally recognized rights and freedoms of any person or community on the basis of their membership or perceived membership in a racial group. The fostering and promoting of uniform standards, common rules and same treatment of people who are not the same constitute racism where the specificity of the individual or community is not taken into consideration. The public dissemination of any communication or statement which insults a racial, ethnic or cultural community or which exposes them to hatred, contempt or ridicule also constitutes racism.**

Racism is next to impossible to eradicate, as noted by the Saskatchewan Commission on First Nations and Métis peoples and Justice Reform 2004 (Ch. 7, "Eliminating Racism"): "This Commission noted that in spite of provincial race and cultural relations policies and the work of a Committee on Multiculturalism, racism remains prevalent in Saskatchewan."

Perhaps a new approach is needed; one that recognizes that the constitutionally protected aboriginal and treaty rights of Native people are also human rights.

From the evidence of our own experience, some of which is documented in this paper, Canadians simply do not seem to view some of the things they say or do against First Nations and aboriginal people as hateful. Successful lobbies against government policy, legislation and even court judgments favourable to First Nations have helped to create a psychological "terra nullius" in which the regulatory landscape has been emptied of Native people who might effectively oppose the usual way of doing business. This has served to discriminate against the collective rights and claims of First Nations, including Nawash, and has fostered an atmosphere of hate that finds expression in crimes against the person and property of individual aboriginal people.

Indeed, we believe that the atmosphere of hate that permeated Crown-First Nations relations in the 1990s helped set back the recognition of aboriginal and treaty rights in this Province by at least a decade.

We recognize the stakes are high. If aboriginal and treaty rights and First Nations' traditional ways were fully recognized and protected in provincial and federal legislation, then the way of doing forestry, mining, tourism, sports fishing and hunting, environmental regulation, law enforcement, and justice would be radically altered. But accommodations can be made (indeed, *must* be made, if court decisions are to be taken seriously).

However, the Crown and First Nations, together, must be able to confront the hate and racism that infect every set of negotiations and every bone of contention between us. This recommendation *together with* recommendation 14, above, regarding amendments to the criminal code, will help clear the path to a better relationship. Education and good intentions are not enough—they must be assisted by legal penalties and strong forums for redress.

36) The Ontario Human Rights Commission and the Canadian Human Rights Commission should be mandated to accept complaints from First Nations peoples regarding violations of their collective rights and, to implement this mandate, outreach offices for the Ontario Human Rights Commission should be established in the north.

It has been our experience that the Ontario and Canadian Human Rights Commissions are ill equipped to safeguard the collective rights of aboriginal peoples. There is a lack of effective, independent forums in which aboriginal complaints about the impact of policies and practices (including the Crown's) can be heard and acted upon. This, notwithstanding the fiduciary obligations the Crown holds with respect to First Nations, and the shellacking the Crown (both Canada and Ontario) has received in recent years over its treatment of aboriginal peoples.[224]

The Commissioners of the Donald Marshall Jr. inquiry recognized the need to equip Human Rights Commissions with the tools to deal with Native concerns about their rights (see their recommendation 32, above). Our recommendation may require a review of the current mandates of Human Rights Commissions and perhaps some legislative change but, in view of international criticism and recurring disputes and court cases, the Crown should make this a priority.

This recommendation will also require both federal and provincial human rights organizations to re-tool to accept complaints from First Nations who feel their collective rights have been abrogated or derogated. This will mean hiring Native and non-Native staff well schooled in Native rights, customs, languages and traditional institutions.

It is difficult, from Toronto or Ottawa, to know and understand the kind of hate and discrimination directed at First Nations and their members. The Ontario Human Rights Commission in particular, must reach out to First Nations and neighbouring communities in rural and northern Ontario. It is safe to say that much of the remedial work that needs to be done is in educating non-Natives (and some Natives) about what racism and discrimination looks like and the impact it has on First Nations' communities and individuals.

Aboriginal and treaty rights are, after all, human rights.

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[224] See, for example, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen," UN Commission on Human Rights, April 2005.

37) The Canadian Race Relations Foundation should do much more to document the hate crimes and discrimination directed at aboriginal peoples and First Nations and to research how their constitutional rights are being derogated from or denied altogether. More specifically, the Canadian government should increase the budget of the Foundation to:

i. **accommodate the placement of at least 4 aboriginal leaders or elders on the Board of the Foundation;**
ii. **hire aboriginal peoples from across the country in research and senior staff positions;**
iii. **adopt a definition of racism that recognizes the impact on the aboriginal and treaty rights of First Nations peoples;**
iv. **fund research into the particular nature of racism against aboriginal peoples, the official and unofficial derogation of aboriginal and treaty rights, and the true incidence and prevalence of hate crimes against aboriginal peoples.**

It is our opinion that the number of hate crimes against Native people, were they properly seen as such and duly reported, would dwarf the crimes against other targeted groups. While the Foundation has done some good research on accessibility to mainstream Canadian institutions (*eg,* education, employment), it needs to better investigate the breadth and depth of aboriginal exclusion. It also needs to research and recommend to the Crown better ways of working with First Nations—ways that would ensure that aboriginal constitutional rights and the uniqueness of First Nations' traditional institutions are not lost.

It is our belief that some of our ways—in justice and environmental stewardship for example—would benefit mainstream Canadian society. The Canadian Race Relations Foundation already has the mandate and infrastructure to look at these sorts of issues. Therefore it is probably the best place to start to develop a "centre of excellence" around what constitutes hate against aboriginal peoples and how the polices and actions of individuals, groups and the Crown serve to derogate from the constitutional rights of First Nations' people.

38) The Crown (Ontario and Canada) should implement a policy of zero tolerance for hateful remarks, actions, and correspondence at all levels of its organization. Proven cases of racist attitudes should result in immediate and irrevocable dismissal of the staff who promote or communicate them.

As we have found, many hateful statements and actions directed at First Nations and aboriginal people are not seen as racist. Therefore, before the Ontario and federal civil service adopt the policy recommended here, there should be a wide-ranging education

campaign regarding what constitutes hatred and racism and the effect such statements, actions, practices and policies have on First Nations and aboriginal people.

In addition, aboriginal organizations, the Canadian Race Relations Foundation, the Ontario and Canadian Human Rights Commissions should meet with all unions whose employees will be affected by a zero tolerance policy in order to draft the policy and to ensure compliance.

h) Implementation of the Recommendations of the Ipperwash Inquiry

At Nawash's Community Forum, Commissioner Linden heard a plea from Band members to find ways ensure his recommendations are implemented. It has been First Nations' experience that recommendations we know would improve our circumstances sit on shelves in Ministers' offices. The most famous case of this is the Royal Commission on Aboriginal Peoples. Perhaps the appointment of two Independent Commissioners, as we recommend above, would help. But first, key government officials need to review, carefully and with guidance, the final report of the Ipperwash Inquiry. Then the governments should commit to specific actions, with deadlines for completion. Therefore we recommend the following process.

39) To implement the recommendations of the Ipperwash Inquiry:

i. **The Crown (Ontario and Canada) should organize a symposium or a short series of symposia with key government Ministers, their political staff, key civil servants, the heads of human rights commissions, Ontario First Nations leaders and elders to review and discuss the findings of the Ipperwash Inquiry and its recommendations. This may be considered the first Covenant Council.**

ii. **Thereafter, Ministers will provide deadlines for the implementation of recommendations as well as their Policy Statements with Respect to Aboriginal Peoples as described in recommendation 11.**

iii. **The Legislature should appoint two Independent Commissioners (for one should be aboriginal) to oversee the implementation of the Ipperwash Inquiry's recommendations and to set up an office to accomplish the tasks set out in recommendation 12. Key counsel and staff from the Ipperwash Inquiry should be hired to assist the Independent Commissioners through the mandate of the current government and into the next.**

iv. **At the election of the next government, the Commissioner of the Ipperwash Inquiry should convene another symposium or series of symposia with key government and First Nations people as described above to refresh memories, review progress and establish a timetable for the implementation of recommendations that are yet to be acted upon.**

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APPENDIX A

Agenda for Community Forum at Chippewas of Nawash Unceded First Nation, September 8 & 9, 2005.

Thursday, September 8 (Fishing)

9:30 am: Convene for first daytime session.

1. Opening prayer, welcome, introductions. (Chief Paul Nadjiwan & Commissioner Sidney Linden)
2. Review of mandate of the Ipperwash Inquiry & expectations from visit to Nawash. (Commissioner Linden)
3. Overview of the matters to be discussed today. (David McLaren, from "Under Siege")
4. Discussion of the struggle for recognition of fishing rights and responsibilities (the names in parentheses are suggestions, others will be there to complete the picture).
    i. Early days of harassment
    ii. The Native idea of rights and responsibilities
    iii. Ross Forgrave
    iv. Deciding to assert the right
    v. Preparing for Court
    vi. Negotiations, fish bans and fish sales
    vii. Fishing Conferences

12:30 pm: Lunch

1. Discussion of the struggle for recognition of fishing rights and responsibilities (continued)
    viii. The Summer of 1995—vandalism, theft of nets, march on the Farmer's Market
    ix. Labour Day 1995—boat burning, stabbing, justice system
    x. More fishing licences and harassment 1996-7
    xi. Building on the science
    xii. Negotiating a Fishing Agreement
    xiii. Troubles with "comanagement"
    xiv. Current issues, future hopes.

4:30-5:00 pm: Adjourn.

Thursday Evening (Community Centre—Band Members)

5:30: 6:00 pm: Reconvene at the Community Centre for feast.

7:00-7:30 pm: Evening session begins at Community Centre.

1. Welcome (Chief Paul Nadjiwan)

2. Overview of Commission's mandate (Hon. Sidney Linden)
3. Review of the day's proceedings (Chief Nadjiwan, David McLaren)
4. Community experiences and opinions on the assertion of fishing rights and land claims.

Friday, September 9 (Burial Grounds, Land Claims)

9:30 am: Convene for second daytime session.

1. Opening prayer, welcome, introductions. (Chief Paul Nadjiwan & Commissioner Sidney Linden)
2. Review of mandate of the Ipperwash Inquiry & expectations from visit to Nawash. (Commissioner Linden)
3. Overview of the matters to be discussed today. (David McLaren, from "Under Siege")
4. Discussion of the struggle for the burial ground at 6th Avenue West.
    a) The community decision
    b) The legal research
    c) Communications
    d) The Vigil

12:00 pm: Lunch

1. Discussion of land claims and potential for future confrontation.
2. Wrap-up.

3:00 pm: Closing prayer and adjourn.

APPENDIX B

Bibliography of Reports and Research by the Saugeen Ojibway Nations

Note that none of the dozens of articles written for the media by Chiefs and staff are included in this list.

Fisheries Research

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APPENDIX C

THREE PUBLIC EDUCATION MATERIALS

Some things to keep in mind...

(Handed out August 5, 1995 at the sportsmen's demonstration at the Open Market, Owen Sound)

Nawash Fishermen have a perfect right to fish in Owen Sound and Colpoy's Bay

The *Jones-Nadjiwon* decision of 1993 by Judge Fairgrieve recognized the aboriginal and treaty rights of the Chippewas of Nawash and Saugeen First Nations to fish commercially in the waters seven miles out from the shoreline all around the Bruce Peninsula. That right is protected by section 35(1) of the Canadian Constitution of 1982 which states:

> **The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.**

The Native right to fish in these waters is a priority right. The only way it can be restricted is for the sake of conservation and only if all other fisheries (angler and commercial) are stopped first. In other words, if conservation is threatened, the last nets out of the water must be Native nets. (A summary of the major legal arguments, quoted directly from the judgment, appears on the reverse of this page.)

Sportsmen's Clubs have not accepted the Jones-Nadjiwon decision.

In letters to the Minister, area sportsmen's clubs have indicated they do not recognize the priority rights of the Chippewas of Nawash First Nation.

Anglers do not have a right to the waters around the Peninsula.

Although they like to refer to the waters of Owen Sound and Colpoy's Bay as "their" waters, they are not. Anglers, like non-Native commercial fishermen, must purchase licences in order to fish. For them it is a privilege to fish. For Natives it is a right. That's a big difference. That's the law.

When the MNR agreed to limit commercial fishing in the Sound and the Bay, the government paid non-Native commercial fishermen not to fish there.

There is scientific evidence that hatchery stocking is hazardous to the health of the Peninsula ecosystem.

At the recent Nawash Fisheries Conference, Dr. Mart Gross from the University of Toronto presented evidence from years of studies that show stocking programs can introduce diseases to wild stocks of fish. Stocking also weakens the gene pool of wild stocks to the point where reproductive behaviour can be bred right out of fish.

Evidence from other studies shows that stocking with fish not indigenous to an ecosystem (for example chinook salmon in Georgian Bay) can harm native wild stocks by competing for territory and food. In fact, fish from the only schools of wild trout left in Georgian Bay have been found to have wounds and scars consistent with attacks from salmon.

The Native way may prove the best way for managing resources.

Sportsmen's clubs are trying to fix a broken resource by throwing fish into waters they were never meant to be in. These fish do not breed naturally. The stocks in Georgian Bay are not self-reproducing. When stocks were threatened in the old days, Native fishermen would leave them alone by purposely allowing certain spawning beds to lie "fallow." Because ecosystems are so complex, many scientists are coming around to agreeing with the Native way of letting nature heal herself.

Native rights will lead to Native self-sufficiency.

What many critics of Native rights do not seem to understand is that the recognition of Native rights will lead to economic self-sufficiency. The revival of ancient, resource-based economies will generate more money for First Nations. In the case of Nawash, at least, most of that money is spent in neighbouring *non-Native* communities.

The Chippewas of Nawash are conducting their own catch assessments.

The Chippewas of Nawash have hired a biologist and are now in the process of counting and measuring the fish that are caught by their fishermen. Meanwhile, the angler catch is completely unknown. No one even does a proper assessment of the total catch at area fishing derbies.

(The sportsmen were worried about an upcoming fishing derby, the Salmon Spectacular, held in late August in Owen Sound. They needn't have. At that derby 4,000 anglers caught an estimated 258,000 pounds of fish.)

DIBAUDJIMOH

Bringing News of the Chippewas of Nawash by Fax
Fax: 519-534-2130 Phone: 519-534-5133
NOVEMBER 8, 1995

The Criminalization of Native Rights ... Then & Now

On December 23 1875, the Collingwood newspaper carried this headline: "INDIAN OUTRAGE." It reported that a non-Native commercial fisherman, "Mr. Malory had all his nets taken from him by the Cape Croker Indians. The government should take measures to have the thieves brought to justice."

An investigation by the government discovered that Mr. Malory was the one breaking the law by fishing without a licence and by fishing in a zone set aside for the Chippewas of Nawash. Not only that, but the Lake Huron fisheries manager had himself suggested the Natives deal with Malory. The Nawash First Nation had complained time and time and again about the rapacious activities of Mr. Malory and other Canadian fishermen. The government, however, took no action.

In 1988 a Wiarton JP forced eleven Nawash fishermen to stand for two hours as he harangued them about fishing over an MNR imposed quota. He portrayed them as thieves, greedily taking too many fish. Then he fined them a total of $32,000.

From 1989-90, the MNR ran a sting operation against Nawash fishermen that cost tax-payers $140,000. MNR conservation officers bought some 20,000 pounds of fish and charged Native fishermen for fishing over quota.

The 1993 *Jones-Nadjiwon* decision put an end to the official criminalization of Nawash rights, at least for a little while. Judge Fairgrieve ruled that it was not the Nawash fishermen that were the criminals. It was Ontario for not recognizing their aboriginal and treaty rights to fish commercially. It also found that the MNR had violated Nawash's constitutional rights by imposing a quota and licensing system on the First Nation.

Fairgrieve changed the law but not the perception

Early in the summer of 1995, two years after Judge Fairgrieve handed down his decision, a Nawash fisherman's boat was sabotaged and defaced with graffiti that said: "splake thief". Later in the summer, another fishermen, who had lost 2,000 yards of nets to someone who had lifted them or cut them free, dutifully reported his losses to the OPP. No one was apprehended. He was on the verge of bankruptcy when *he* was charged by the OPP for booby-trapping his nets in an effort to protect them.

In the space of about a month, some 12,000 yards of nets were stolen or damaged in various incidents. Two Nawash boats were sunk, one was later burned and another Native boat was set adrift. Not a single person has been charged in all the incidents. The local MPP, Bill Murdoch (who is also a Parliamentary Assistant to Natural Resources Minister Chris Hodgson), had the gall to suggest, in a recent *Globe and Mail* interview, that "the Chippewas" were doing it themselves.

What we heard at the Conference

The story of the criminalization of Nawash rights is only one of the many stories that were heard at the recent Conference on the Criminalization of Native Rights.

Attendees and the press heard from Chief Glen Hare of West Bay who talked about Operation Rainbow, another sting by the MNR. This one has resulted in some 35 Native hunters being charged. The sting and the prosecution, have, so far, taken over 7 years and cost tax-payers millions of dollars. MNR conservation officers pretended to be American hunters running out of vacation time. They offered money to Native hunters and then charged them with the commercialization of game. In some cases they added alcohol so they could lay weapons charges as well. The bands involved have exhausted their legal funds, but the Province seems determined to continue with charges.

Representatives from the Delaware of the Thames told about charges laid about two years ago against band members for selling fish caught in the Thames River. Again, MNR conservation officers posed as tourists just after some fresh fish. The charges came after a lengthy campaign on the part of local anglers and the OFAH to paint First Nations fishermen as little better than thieves.

The Ontario Federation of Anglers and Hunters (OFAH) even released a supposedly confidential enforcement report in an attempt to "prove" Delaware fishermen were taking 600.000 pounds of walleye out of the river by their reserve during the spawning season. Their charge that the Delaware were ruining the walleye fishery in the Thames was contradicted by official reports from the MNR. However the perception of the Natives as thieves was reinforced by a W5 program that CTV aired in the Spring of 1992. Davison Ankney, then President of OFAH, took credit for getting that program to air.

> ***The 5th Estate show is on events in the Bruce since the August 5th angler demonstration against Nawash fishing in Owen Sound. It's been bumped, so stay tuned.***

Marcia Simon, the Treasurer of the Dudley George Memorial Fund, told how his death was unprovoked and how his family who tried to help him were charged with contributing to his death. She also told how Ontario refused to negotiate a peaceful settlement because it was a "police matter." Just who ordered the police in is still not clear. One thing is clear though. First Nation oral history is a lot clearer than Ontario's common sense. It turns out there is a burial ground at Ipperwash Provincial Park after all — right where Stoney Point people said it was. **[NOTE: Donations to the Dudley George Memorial Fund can be sent c/o Marcia Simon at RR2 Forest Ontario, N0N 1S0]**.

Northern First Nations were not represented at the Conference. However, lawyers who represent First Nations hunters and fishers complain of the same kind of criminalization. In the case of the Kingfisher Lake First Nation, for example, the MNR set up their decoy moose during the First Nation's annual community hunt, right in the path of Native hunters. They detained two Native hunters who shot at the decoy, but did not charge them with anything. The power of the MNR to detain and confiscate game and equipment is putting a tremendous chill over the assertion of rights in the north.

There are solutions ...

At the conference, solutions were discussed too, not just the problems. Solutions differ from First Nation to First Nation because each has its own treaties and histories. There is a common thread however. It starts with the recognition of Native rights to resources and ends with a management role for First Nations that includes the renascence of ancient resource-based economies.

With all the money spent by the MNR in sting operations, you'd think that some of it might be better spent on research to see if First Nations have, in fact, rights to the commercial harvests of fish and game. I suggested that idea to the Native liaison officer for southwest Ontario, Wendy McNab, when I first heard of the charges against the band member from the Delaware of the Thames. She said their rights weren't the same as Nawash and Saugeen. I reminded her that before the *Jones-Nadjiwon* decision, the MNR considered the Chippewas of Nawash to be criminals too. She said she hadn't thought of that.

Chief Akiwenzie spoke at the Conference of the Chippewas of Nawash's attempts to negotiate a comanagement arrangement with the MNR for the fisheries around the Bruce Peninsula. It makes sense, he said, for First Nations at least to share responsibility for managing resources with the MNR. The Nawash Fisheries Conference held this past Spring in Port Elgin showed that Native people know as much about the resource as the MNR — perhaps more. The warnings Nawash fishermen have been sounding for years about the effects of stocking waters with hatchery-reared fish were echoed by biologists from the University of Toronto.

It makes sense economically too. If cash-strapped governments are looking to cut back on everything from bureaucracies to welfare payments, then they should be happy to help revive First Nations' economies. Healthier First Nations' economies mean fewer people on welfare. They also mean healthier non-Native economies, since much of what is earned on reserves is spent in neighbouring communities. In the case of the Chippewas of Nawash, roughly $3 million a year, just in groceries, appliances and cars, goes into the pockets of Owen Sound and Wiarton businesses.

Who Stands with First Nations?

The *Globe and Mail* report on the Conference emphasized the non-Native groups who stood to say it was time to look at things differently — that Native people who assert their rights and rightful claims are not criminals. If demonstrations attract the media, then maybe it's because that's the only way the medi seems to hear Native claims. When demonstrations do occur, people should look behind the headlines at the solutions First Nations themselves have already put before the government.

The Very Reverend Bruce McLeod, a former moderator of the United Church of Canada said that criminalization of Native rights allows governments (and the public) to dismiss the issues behind the claims too easily. Phyllis Fischer of the Canadian Friends (Quakers) said, "We are concerned about the increasing violence in the name of law and order directed toward the First Nation communities when they exercise their historic, legal and moral right."

Michelle Swenarchuk, Executive Director of the Canadian Environmental Law Association, agreed with that concern and added, "Aboriginal tend to want those resources for survival. The rest of us want it either for sport or profiteering, but right to survival comes first." She might also have said that Canadian courts agree. Both the Supreme Court in *Sparrow* and Judge Fairgrieve in *Jones-Nadjiwon* recognize First Nations have a "priority right" to resources. Ms. Swenarchuk pointed out that many First Nations have very reasonable approaches to co-management. However, Ontario seems to moving to confront First Nations, and supporting hunting and fishing associations that resent Native claims.

Also stating their support for First Nations were Diane Baltaz of the Catholic Diocese of Hamilton, Hassan Yussuf, the Human Rights Director for the CAW, Rick Bauman for the Mennonite Central Committee and Kahntineta Horn for CASNP (the Canadian Association in Support of Native Peoples).

IN BRIEF

ON FIRE

This little acronym stands for "Ontario Foundation for Individual Rights and Equality". It was founded recently at a public meeting at a little town called Thedford in southwest Ontario. It is the local non-Native response to events at Stoney Point (aka Ipperwash). The first FIRE started in BC in response to the anti-Native angst that was aroused in Gufstasen Lake. The Ontario group met again a couple of weeks ago to air their feelings about the Native claim to Sarnia. It is expected this group will grow like, well, wild-fire. Watch for a chapter in a community near you.

Anglers Kill 258,000 lbs of fish

Now here's a headline you won't see in your local press. But it's a fact in the Bruce. Some 4,000 good ole boys registered 4,300 fish for prizes at the 10-day, fun-filled Salmon Spectacular held late last August. The organizers have refused to release any more information than that. Believe me, we've asked them. They won't tell reporters for the *Sun Times* and the newspaper was one of the sponsors! Even the MNR doesn't know how much of what species the anglers really took — or should I say, *especially* the MNR.

But we can guess. Here's how ...

I've been told by other derby organizers that there are probably 3 fish caught and kept for every one registered. So that's 4,300 x 3 or 12,900 fish caught and kept. The prize winning salmon weighed in around 28 pounds and the prize winning trout at about 25 pounds. So consider an average weight for the keepers at 20 pounds per. That's 12,900 fish x 20 pounds or 258,000 pounds.

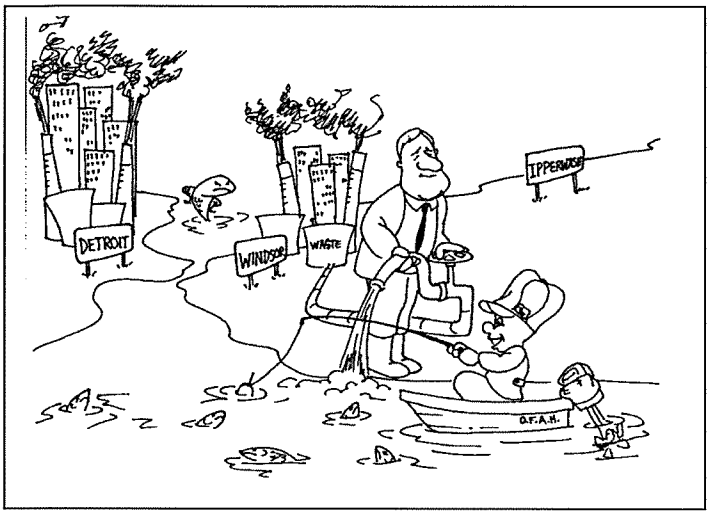
And that doesn't count the ones that were put back (catch and release has a mortality rate of about 70%, depending on species and where the hook is set).

Feeling Harrissed Yet?

You will, sooner or later. In the meantime, consider this definition from the Ontario Human Rights Code: harassment is "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" (Section 9(1)(f).

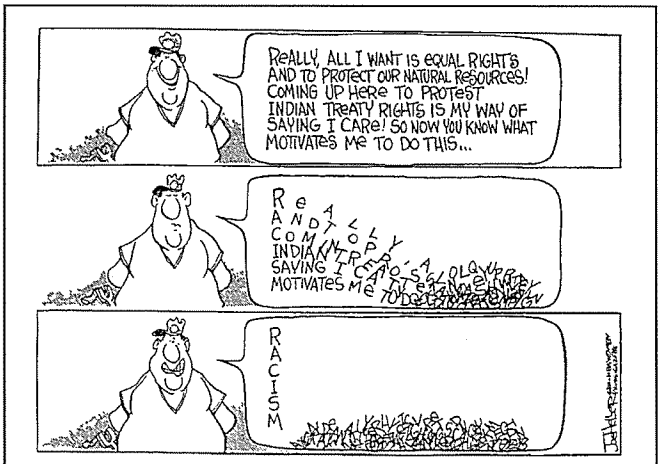
That, according to the Human Rights Commission, includes racial slurs and jokes, even if no one objects when they are made.

Some cartoons from http://www.bmts.com/~dibaudjimoh/page36.html



Angler group longs for dirty Erie (*Globe & Mail*, Mar. 3, 1998)

A little sewage might help raise fish stocks, says the Ontario Federation of Anglers and Hunters, but scientists disagree. Terry Quinney, wildlife biologist for the OFAH, said in an interview that perhaps what sagging walleye stocks in Lake Erie need is an increased dose of the phosphates that nearly killed the Lake in the 1960s. Phosphorous loadings in the Lake have fallen to 11,000 tonnes annually from a high of 28,000 tonnes in 1968, but that's still some 6,500 tonnes more than before European contact.



A Cartoonist Looks at the Wisconsin anti-Native rights Lobby

From the Green Bay Press Gazette, 1989. Reproduced in *Walleye Warriors*, by Rick Whaley & Walt Bresette, NSP, PA 1994.

Toronto Sun news story, April 4, 1997:

Chris Hodgson, Minister of Natural Resources announces deer caught eating apples in orchards will be shot on sight, saying Natives do it illegally, so he's changing the law so non-Natives can do it legally.

B.
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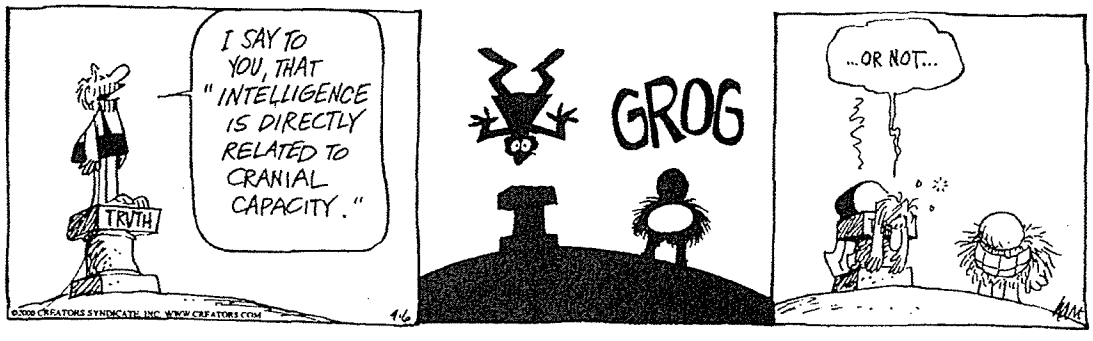
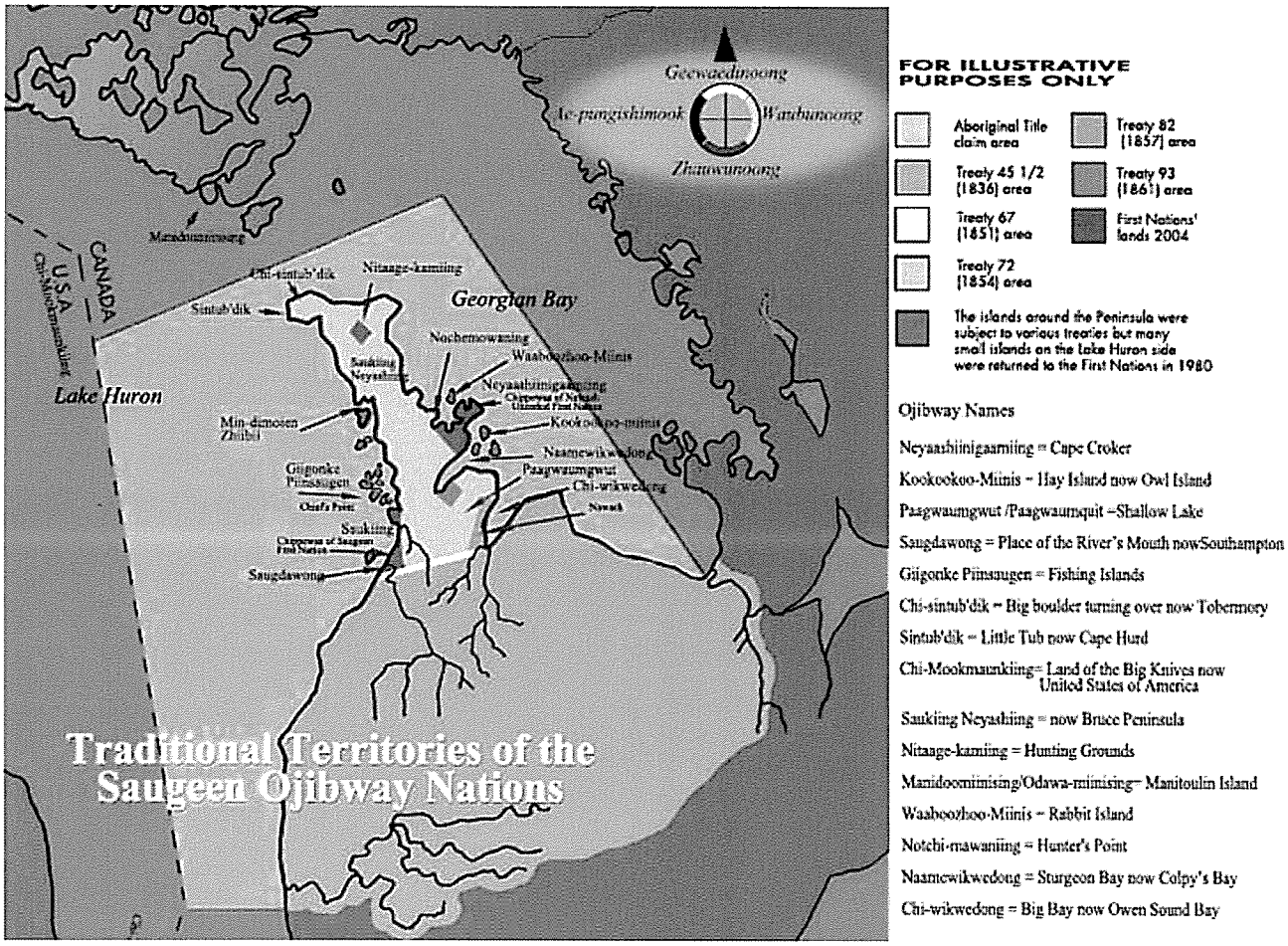


APPENDIX D

Map of the Saugeen Ojibway Nations Traditional Territories



APPENDIX E

Definition and Checklist for Racism

FINAL DRAFT: September 12, 1993

Preamble

This preamble and definition is based on continuing discussions between staff of the Saugeen Ojibway and staff of the following supporters of that First Nation's fishing rights:

- Anti-Racism and Discrimination Alliance of Grey-Bruce
- Catholic Church (Hamilton Diocese)
- CAW (Port Elgin Educational Centre)
- Central Mennonite Committee
- Project North Circle (Wiarton)
- United Church of Canada (Hamilton and Toronto Conferences)

The definition is an attempt to distil the essence of a number of definitions supplied by these and other groups (including the World Council of Churches and the United Nations). During the distillation, emphasis was placed on the practicability of the definition -- it had to help us identify racism in Canada in 1993. Hence we have added a "checklist for racism."

The definition below does not try to deal with the ideology of racism or whether it consciously motivates racial acts. Nor does it deal with the idea that race itself may be a social construct, having no basis in biology. The definition of racism below simply recognizes that racism exists and that it does harm to its targets. It tries to define this harm in a practical way, much as the definition of hate literature does in the Criminal Code.

Semantic and Historical Shifts in Meaning of the Word "racism"

The popular usage of the word "racism" refers to *actions* that result from any attitude of comparison of one group to another group with negative or destructive results. The definition below recognizes the semantic shift in the vernacular by defining racism as an "action."

It is necessary to consider another "shift" -- this one in history. Here is how the Saskatchewan Conference Church Society Committee put it in their report, *Beyond Ethnocentricity*:

> "Power is at the root of racism. [Alliances for those seeking power or in power are] made stronger first by exaggerating the differences between those with power and those without, and then by assigning values to these differences. The assigned values are made to stick and eventually to become part of the 'natural' order of society. ...
>
> "Once the situation has jelled and powerful and powerless alike have begun to 'breathe' such attitudes, then it is safe as a precautionary measure against change to do two things: to stress the flexibility of the situation by pointing to carefully selected 'token members' of the powerless who have entered the ranks of the powerful; and to verbally minimize the still all-important differences and to insist that all are equal. Whereas initially, it was

> important to stress the differences, it now becomes advantageous to stress the sameness -- the equality of *all* -- in order to effect the same racist ends."

This theme of "equality for all" (in the context of institutional or systemic discrimination) is picked up by Judge Murray Sinclair in the report of the *Manitoba Aboriginal Justice Inquiry*:

> "Systemic discrimination [defined as the result of racial prejudice] involves the concept that the application of uniform standards, common rules and treatment of people who are not the same constitutes a form of discrimination. It means that in treating unlike people alike, adverse consequences, hardships or injustice may result ... it is clear that operational policies applied uniformly to Aboriginal people sometimes have unjust or unduly harsh results. The reasons may be geographic, economic or cultural. However, it must be acknowledged that the application of uniform policies can have a discriminatory effect."

From Judge David Fairgrieve's decision in the Saugeen Ojibway fishing trial:

> "The Band's fishing income is a crucial part of its subsistence economy, and the limited access caused by the quota produced greater deprivation and poverty and contributed to increased unemployment and poverty, individually and communally. The quota had a serious adverse restriction and constituted an infringement under sec. 35(1) [of the Constitution].... The native fishery was seen as just one part of the commercial fishery. No special regard was given to the Band's fishery operation, quite apart from the question of any constitutional priority. ...
>
> "I accept the defendants' submission that the evidence established that the effect of the Ministry's quota system has been to allocate to non-native fishermen the vast preponderance of fish available for commercial harvest. The failure to regulate the recreational fishery in accordance with the same conservation plan has had the inevitable effect of shifting a greater share of the resource to that user group. In neither respect has the Crown demonstrated that the plan ... recognized that s. 35(1) required that priority be given to the aboriginals' stake in the fishery resource. ...
>
> "The quota restrictions do not meet current constitutional standards and are, accordingly, unenforceable against the defendants."

Definition of Racism

RACISM is any communication, action or course of conduct, whether intentional or unintentional, which denies recognition, benefits, rights of access or otherwise abrogates or derogates from the constitutionally recognized rights and freedoms of any person or community on the basis of their membership or perceived membership in a racial group. The fostering and promoting of uniform standards, common rules and same treatment of people who are not the same constitute racism where the specificity of the individual or community is not taken into consideration. The public dissemination of any communication or statement which insults a racial, ethnic or cultural community or which exposes them to hatred, contempt or ridicule also constitutes racism.

For further information, contact Lenore Keeshig-Tobias or David McLaren
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Checklist for Racist Materials Relating to First Nations

The purpose of this checklist is to assist in the evaluation of written materials (news articles, commentaries) about First Nations struggle to maintain their rights. This checklist is designed to highlight the negative bias in the use and manipulation of words, information, facts and interpretations. Examples are given wherever possible.

Please feel free to expand, clarify, question and comment. Remember this is only a working draft. Please note #4 Overall Impact: this is an attempt to make emotional ties with the scrutinized document. I feel this is necessary in bringing about an understanding of racism and racist documents.

1) Language Use -- Text -- Main Body of Written Words -- Includes Choices of Words, Information And Facts

a) Loaded words: native fiasco, native agenda, unregulated Native fishery
b) Manipulation of words: conservation abuses by some natives / massive native kill of spawning walleye / natives hunt and fish *outside the law* / non-native must continue to adhere to conservation laws
c) Insulting overtone and condescension.

2) Information Use -- Texture -- Interrelationship and Interpretation of Facts and Information -- Disposition:

a) Stereotypes & variations: that demean or ridicule cultural values, beliefs, traditions contrasted unfavourably: over-simplification and generalization / no continuity of past with future / presented as "frozen in time" / not allowed to evolve
b) Ethnocentric western focus on material object: birch bark canoes, spears, baskets, etc.
c) Tokenism: carefully selected "Token members" or spokes person / over-simplification and generalizations / quotes out of context
d) Omissions or Limitations: no Native spokes person or Natives are spoken for or paraphrased / no Native perspective / denial of Native history / quotes out of context
e) Distortion: historical inaccuracies / factual inaccuracies / unfounded/unproven allegations / second-hand information / quotes out of context
f) Appropriation of Native values, beliefs.

3) Context -- Circumstances that are Relevant to Event and Facts -- Contribution to Understanding -- Meaning

a) Implied negative value judgment: over-simplification of issues / lifestyles and rights contrasted unfavourably / as if "frozen in time," and not allowed to evolve
b) Cultural values, beliefs, traditions described inaccurately and out of context with their civilizations and history and evolution over time.
c) Promotion of equal rights, common rules and same treatment: denial of historical relationship with First Nations / denial of Native history/ denial of aboriginal and treaty rights.
d) Author's qualifications, and cultural and personal perspective: Is the author knowledgeable and respect of Native cultures?

4) Over-all Impact -- End Results -- Intellectual and Emotional Response

a) Fosters and promotes application of equal rights, common rule and same treatment for people who are not the same.

b) Encourages belief that Natives are inferior and should live by "white" standards for their own good.

5) Racism is

-- a psychological manifestation of feelings of insecurity, fear, lack of trust and self-confidence.
-- more than name-calling and racially motivated violence and hate groups like the skinheads and KKK. It is denying minorities their fair share of jobs ... It is government agencies and departments who are not doing enough to ensure that their programs, policies and legislation respond to the multicultural reality of Canada.
-- is a prejudice that involves an unscientific belief in the superiority of one racial or enthnocultural group over another, and/or impairs the recognition of human rights and fundamental freedoms in all fields of life.
-- an ideology that takes for granted one race's superiority over another
-- a uniquely Euro-American phenomenon directed mainly at Africans, Jews and Aboriginal peoples.
-- domination by certain groups over minority groups, based on physical attributes such as skin colour.
-- is a term of power exercised by the white English-speaking majority over the non-white English-speaking minority
-- any act that excludes a person from activities, or subjects a person to maltreatment, due to their skin colour or racial background.
-- power + prejudice
-- a denial, expressed or not, intentional or not, that all persons are made in the image of God and that all persons, regardless of ethnic origin, share a common dignity and worth
-- involves both attitude and behaviour
-- a systemic mistreatment of a group of persons on the basis of their race, skin colour, ethnic origin, nationality or religion
-- a form of denying equality to all people
-- a set of implicit beliefs, assumptions, and actions based upon an ideology of inherent superiority of one racial or ethnic group over another
-- evident within organizational or institutional structures and programmes as well as within individual thought or behaviour patterns
-- is an ideology based on an unwillingness to respect differences which results in oppression against an identifiable group (race) through the denial of their culture, values and history
-- to exclude a racial group from their constitutional rights, based on an assumption that certain (Western) racial-cultural characteristics are superior and/or certain racial-cultural characteristics are inferior
-- assumes that certain racial-cultural characteristics, language or history are superior and therefore seeks to silence and exclude a race of people from their constitutional rights.
-- a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race.
-- a belief, an ideology, an attitude or prejudice
-- generalized and final assigning of values to real and imaginary differences
-- benefits the accuser at expense of victim

-- justifies accuser's own privilege or aggression
-- concentration of power, quest for power
-- quest for power must be legitimized
-- prejudice + power = racism
-- a symptom
-- any attitude, action or institutional structure which subordinates
-- institutional racism is exclusion of racial minorities from top management, decision making
-- systemic mistreatment of a group based on differences
-- denying equality to all people
-- they do not "treat everyone equal" by denying differences
-- exaggerate the differences
-- assign values to these differences
-- ingrained set of attitudes to stress the flexibility of situation
-- has "token members"
-- verbally minimizes the still all-important differences
-- insists that all are equal
-- stress sameness "the equality of all"
-- has historical roots
-- ethnocentric pride
-- preference for distinct characteristics
-- status quo
-- factor in numerous violations of human rights and fundamental freedoms
-- ideology based on unwillingness to respect differences
-- oppression against an identifiable group
-- denial of culture, values, and history
-- excludes racial group from groups' Constitutional Rights
-- assume certain racial-cultural characteristics are superior
-- assume certain racial-cultural characteristics are inferior
-- assumes certain racial-cultural characteristics, language or history are superior
-- seeks to silence and exclude a race of people from their Constitutional rights
-- fear of the unknown
-- appropriation (mockery)
-- misinformation, dis-information
-- stereotypical ideas of the other
-- stubborn prejudice (in face of facts)
-- possessory/ownership (power, resources, information)

APPENDIX F

Background into Call for an Inquiry into the Events of the Summer of 1995

The Chippewas of Nawash are calling for an official inquiry into a series of events that occurred in the Bruce Peninsula over the summer and fall of 1995. In that space of time, many Native fishing boats and equipment were defaced or vandalized. Thousands of yards of nets were lifted from the waters and stolen or damaged. Two Native fishing boats were sunk, and one, a tug, was burned out to a shell a week after it was sunk. The same weekend that the Native-owned tug was burned, four young men from Nawash were assaulted and three were stabbed in Owen Sound. They were lucky to escape with their lives. There are consistent and reliable reports that officers from the Owen Sound City police and the Owen Sound OPP detachment stood nearby and watched the battle.

The Chippewas of Nawash are a First Nation whose reserve is at Neyaashiinigamiing (or Cape Croker) on the Georgian Bay side of the Bruce Peninsula. On April 26 of 1993 they, along with their sister Band, the Chippewas of Saugeen, won an Ontario court's recognition of their commercial fishing rights. The court decision is known as *Jones-Nadjiwon* or *R. v. Jones* or the Fairgrieve decision, after the Judge who heard the case.

The judgment clearly recognizes the Bands' aboriginal and treaty rights (ie. rights under section 35 of the 1982 Constitution) to fish commercially in the waters around the Bruce Peninsula. It also found that the Province (by imposing a quota system on the Bands as part of its licensing requirements) had discriminated against Nawash fishermen by ignoring their section 35 constitutional rights and as defined further by the Supreme Court's decision in *Sparrow*. The Province did not appeal the case.

In spite of the clarity of the *Jones-Nadjiwon* decision, opposition to Nawash fishermen practicing their rights to fish commercially have increased. From angry letters to the editor, opposition turned to action: a Nawash fisherman's boat was defaced and vandalized at Tobermory. A mob of 75-100 anglers marched on the open market at Owen Sound to protest Native fishing. That protest climaxed with a bag of fish guts being flung at a Native woman who had rented a stall to sell fish.

From there the protests turned ugly — thousands of yards of fishing nets were stolen or damaged, putting small operators at the edge of bankruptcy. One Native boat was cut loose in the harbour at Wiarton. And then a large Native tug was sunk at a government dock at Howdenvale. A week later, on busy Labour Day, in the middle of a sunny afternoon, the same boat was completely gutted by a fire deliberately set. We have no doubt the stabbings in Owen Sound (and the police inaction) are linked to local non-Native feelings about the Nawash fishery.

In all the crimes against Nawash band members, only one person has been charged — a non-Native for throwing a beer bottle. With respect to the burned boat, it seems the OPP

are more aggressively trying to find a Native to charge — working on the theory the owners burned their own boat. Only one other person has been charged — a Native fisherman for allegedly booby-trapping his nets after having nearly lost his livelihood from thefts.

All this is happening against a ferocious backlash against Natives and Native rights in Ontario:

- The killing of Dudley George by the OPP.
- Operation Rainbow, a sting by the MNR targeting Native hunters on Manitoulin Island.
- Other charges against Native hunters in Ontario that have put a chill over the practice of what Native people say are their hunting rights.
- MNR harassment of Native hunters in the north is hampering the free practice of rights there.
- Cancellation of communal licences for the Williams Treaty First Nations.
- An attempt by Ontario to cancel the Interim Enforcement Policy — the Province's only response to *Sparrow*.

Questions for an Inquiry into Events concerning Nawash Commercial Fishing Rights in the Bruce:

The community is concerned that the hatred, vandalism and violence shown to Nawash band members in their own traditional territory has not been adequately addressed by the authorities. We are concerned that local and Provincial authorities are not protecting Natives in the Bruce from attack—in spite of repeated appeals to them for action. Nawash residents are being targeted by those opposed to the practice of their rights and the fact that no one has been arrested sends the message that it's OK to attack Native property and persons.

Some of our questions reach into the origin of the troubles in the Bruce—namely, the First Nation's new role in the fishery. More specifically:

1. Why have the OPP laid no charges in all the incidents of theft and vandalism reported by Nawash fishermen to the police and to the MNR?
2. What is the attitude of area police and MNR conservation officers with respect to offences against Native fishermen?
3. Why were local OPP involved in an investigation of the burning of a Native tug after the case was taken over by a special unit from Mount Forest? And why were these local OPP pursuing Native suspects after the special unit had all but ruled that avenue out?
4. What was the role of the Owen Sound City police and the Owen Sound OPP detachment in protecting Native youth assaulted and stabbed in Owen Sound by a gang of non-Natives in the early morning hours of September 4, 1995?
5. What is the source and nature of opposition in the Grey-Bruce region to Native fishing rights and did it have any effect on the progress and outcome of MNR and police investigations?

6. What has been the role of the Ontario Ministry of Natural Resources in implementing the spirit and intent of the *Jones-Nadjiwon* decision and in calming non-Native tensions around Nawash fishing rights?
7. Why does Ontario not recognize resource agreements with First Nations as self-government issues and put the necessary resources into implementing such agreements?
8. What is the role of the federal government in this affair? Generally, what responsibility does Canada carry for ensuring its delegate, Ontario, acts in a manner that best serves conservation *and* Canada's fiduciary obligations to First Nations?
9. What process (that will involve the First Nation, Ontario and Canada) can be put in place to resolve competing claims to the Bruce fishery without compromising First Nations rights or the Nawash urge to develop a self-sustaining economy?

The resolution of the issues expressed by these questions have important ramifications for other First Nations, many of whom are just beginning talks with Ontario or resource issues. A process that works will be an important step in resolving similar disputes elsewhere.

It is Nawash's intention to call on the federal government to initiate this inquiry for three reasons:

- Since the message coming from provincial authorities is that they will not or cannot act to protect Chippewas of Nawash persons and property and since no satisfactory reasons for this have been forthcoming, an official inquiry is required.
- Canada has the prime fiduciary obligation for First Nations — it has not yet been determined how much of that obligation (if any) has been leaked to the Province. Besides, Ontario has never proven an effective guardian of First Nations rights.
- It is unlikely, in the current atmosphere in Ontario, that the Province will answer our call for an Inquiry.

There is little doubt we will have the support of a number of non-Native groups in our call. For example, the United Church, the Canadian Environmental Law Association, and the Law Union of Ontario have already publicly supported our call for an Inquiry at a press conference held March 25, 1996 in Toronto.

Questions for a Broad-Based Inquiry:

Politically, it may be more convenient for the federal government to respond by setting up, or pressing Ontario to set up, a more broadly based inquiry into how Native rights and self-government issues (including resource-based economies) are being implemented in Ontario:

1. To what extent has Ontario re-vamped its laws in the light of the 1982 Constitution, *Sparrow* and other cases that recognize Native rights?

2. How has Ontario responded to the process laid out in various court decisions (especially *Sparrow*) for negotiated agreements based on aboriginal and treaty rights?
3. What has been the role of the MNR in giving liberal interpretation to aboriginal and treaty rights in negotiations, in enforcement policies and practices and in the courts? (More specifically, this question should take as its focus the MNR's Operation Rainbow and charges it has laid in connection with Native hunting and fishing elsewhere in the Province.)
4. How do Ontario bureaucrats and politicians view key aboriginal issues such as hunting and fishing rights, land claims, claims to resources, Native jurisdiction, comanagement, self-government, and how are these views reflected in policies and practice?
5. What are some of the factors that have contributed to the failure of Ontario to resolve rights and claims issues in a peaceful and negotiated manner? (This question must include the role of groups expressing opposition to the practice of Native rights.)
6. What should be the role of the federal government in directing its delegate, Ontario, to act in a manner consistent with the constitution and with the direction given by the courts in aboriginal matters, and what would be the role of the federal government in facilitating the resolution of rights and claims issues in Ontario?

Chippewas of Nawash Unceded First Nation

RR 5 Wiarton Ontario N0H 2T0
Phone: 519-534-1689 Fax: 519-534-2130

http://www.bmts.com/~dibaudjimoh/

25 March 1996

Hon. Ron Irwin
Minister Indian Affairs
Ottawa, Ontario

BY FAX: 613-992-6410 (5 pages in total: letter + background paper)

Dear Mr. Minister,

Thank you for meeting with our delegation on February 29th. As you know we are quite concerned about the backlash against our treaty and aboriginal fishing rights in the Grey-Bruce area of Ontario. We feel that if an agreement with Ontario had been reached in a timely manner, our community would not have been subject to the attacks of last summer and fall. We feel that we have exhausted all our means to obtain answers to our questions from provincial authorities about who committed those crimes and why.

Judge Fairgrieve, in his *Jones-Nadjiwon* decision, reminded Ontario that *Sparrow* "dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement." It has been nearly three years since that instruction, but we have found Ontario reluctant to negotiate *any* approach that will assure us of a sustainable economy. Our suggestions for a new arrangement based on models that have been proven to work elsewhere have not been seriously considered by the Ministry of Natural Resources. We also feel that the Ontario MNR's suggestions of closing the trout fishery to all users will bring further retaliation against Nawash fishermen and band members.

We feel your delegate in matters of Ontario's inland fishery is not a competent steward of the resource on which the Chippewas of Nawash must rely for a living. We further feel the MNR is prejudicing our constitutional right to a commercial fishery by blaming Nawash fishermen for its own failure to rehabilitate trout stocks — stocks which, I would remind you, were decimated by non-Native fishermen. Finally, we are not satisfied with the answers the provincial authorities have given us regarding the events of the past summer and fall. We fear these events (or worse) may be repeated unless you become involved.

/page 2 ...

We therefore call on you, in your role as the Crown's fiduciary for First Nations, to initiate a call for an inquiry under section 2 of the federal *Inquiries Act* in order:

- to answer our outstanding questions regarding the crimes committed against the Chippewas of Nawash during the summer and fall of 1995 (see attached background paper);
- to explore the sources of the public animosity shown to Nawash commercial fishing rights and the role governments had in encouraging or discouraging that animosity, and what role that animosity had in delaying or frustrating an agreement between Ontario and the Chippewas of Nawash;
- to investigate resource agreements signed elsewhere between First Nations and other governments as possible models for Ontario;
- to discover a process by which an agreement satisfactory to Ontario and Nawash might be reached and the role of the federal government in facilitating such an agreement;
- to search for a model process that will assist Ontario to reach similar agreements with other First Nations.

While we would welcome the participation of Ontario in the inquiry we propose, we are calling on the federal government to initiate this inquiry for three reasons:

1. Since the message coming from provincial authorities is that they will not or cannot act to protect Chippewas of Nawash persons and property and since no satisfactory reasons for this have been forthcoming, an official inquiry is required.
2. Ontario is only Canada's delegate in matters affecting the inland fishery.
3. Canada has the primary fiduciary obligation for First Nations.

The impasse in the Bruce needs to be opened up and examined, not so much in order to lay blame, but to look for workable solutions to what appears to be an insurmountable problem. First Nations must be able to partake, to a greater degree than we are now being permitted, in the resource economy of Ontario. The earth was given to us to take care of and to live by. We regard our treaties with Canada to be our licence to you to share that gift. By those treaties we did not surrender our right to make a living in our traditional ways.

Miigwetch

(Signed in the original)

Ralph Akiwenzie
Chief, Chippewas of Nawash First Nation
(PH: 519-534-1689)

cc. Michael Harris, Premier of Ontario
Ovid Jackson, MP Grey-Bruce
Elijah Harper, MP
Ovid Mercredi, Grand Chief, Assembly of First Nations
Gord Peters, Grand Chief, Chiefs on Ontario
First Nations of Ontario

Appendix G

MNR Conservation Officer Joel Tost Retires

2

Joel Tost has retired after 36 years as a conservation officer. ST. 27 Apr. /05

By JOHN WRIGHT
For The Sun Times

For decades, Joel Tost stood guard over Ontario's natural heritage. As a conservation officer, his beat was the fields and forests, streams and lakes of the province.

In his 36 years as a game warden, he had poachers threaten to shoot him and tough characters threaten to stab him. Some he had to arrest after fisticuffs and brawls.

He had poachers threaten to shoot him and tough characters threaten to stab him. Some he had to arrest after fisticuffs and brawls.

Family members were threatened and cursed in phone calls to his home. At one family picnic, he had to deck a man he had previously charged who was venting his rage on Tost's father.

But there were good times too — the best of them working with Grey-Bruce residents on wildlife enhancement projects.

"I loved working with the outdoor clubs around here," he said in a recent interview. "You really felt fulfilled."

He retired this year as one of the longest serving active conservation officers in the province.

His pride, he said, was being a member of a small band of some 250 conservation officers sprinkled across the province — a member of one of the oldest law enforcement forces in Ontario, created in 1892 to protect the natural heritage of Ontario.

His pride was being a member of a small band of some 250 conservation officers sprinkled across the province — a member of one of the oldest law enforcement forces in Ontario, created in 1892.

The worst of times came near the end of his career with the sudden rise on the legal landscape of the constitutional rights of aboriginal people. Conservation officers, he said, suddenly found themselves placed under constraints, ordered by their political bosses to stand aside when his duty to protect resources ran into the right of First Nations to those resources. In 36 years of service, Tost never saw anything like it.

The Ontario and federal governments are still trying to sort out what aboriginal rights encompass, even as the Metis are demanding similar constitutional access to natural resources.

Tost was born in Georgetown and raised in a family of uniformed men, men who served in the army and navy. He had an uncle in the OPP. They were all hunters and fishermen.

Tost says his career choice was influenced by an old-time game warden, Eddie Smith, who from time to time checked out his family members as they hunted around Orangeville.

Tost was a graduate of the last Land and Forest Department school at Dorset before it closed. It trained young recruits in law, in methods of arrest, charges, court procedures, penalties and fines.

It was a marked contrast to the older officers who were in the field at the time. Their training was more to hand out warning and less to press charges through the court system.

Tost's first job with Lands and Forests was a three-month stint in 1969 as a forestry technician around Owen Sound. Three months later, he became a full-time CO in the Hespeler — now part of Cambridge — area.

Tost said he came to love his experiences with the older CO's there — "They were half management, half enforcement and all experience.

"Every officer I worked with then were men with families and kids," said Tost. "Here I walked in, 19 years old, full of piss and vinegar and ready to rock and roll. I was trained in the new class of stricter enforcement."

While under the wardship of an older officer, Tost entered a house one day when the father was found to have shot a deer out of season.

"His family was poor, the family was without a lot of things such as food. He had kids. I didn't say anything but listened to my CO. He looked at me and I looked at him and he then gave a warning to this fellow not to do it again. The fellow promised he wouldn't and we knew we would never see him again in that situation. We never did.

"I always believed the law was black and white. That day I learned from a wiser CO that in some circumstances, there were two sides to every story."

In his six years in Hespeler, he used his training to push charges beyond what older officers did. "One day we got a fine of $250 for guys taking deer out of season. It was unheard of at the time, when you consider in those days people were fined $25 for drinking and driving. One OPP officer fell off his chair when he heard the conviction and penalty."

Please see 'I DID THE JOB' Page B1

Continued from Page 1

Tost, his wife Diane and their daughter Jennifer moved to Wiarton in the mid-70s.

"When you come to live in a place like Wiarton, it is totally different. Here you live amongst the local people. You get to know a hell of a lot about the people you are working with or against."

Tost recounts how he won fines in Hespeler for "snagging suckers." In Owen Sound snagging was a major problem, but "here you had rainbow trout, real fish," he said.

When he and other young COs pushed their first game and fish charges into court, local judges were rather surprised over their aggressiveness with what were misdemeanors.

"Old Judge Hay once commented 'What is logs and frogs doing in my court?' "

"When I came to Owen Sound, fines were $25," remembers Tost. "One guy told me that a $25 fine was chicken feed . . . just a good night's cost of entertainment for him. These guys were hard core. These guys sold fish behind Duffy's and the Hepworth Hotel and the eggs on the black market."

Joel and his fellow COs worked hard and saw fines go from $25 to $1,000 for a fish taken illegally. He worked hard to learn court procedure, eventually, prosecuting game and wildlife cases.

Tost's relationship with the media, phoning and tipping them off, turned him into a high-profile officer. But, he said, "I didn't do it to promote me. I did it to help the resource. I did it to bring to the public's attention the importance of the local resource and to the enforcement problems of the other COs here."

As the only CO on the Bruce Peninsula after Bill Grieves retired, Tost for years worked with National Park biologists around Tobermory on black bear studies and management programs.

He loved the bear management part of his job, which included live trapping. The part he didn't like was shooting nuisance bears that had learned cottagers and their garbage were sources of food.

When he had to put one down, he was grateful he could take it to Cape Croker where the residents would consume the meat and use all the hide. Then one day, one of the National Parks officials trained in tranquilizing let slip that the chemical was carcinogenic and stayed in the bear for two years.

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always away.

"On the weekends, he was always working. When he was away, of course, that's when our children would get sick. You are alone when all the skating events were taking place. It's twice a week and you are doing everything, such as the laces."

Then came the pressure and stress of native issues.

"It was hard when the stress started on him. I wanted him to get another job," she said.

"It was hard when the stress started on him. I wanted him to get another job."

Joel's wife Diane

One day Diane collapsed with what doctors said was a burst vein in her head. It was three months of headaches and a year of learning how to speak all over again. They had to get an answering machine because with Tost away, she had to field a lot of calls.

For many years, she was the unofficial secretary of the natural resources ministry. Callers expected her to answer all wildlife questions and were sometimes rude when she could not.

The rise of First Nation nationalism across Canada, especially claims to the fisheries, caught federal and provincial governments by surprise. When provincial and federal courts started handing down judgments in the 1990s supporting native rights under the Charter of Rights and Freedoms, confusion reigned in the political halls of the country.

Charges against native people were stayed in certain cases. Game wardens, who were trained to protect resources, overnight were told there were people they were not to charge, even though there were no new laws spelling out how officers were to conduct themselves.

For Tost, native fishing outside the perimeters of the Ontario Game and Fish Act was always a touchy issue, even when he first came to work as a CO around Owen Sound.

"Native issues went right back to when I first came to Wiarton and spearing below Dennys Dam in Southampton was a problem at the time," he said. Back then, young Saugeen men walked the river spearing trout at night, hiding from the COs.

Then came the Sparrow case out in British Columbia, and the landmark local ruling by Judge David Fairgrieve, who acquitted two men from Cape Croker, saying they had a right to fish for food and participate in the commercial fishery.

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Tost was amazed his ministry had not been informed and asked the guy if Parks Canada had made consumers of the meat aware of this. He said the reply by the biologist on the spot was, "Oh."

Last year "our ministry came out with a policy that the meat of tranquilized bears should not be consumed," he said. It angers him that any bear put down now that was previously tranquilized is just disposed of as garbage.

Tost's wife Diane said one of the best parts of her husband's job was when he brought home young wild things lost or hurt. She remembers one litter of raccoons she had to feed.

"They were so much alike, I remember I lost track of which had been fed." She patted a blob of Pablum on their heads to keep track.

The worst part of the job was that Joel, the father of a young family, was

That opened the doors to a full-blown commercial fishery and "that's when everything went to hell," said Tost.

During the spring and fall runs, native spearing was conducted openly. Any charges by Tost and his fellow CO's to stop it were thwarted by Charter arguments in court. Also, their bosses instructed them to lay off because the governments of the day were in negotiation with native communities.

"It was done completely wrong," he said. "The government broke every law in the book."

And yet, he had a book in his hand — the Ontario Fish and Game Act — which he had sworn to enforce. "But the government kept saying we're negotiating this and we're negotiating that and we don't want you to do this or to do that and upset the apple cart."

Eventually, the Owen Sound Ministry of Natural Resources district office told its enforcement staff an agreement had been reached with local First Na-

On May 6, the MNR and friends will hold a retirement dinner for Joel Tost at the Owen Sound Legion.

"Why couldn't the government just tell the truth about what was going on? There would have been fewer problems if they had."

Joel Tost

tions and the communities would fish only up to a certain quota.

Tost and another officer carried out an undercover operation acting as fish buyers. They claimed they had pictures and other hard evidence showing natives were selling way over their quota over a short period of time. Because no charges were laid, "we couldn't tell the chief which guys were overfishing . . . Then Premier Bob Rae steps in and cans the whole operation."

At one point, former natural resources minister Bud Wildman was to speak to the Ontario Conservation Officers' Association annual meeting in Sault Ste. Marie.

Tost, who attended, was instructed not to say anything. He listened as Wildman told the COs how negotiations had led to a workable quota system in Georgian Bay and Lake Huron that prevented overfishing.

"He was wrong," said Tost, who stood up during a question and answer session after the speech and told the minister he was being fed erroneous information by the Owen Sound office and that, in his opinion, things were a mess.

He remembers Wildman meeting with him in a back room afterwards to get clarification of what Tost meant. Wildman warned Tost he had better be able to back up his accusations.

Tost sent him a detailed report just days later. He had files, letters and documents backing up his claim. There were also newspaper clippings of incidents around the Owen Sound district.

In the days that followed, Tost became the subject of an OPP investigation and he was ordered not to do or say anything about the issue. At one point, he and fellow CO Don Weltz attempted to lay a charge through the OPP that the minister was not doing his duty to protect the fisheries. The stress and pressure upon Tost was to become so great, he finally succumbed to illness. He took a long leave of absence for the first time in his career.

What confounded Tost was the lack of honesty.

"Why couldn't the government just tell the truth about what was going on? There would have been fewer problems if they had," he said.

He says his bosses kept telling him he could not enforce the Fish and Game Act, "but there was nothing in the law that said I couldn't.

"The law said you can't do it (overfish), but they said, look, we're still negotiating. Well, they have been negotiating all the time I have been here and we're still negotiating and we'll continue to negotiate until there is no fishery left out there."

But in the end, he said, "I did the job. I did it my way. I felt I did it competently."

On May 6, the MNR and friends will hold a retirement dinner for Tost at the Owen Sound Legion.

Appendix H

Best Practices ... What Works

These lists have been teased from the text of "Under Siege", principally from the section, "Connecting the Dots". They are a kind of shopping list of the lessons we have learned in protecting our burial grounds and asserting our fishing rights. They are lists of the things we have found work, best practices and hints for First Nations and the Crown. They are not recommendations, although some of the practices below are referred to in the section, "Recommendations of the Chippewas of Nawash Unceded First Nation".

The Four Deadly Sins that Doom Relationships

It is the general relationship between the Crown and First Nations that needs mending (or "polishing" in the words of the protocol of the Covenant Chain). Appendix H is a compilation of lists that, if addressed, will in very practical ways, prove to be the polish that is so badly needed.

"Under Siege" identifies four attitudes that are guaranteed to lead to failure in renewing the relationship between the Crown and First Nations. They will also doom any kind of negotiation and they will turn a confrontation violent. These "four deadly sins" must be avoided at all costs:

1. **Criticism:** is the most common and perhaps the least serious. In negotiations around resource rights and land claims, it is First Nations that generally engage in criticism. Critiques of how each side is not living up to the expectations of the other is not necessarily bad if they are given in good faith and are understood to be part of the protocol, as they were when the Covenant Chain Councils were held.
2. **Defensiveness:** Criticism leads to defensiveness which is not so helpful because that leads to stonewalling. Defensiveness is easy to fall into when criticism from the other side begins to dominate the discussion. Again, a well constructed and agreed upon protocol will do much to avoid the need for defensiveness.
3. **Stonewalling:** Now things are getting serious. For once one side or the other (usually the Crown) begins to drag its feet at getting to a successful resolution, mistrust and bad faith bargaining begin to infect the relationship at the table.
4. **Contempt:** We know, from our own experiences, and from those of other First Nations, that when this attitude comes to the table, negotiations have already failed.

These attitudes are usually found in early warning signs of conflict as well. Both First Nations and the Crown would be wise to identify them and deal with them before they begin to infect negotiations.

Early Warning Signs

From the section, "Potential for Future Confrontations: Early Warning Signs."

We know the process of nullification well now. And we can almost predict future confrontations if the following conditions (listed roughly in order of escalation) exist:

- Governments are ignoring Native claims to rights or lands or burial grounds and are underestimating or discounting (nullifying) their importance.
- A First Nation is determined to assert its rights and claims, as indicated by past submissions to the Crown of their grievances, the degree of community participation at demonstrations, blockades and vigils, and the extent to which they disobey provisions unilaterally put upon them.
- The Crown ignores First Nations concerns before implementing initiatives or persists in "consulting" them at the last minute on its proposals or even later, in the operational phase, when plans are already being implemented.
- During talks between a First Nation and the Crown, the Crown's representatives give no recognition of the history behind the matters under discussion, or they convey an underestimation of it.
- An unwillingness of the Crown's negotiators to address the legacy of unfair treatment; more specifically, a refusal to discuss compensation.
- An active backroom lobby that is successful in obtaining official condemnation of Native actions or goals from municipal and county or regional councils.
- There exists, in the non-Native community, an atmosphere of racism or hostility that is never addressed. The toxicity of the atmosphere might be gauged in the press by examining reports, editorials and letters to the editor and counting the denials of history, the belittling of claims, the examples of junk scholarship, and assessing the reactions of local politicians, MPs and MPPs. On the streets the atmosphere can be tested by the number of assaults against Native people in white communities.
- There exists, among enforcement personnel, a misunderstanding or under appreciation for the importance and legality of Native rights.
- Law enforcement personnel are laying unwarranted charges against First Nations' people. In the case of a dispute over resources, this may include: the laying of fish and wildlife and firearms charges against Native hunters and fishers in lower courts, harassing Natives hunting and fishing, or otherwise showing contempt for Natives' own ideas about their rights.
- Law enforcement personnel do not move swiftly to investigate and lay charges against those who commit crimes against Native people or their property.
- Government officials, police and Crown Attorneys discount such crimes as "drunken brawls" or "expressions of frustration with government policy".

The notion that the media can be used as a diagnostic tool for impending confrontation was explored in the section, "Connecting the Dots: The Importance of Communications". The Crown and First Nations should ask the following questions:

- How many articles on the matters under discussion (*eg,* resource access) did not include quotes from the First Nation's representatives?
- What are the letters to the editor saying about the issues? What are they saying about the First Nation?
- Is there any response to inaccurate reports or erroneous accounts of history?
- How many well-researched, in-depth articles about the First Nation appear in the media?
- How many positive profiles of Band members or programs appear in the media?
- What are local politicians, especially the MPP and MP saying about the matters in dispute? They may not be saying anything in the media, but they might in municipal council meetings and in resolutions passed by local councils. Are their comments "statesmanlike" or are they more likely to permit acts of vandalism and violence?
- How many negative comments in the media and elsewhere are being made about the situation? How many negative comments about Natives, in general? How many contemptuous comments? How many positive comments?
- Is there an observable increase in charges against Native people in recent months?
- Is there an increase in "nullification"?

The ignoring, or the discounting, or the criminalization of Native rights and claims is a nullification of our existence in Canada. It is a denial of history—both ours and Canada's. When you deny someone's past, you deny them a future, no matter how in your face they are today. You can nullify a people for only so long.

For First Nations Asserting Rights and Claims

1. Before embarking on a rights-based agenda, First Nations must have four things in place:
    a. First and foremost, the solidarity of the community;
    b. A legal strategy that must include historical research and should include proving rights in court;
    c. A communications capability and strategy using legal and historical research and, in the case of resource rights, using science and traditional knowledge;
    d. A management capability and strategy based on science and rooted traditional knowledge.
2. Hire the appropriate legal expertise and ensure your rights are researched thoroughly. You may want to start with negotiations, but you must be prepared to resort to the courts if negotiations fail.
3. Communications was listed by US tribes as being as important as a legal strategy and a resource management strategy. Hire a communications coordinator to develop a strategy that:
    a. educates the public through the media, schools, service clubs, etc, and repeats your message as frequently as possible;

   b. deals with the inevitable backlash (this will require anti-racism and human rights work);
   c. will foster good relations with the main political players at all levels of government;
   d. builds and maintains a network of allies, including (if the issue deals with resources) environmental non-government groups (ENGOs); but watch out for conflicting agendas.
4. Hire the expertise required to deal with the issue—*eg,* a fisheries biologist if you are pursuing fishing rights—to:
   a. develop management and assessment plans for the First Nation
   b. do research or coordinate university-based researchers in studying the resource
   c. vet the MNR's management schemes, biology and methodology
   d. collect and use traditional knowledge (TK) in management plans.
5. Seek adequate funding for communications and stewardship from all available sources. *And* look for pro bono opportunities from the network of allies your communications coordinator is building.
6. Participate in external forums and organizations where policy and legislative decisions may affect your rights—*eg,* the International Joint Commission, the Great Lakes Fisheries Commission, any current commissions or inquiries.
7. Participate in environmental planning exercises locally; for example, OMB hearings in order to encourage a more sustainable use of land and water and to enhance your profile as the best steward of the land.
8. Encourage, through the scientific expertise you have hired, university-based researchers to partner with you in studying the resources and the ecosystems in your traditional territories. Insist they work with those people from the community who possess traditional knowledge. Involve the youth, your fishers, hunters and trappers in carrying out the research.
9. Attend all public meetings in the non-Native community if they concern your rights in order to ensure your point of view is properly represented. Bring women and elders. Hold a press conference afterwards to get your point of view into the media.
10. Follow-up public pronouncements on matters that affect you with letters to the editor, media interviews, op eds. Demand equal time on local open-line shows. Press the media to run "good news stories" about the Band and members.
11. You may want to join organizations that oppose your rights in order to track their activities and to present your point of view at their meetings. This is one way of determining whether such groups are really concerned about conservation and government policy or whether they just hate to see Natives practicing their rights (or just hate Natives).
12. Lodge complaints about the activities of such groups (and the government) with federal and provincial human rights commissions, even if no apparent good seems to come of it; the paper trail you create can be used to show systemic or pervasive discrimination and an atmosphere of bigotry.
13. Respond to news stories generated by opponents and to letters and op eds placed by your opponents. Every bad story or letter to the editor is another opportunity to

tell your side of the story, for most dailies and radio stations are committed to the right of response. If not, inform the regulatory bodies (the CRTC and the Press Council) and lodge a human rights complaint.

14. Organize a conference on the health of the resource you are concerned about. It will bring scientific and public scrutiny to bear on the issues, including your rights. Such a conference may generate scientific and legal support for your position and put your opponents in a bad light.
15. To protect your school-age children from the backlash:
    a. hold classes for children (during lunch hour if necessary) to brief them on the history behind the issue and the reasons for current actions;
    b. lobby the principle and the school board for including your local history in the curriculum;
    c. provide speakers and materials from the community for the classrooms;
    d. if opposition is met, contact the office of the Minister of Education.
16. Native academics and leaders off reserve have an important role to play by countering the "backlash journalism" that currently passes for critical thinking in all the prominent media. They must play a leading role in re-educating editors, editorial boards and the public by responding to the errors, faulty logic and ignorance of columnists and broadcasters.
17. Insist the police investigate acts of violence against Band members or vandalism against their property. Conduct your own investigation if necessary. If local authorities refuse to prosecute assaults against Band members or damage to property, lobby the government (preferably through allies).
18. Refuse the authority of licences that derogate from your aboriginal and treaty rights, especially if those rights are recognized by the courts. Be prepared for legal action if the Province prosecutes you for operating outside the terms of a licence if you have no court decision recognizing your rights.
19. Insist all negotiations with the Crown on your rights and claims be facilitated by a professional you agree to.
20. Be prepared to think and act "outside the box". Sometimes a blockade or vigil will be the only way of attracting attention; but be aware that these no longer automatically have the support of the public and you will have to

For First Nations acting "outside the box"

1. Ensure you have done the research that backs up your claims.
2. Ensure that the action is required … are there avenues for resolution that have not yet been tried?
3. Work to attain public support by controlling communications with a media campaign that features the research you have prepared to back your case.
4. Ask for expressions of support from your allies and get them to urge the proper officials to negotiate with you.
5. Begin a dialogue with police and make sure they understand your legal rights and that you have control of the situation. Encourage them to encourage the proper officials to talk to you.

6. If you are in close proximity to businesses or residences, take the time to talk to them about why you are taking direct action.
7. Clearly articulate to all concerned:
    a. the reason you are there (to protect the environment and to assert your rights);
    b. the research you have done and the events that have driven you to take direct action;
    c. the things you need to cease the action;
    d. the long view … what your community is striving for in the future.
8. Keep things under control on your side.
9. Ensure you have the right people on site and off-site (this is especially important if access to and from the site is limited; you will need legal and communications help outside the barriers).
10. Respond to every negative expression of your actions in the media.
11. Respond positively to every substantive offer to resolve the dispute in your favour.

For the Honour of the Crown—to Improve Relations

1. Implement Royal Commission on Aboriginal Peoples.
2. In consultation with First Nations develop a "check list of consultation and accommodation" that will implement the *Haida* and *Taku* decisions of the Supreme Court of Canada (November 2004). Such a check-list shall include:
    a. funding to allow First Nations to investigate the possible impacts of government policies, proposals, and legislation on aboriginal and treaty rights and land claims;
    b. a protocol by which the Crown notifies and consults First Nations at the start of the strategic planning process;
    c. a protocol by which the First Nation will agree that the consultation is adequate;
    d. a method to ensure the rights and claims of individual First Nations are protected by the protocol. As a start, we reproduced a list of what consultation should look like based on Haida and other court decisions. That list is included just below in "What Consultation Looks Like."
3. Institute article 8j of the Convention on Biological Diversity which calls on signing parties to incorporate indigenous traditional knowledge into their environmental management regimes.
4. Review all policies, practices and legislation to ensure they do not have the effect of derogating from First Nations rights or "nullifying" First Nations history or culture (as some current policies and legislation regarding burial grounds and Native heritage sites do).
5. Hire First Nations people in senior government positions (*eg,* District Managers, Department Heads, Assistant Deputy Ministers for the MNR and MoE) or ensure such people have a clear understanding of the histories, protocols, rights and claims of the Native people the person will be dealing with. This expertise must

be counted as significant as scientific or policy expertise in choosing successful candidates.

6. Ensure every key Minister has someone in his or her office that has a clear understanding of Native histories, protocols, rights and claims; and make that person the primary contact person for First Nations. Key Ontario ministries include Ministry of the Environment, Ministry of Natural Resources, Attorney General, Ministry of Social Services, Ministry of Health, and Ministry of Education.
7. Improve the education of both police and conservation officers with respect to First Nations' history in Ontario, Constitutional law, Native customs and society, Native environmental ethics. Such education *must* be a separate course in the core curriculum for all enforcement personnel.
8. Improve the training of Justices of the Peace and local Crown Attorneys in all of the above areas but especially in the Constitution and the case law that deals with aboriginal and treaty rights.
9. Improve the education of all high school students in Ontario in this area by injecting healthy doses of these elements into core, obligatory courses such as English, History, Science, Geography/Social Studies and Law.
10. Recognize the corrosive role racism plays in Native-non-Native relations and fund First Nations and Native organizations to do anti-racism work.
11. Restructure federal and provincial Human Rights Commissions to better deal with First Nations' complaints of harassment; starting with the creation of a separate but equal section for aboriginal and First Nations' complaints under the leadership of a recognized aboriginal person.
12. Revise the Criminal Code to include, under the hate crime sections, denials of established fact and history.
13. Agree to facilitation of all negotiations with First Nations if they request it and ensure the First Nation has an equal hand in selecting the facilitator.

For the Honour of the Crown—What Consultation Looks Like

The courts have, through their decisions, given the Crown a pretty good picture of what must constitute consultation with First Nations. The following list, because it is based on court decisions, should be considered the minimum duty.

From the section, "The Importance of the Honour of the Crown".

1. There is always a duty of consultation and the requirements of that consultation vary with the circumstances, such as the nature of the Aboriginal right and the potential infringement of the right (*Delgamuukw, Taku, Haida Nation*).
2. The Crown's duty to consult and accommodate Aboriginal interests founded in the honour of the Crown is a continuing duty. The Crown is obliged to honour its duty each time it makes a decision or deals with a license if it has not fulfilled its duty when previously making a decision or dealing with a

licence. (*Gitanyow First Nation* v. *British Columbia (Minister of Forests)*, 2004 BCSC 1734)

3. There is a duty on the Crown to ensure that a First Nation is provided with full information on the conservation [or any other] measure and its effect on the First Nation and other user groups (*R.* v. *Jack* (1995) 16 B.C.L.R. (3d) 201 B.C.C.A.).
4. The Crown is required to explain the need for a particular conservation [or other] measure (*R.* v. *Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C.C.A.).
5. The Crown has a duty to fully inform itself on the fishing [or other] practices of the Aboriginal group and ascertain the First Nation's views of the conservation [or other] measures (*R.* v. *Jack*).
6. The Crown's duty to consult is not fulfilled by merely waiting for a First Nation to raise the question of Aboriginal rights (*R.* v. *Sampson*); there is a positive duty on the Crown to inform and consult (*Halfway River*).
7. The fact that a First Nation receives adequate notice of an intended decision does not mean that there has been adequate consultation (*Halfway River*).
8. The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have the opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action (*Halfway River*).
9. The Crown has a legally enforceable duty to First Nations to consult with them in good faith and it must endeavour to seek workable accommodations between the Aboriginal interests and the short term and long term objectives of the Crown and other parties, and that obligation extends to both the cultural and economic interests of First Nations (*Haida Nation*).
10. Consultation must be undertaken with the genuine intention of substantially addressing the concerns of First Nations (*Mikisew Cree First Nation* v. *Canada*, [2002] 1 C.N.L.R. 169 F.O.T.D.).
11. Non-Aboriginal economic concerns or "economic forces" alone will not be sufficient for the Crown to justify an infringement and do not remove the Crown's duty to consult (*Haida Nation*).
12. There is a reciprocal duty on First Nations to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means available to them (*Halfway River*).
13. Providing "standard information," which is of the same form and substance as the information being given to all interested stakeholders taken alone, does not constitute consultation within the meaning of section 35(1) (*Mikisew Cree First Nation*).

14. First Nations are entitled to a distinct consultation process apart from public forums or general public or stakeholder consultations (*Mikisew Cree First Nation*).
15. The concept of reasonableness applies to the duty to consult (*R.* v. *Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.).
16. The Crown cannot delegate its consultation duties to third parties (*Mikisew Cree First Nation*), although third parties may well have their own legally enforceable duty to consult with First Nations (*Haida First Nation*).
17. The shortness of time or the economic interests of non-First Nations are not sufficient to obviate the duty of consultation (*Gitxsan and other First Nations* v. *British Columbia (Ministry of Forests)*, 2002 BCSC 1701.
18. The first step in any consultation process is a discussion of the consultation process itself (*Gitxsan and other First Nations*)."

For the Honour of the Crown—to Succeed in Negotiations

From the section, "The Importance of the Honour of the Crown".

1. First, research the history and current struggles of the First Nation you will be sitting with to the point where you learn respect for the people and their traditions.
2. Know the people that you will be sitting at table with. This may necessitate pre-negotiation visits to the community to meet people and to hear the stories of the old days that they choose to tell you.
3. If you are the provincial Crown, insist the federal Crown be part of the discussions; if you are the federal Crown insist the province be at the table. (But don't allow the refusal of one to come to the table scuttle discussions entirely.)
4. Understand that the matters on the table are between you and the First Nation. You may be obliged to represent the interests of third parties, but they must not be at the table and they cannot know the details of negotiations until a resolution is achieved.
5. Know the history of the First Nation you will be sitting at the table with.
6. Where there are disagreements between you and the First Nation regarding history, be prepared to fund research that will allow you to agree on the history (as long as the First Nation has at least an equal role in doing the research and that research include oral history and the old stories). Although progress at the table will probably stop until the history is settled, once it is, it may have the added bonus of resolving matters such as what rights the First Nation retain without having to go through an expensive and time-consuming trial.
7. Make sure the people who are representing the Crown at the table have enough authority to commit the Crown to the promises you make and the to understandings you agree on.

8. Understand the protocols in use at the First Nation and employ them during negotiations. Consider seconding members of your negotiating team to the First Nation for a few weeks or months before the talks begin; and accepting secondments from the First Nation to your offices during the same time.

10. Be prepared to deal with legacy issues by, for example, agreeing to negotiate compensation. For, when the grievances from our history are satisfied, the present will be easier to deal with and the future more certain for everyone, including the stakeholders not at the table.

9. Do not let your current legislation, policies and practices stand in the way of a good agreement with First Nations.

10. It is essential that an independent facilitator with experience [in First Nation claims and rights], and who is agreeable to all of the parties, should chair the negotiations and be responsible for the independent written record of the negotiations.

11. This independent record must be circulated to all parties before the next meeting is held giving all parties the opportunity to study the record and make representations to the independent facilitator on any matters of concern that may arise.

12. The independent facilitator must give all parties good notice of the negotiation meetings, circulate the minutes of the last meeting and provide the parties with a written agenda for the consideration of the parties at the next meeting.

13. Early on in the negotiations, it is important for the general area of dispute to be identified and then for the problem to be partialized into segments that can be addressed in manageable portions.

14. Where necessary, it is essential that independent researchers, agreeable to all parties, undertake background research on the factual issues in dispute and provide written reports to the parties for their consideration and response.

15. Negotiations should deal not only with the particular issues in dispute but also with the expectations of the parties on future negotiation meetings including who will be responsible for moving items forward and the dates by which such actions are to be taken. Further, it is essential that media relations be agreed in the sense of who is to communicate with the media and the content of any disclosures approved by the parties.

16. Successful negotiations will not only clear away relationship problems and factual misunderstandings among the parties but will also assist in improving future relations and negotiations. Peaceful resolutions have been achieved in hundreds of matters by these means.

17. Even if no negotiated solution is possible, the process will have greatly helped in clarifying the issues that the parties may or may not wish to litigate at some time in the future.

For the Police—Dealing with Confrontations

From the "Importance of Law and Order".

1. Maintain a calm, patience and constant vigil of the site of the confrontation.
2. Resist all pressures for a physical solution; rather insist Crown officials negotiate a peaceful resolution.
3. Deploy cool, calm commanders with an appreciation for the complexity of Native rights and claims, experience in dealing with confrontations involving Native people, the authority to use discretion, and a talent for striking up relationships with leaders on both sides of the dispute.
4. Hold frequent briefings with officers on the line to ensure they have the same understanding.
5. Be willing to bring together the right people from both sides of the dispute.
6. Keep media access open for all parties, but a low but visible profile for police.
7. Keep open all methods of communications (no jamming of cell phones or Internet access).
8. Keep open communications with First Nations police forces (if any) and municipal or provincial forces.
9. Hold frequent discussions with leadership on both sides, especially with the peacekeepers in the Native camp. Quietly press for peaceful resolution.
10. Formulate a plan for the quick deployment of backup and medical services.

For both First Nations and the Crown

The following best practices hold equally well for resolving immediate confrontations and for conducting protracted negotiations.

From the "Importance of Law and Order" and "Why the Burial Ground Vigil was Successful".

1. Leaders on both sides must be calm and reassuring.
2. The principals involved need to already trust one another or quickly develop a trusting relationship. Trusting relationships developed before a confrontation will assist greatly in the resolution of confrontations.
3. Speed in getting the right people to the right table is important. Delay will only exacerbate a confrontation and frustrate those involved in long-term negotiations. Once one of the parties lose faith in the process, it will be hard to get negotiations back on track. Conversely, prompt action, even if it is encouraged by confrontation, can lead to a restoration of faith between the parties and successful resolution of the issues that sparked the confrontation.
4. The principals must strive, in good faith, to reach long-term agreements on disputed issues. Good faith bargaining means sticking to the goals of the negotiations agreed to by both sides and not loading the table with additional terms or objectives at the last minute. This is especially important during a

confrontation. Good faith bargaining also means not grandstanding for the media or using the media to avoiding the limelight except where it promotes a resolution. It means not using situations, such as confrontations, to embarrass the other side or to stonewall getting to a solution.

5. Once negotiations begin, the discussions belong at the table, not in the media. As long as negotiations are proceeding, the media should be used for information purposed only and not for grandstanding or for addressing grievances.
6. Lines of communications with all levels of both sides must be kept open and the lines and protocols must be clear. Offers and counter offers that are made must be responded to in a timely manner.
7. Reports of "violations" of laws or protocols must be substantiated before reacting to them.
8. Protocols for dealing with infractions and the crises that always arise must be developed and followed.
9. Those who would stir up trouble or divisiveness on both sides must be dealt with. Although the Crown may feel obliged to represent third party interests at the table, third parties themselves must be told to stay out of the way.
10. Order must be maintained, and seen to be maintained, by both sides, as was done at the Owen Sound burial ground vigil and as Nawash did during the fishing wars with our own by-laws. Just because Native fishing boats are not being boarded by MNR Conservation Officers does not mean we are not regulating our fishermen.

EXHIBIT "B"

This is Exhibit ...B..... referred to in the
affidavit of Paul Bates
sworn before me, this ...1st.....
day of ...August..... 20.13...
A COMMISSIONER FOR TAKING AFFIDAVITS

SUBSTANTIVE COMMERCIAL FISHING AGREEMENT

BETWEEN:

THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

-AND-

SAUGEEN FIRST NATION

(Collectively, the "Saugeen Ojibway Nation" or "SON")

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE
MINISTER OF NATURAL RESOURCES
("MNR")

PREAMBLE

WHEREAS on August 23, 2011, the Parties entered into a Framework Agreement in which the Parties agreed to binding goals, principles, objectives and mutual commitments that are to be implemented in a Long Term Substantive Commercial Fishing Agreement;

AND WHEREAS the Parties continue to respect and reaffirm these same goals, principles, objectives and mutual commitments as they enter into this Long Term Substantive Commercial Fishing Agreement;

NOW THEREFORE, the Parties agree as follows:

INTERPRETATION

Definitions

The following definitions apply in this Agreement:

"the Bays" means those parts of the waters that are known as Owen Sound and Colpoys Bay in Lake Huron;

"Colpoys Bay" means all waters that are inside the solid line running from Gravelly Point on a line of sight through Skinner's Bluff on the map attached in Schedule C – Fishing in the Waters ("Schedule C");

"Compliance Protocol" means the protocol established between SON and MNR to ensure compliance with this Agreement as set out in Schedule E – Compliance ("Schedule E");

"Framework Agreement" means the Agreement entered into by the parties on August 23, 2011, and attached as Schedule A – Framework Agreement ("Schedule A");

"Owen Sound" means all waters that are inside the solid line running from Vail's Point to Pyette Point on the map attached in Schedule C;

"TAC" means the total allowable catch for a species set out in Schedule D – Total Allowable Catch and Data Exchange ("Schedule D");

"the Waters" means those parts of Lake Huron that are inside the area that is shaded with hatch marks on the map attached as Schedule B – The Waters ("Schedule B"); and

"Working Group" means any group established by the Governance Committee pursuant to this Agreement or the Framework Agreement, for which the Terms of Reference are set out at Schedule F – Terms of Reference for Working Groups ("Schedule F").

THE AGREEMENT

1. Purpose

1.1. The purpose of this Agreement is to implement the commitments made by the Parties in the Framework Agreement to enter into a Long Term Substantive Commercial Fishing Agreement.

1.2. The Parties agree to implement the commitments identified in paragraph D of the Framework Agreement as an important step in their constructive ongoing and harmonious relationship.

2. Nothing to Abrogate or Derogate Rights

2.1 Nothing in this Agreement shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal or treaty rights of the SON as recognized and affirmed in section 35 of the *Constitution Act*, 1982.

2.2 This Agreement is without prejudice, and shall not be relied upon by either Party in a judicial or quasi judicial proceeding, except for the enforcement of this Agreement.

3. Scope

3.1 This Agreement does not define Aboriginal or Treaty rights. It is intended to provide for the sustainability of fish, the support of the SON commercial fishery and the safety for all on the waters.

3.2 This Agreement applies to all species of fish that are caught for commercial purposes by the SON commercial fishers in the Waters.

3.3 This Agreement does not address SON's fishing for food, social or ceremonial purposes, and nothing in this Agreement shall be construed so as to apply to such fishing.

4. Fishing

4.1 The SON will designate, in accordance with SON's own practice, those members who may engage in commercial fishing under this Agreement ("SON Commercial Fishers").

4.2 SON Commercial Fishers who fish or engage in other activities under this Agreement will comply with the terms of this Agreement, including Schedule C and Schedule D.

4.3 SON Commercial Fishers will recommence fishing in the Bays starting 60 days after this Agreement comes into force, and shall continue thereafter according to Schedule C.

4.4 In each year, SON agrees that SON Commercial Fishers will not catch more than the TAC for each species for which the TAC has been established.

4.5 The TAC for the Waters for lake whitefish is set out in Schedule D.

4.6. In order to ensure the sustainability of the resource, the TAC Working group shall recommend to the Governance Committee no later than June 15 in each year an appropriate TAC for lake whitefish, and any other species for which it is of the view that TAC should be established, for Zones 1, 2 and 3, as described in Schedule B.

4.7 Where no TAC is set for a species, either Party may ask the Governance Committee to consider the issue of whether TAC should be set for that species and, if so, what process should be adopted.

4.8 If the Governance Committee decides that TAC should be set for the species, Schedule D shall be amended in accordance with paragraph 9.2 of this Agreement to reflect this change.

4.9 If no TAC has been set for a species, there is no limit on the weight of that species that may be caught.

5. Data Exchange

5.1. In order to ensure the sustainability of the fishery, to ensure the Parties' mutual responsibility for fisheries assessment work and to assist the TAC Working Group, the Parties agree to exchange fisheries data in accordance with paragraph 5 and the protocol set out in Schedule D.

5.2 MNR agrees to exchange annual Lake Huron lake-wide harvest data from commercial fishers that are not SON Commercial Fishers and, to the extent it is available, from recreational fishers in accordance with Schedule D.

5.3 SON agrees that SON commercial fishers shall report to SON their daily catch for all species and their fishing effort, including location of catch, gear type and the length of time nets were set in the water in accordance with Schedule D.

5.4 SON agrees that the information provided by SON Commercial Fishers to SON under paragraph 5.3 shall be shared with MNR in accordance with the process set out by the Governance Committee in accordance with Schedule D.

5.5 As directed by the Governance Committee, both Parties agree to provide any other information that may be helpful to the TAC Working Group at the end of fishing for that year.

6. Compliance

6.1 The Parties agree to follow the Compliance Protocol as set out in Schedule E.

7. Funding

7.1. The Parties recognize that in order to implement this Agreement, prudent, fair and reasonable funding is necessary for the work that is to be collaboratively undertaken under this Agreement.

7.2. The Parties agree to work together through the Governance Committee to finalize annual work plans and budgets by March 15.

7.3. MNR will provide SON up to $850,000 over a five-year term of a new substantive commercial fishing agreement. This sum to be provided as follows:

- Year 1: $250,000 for April 2012 – March 2013 (subject to deductions made in accordance with the MOU signed by the parties on February 23, 2012)
- Year 2: $180,000 for April 2013 – March 2014
- Year 3: $170,000 for April 2014 – March 2015
- Year 4: $150,000 for April 2015 – March 2016
- Year 5: $100,000 for April 2016 – March 2017

7.4. The funding set out in paragraph 7.3 will be provided in accordance with a Transfer Payment Agreement entered into by the parties.

7.5. If the Governance Committee recommends a project that will be valuable to the parties but for which there is insufficient funding under paragraph 7.3, both parties shall exercise best efforts to attempt to locate funding, including support in kind and funding from initiatives provided by other agencies, in order to contribute to those projects.

8. Implementation of Goals, Commitments and Obligations: The Governance Committee

8.1. The Governance Committee established under the Framework Agreement is continued, and will serve as a mechanism for ensuring there is collaboration in the governance and implementation of this Agreement.

8.2. The Governance Committee will continue to act in accordance with Part II of the Framework Agreement, with necessary modifications.

8.3. The Governance Committee will meet at least quarterly.

8.4. The Governance Committee shall undertake the following non-exhaustive list of matters:

a) Direct and approve the development of a work plan and budget for each year in order to implement the commitments set out in this Agreement.
b) Identify and use best efforts to pursue other funding as necessary.
c) Establish TAC and amend Schedule D accordingly.
d) Seek the participation of the federal government, or other agencies or ministries in the implementation of this Agreement.
e) Review any recommendations made by the Stocking, TAC, Communication/ Education and Economic Development Working Groups or any other Working Groups, and implement them as agreed.
f) Seek to resolve disputes that arise in respect of the interpretation, application or implementation of this Agreement.
g) Deal with any other matters as determined by the Governance Committee.

8.5 The Governance Committee, or a working group directed to do so, shall prepare a report (not exceeding 5 pages) no later than March 31, 2014 with respect to the experience of the Parties in implementing this Agreement that identifies the progress made and any challenges. If the report identifies a lack of progress in fulfilling the commitments and objectives of this Agreement attributable to a shortfall in funding provided under paragraph 7.3, the Governance Committee shall seek to resolve the issue. If the issue cannot be resolved by the Governance Committee, it will refer the matter to the Minister of Natural Resources for

consideration of possible ways to resolve the issue in accordance with the spirit and intent of this Agreement.

9. Schedules

9.1. The Parties agree that the Schedules to this Agreement form part of the Agreement.

9.2. The Parties agree that although this Agreement may only be amended on the agreement of the Parties in accordance with paragraph 12.3, the Schedules to this Agreement may be amended from time to time by decision of the Governance Committee.

10. Continuation of Work begun under the Framework Agreement and Dispute Resolution

10.1. The Dispute Resolution process established under paragraph IV of the Framework Agreement is continued with necessary modifications and will serve as a mechanism for addressing disputes under this Agreement.

10.2. The Working Groups established by the Governance Committee pursuant to the Framework Agreement are continued and the terms of reference are attached as Schedule F.

11. Other Provisions

11.1. A summary of the terms of the Agreement may be agreed upon and provided to interested third parties, or as part of communication and education efforts agreed to by the Governance Committee.

11.2 The Parties agree that on the date that this Agreement comes into force, it and the Framework Agreement will not be confidential, despite paragraph V (A)(1) of the Framework Agreement.

12. Term of the Agreement

12.1. This Agreement comes into force and effect on the day it is signed by both Parties.

12.2. This Agreement shall be in force and effect for a term of 5 years from the date that it comes into effect and shall terminate at the end of its term, unless the Parties agree otherwise.

12.3. This Agreement may be amended by written agreement duly executed by the Parties.

13. Termination and Notice

13.1. This Agreement may be terminated:

a) by mutual consent, as recommended by the Governance Committee; or,
b) by either Party, 30 days following the delivery of notice in writing, which shall be delivered by mail, fax or email, to the Minister of MNR, or the 2 Chiefs of SON.

13.2 Despite paragraph 13.1, where notice has been provided under 13.1(b), the Parties will, within the 30 days of the delivery of the notice of termination, meet in a mediated forum in an effort to resolve any dispute leading to the notice of termination.

13.3 Notice that may be required under this Agreement, other than a notice of termination, shall be in writing and shall be delivered by mail, fax or email to the representatives of the parties that are on the Governance Committee.

NOW HEREIN THE PARTIES AGREE TO THIS AGREEMENT:

SIGNED
in the presence of:

Witness

Date Jan. 24/13

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Natural Resources
per:

Honourable Michael Gravelle
Minister

Date JAN 24 2013

SIGNED
in the presence of:

Witness

Date Feb 21, 2013

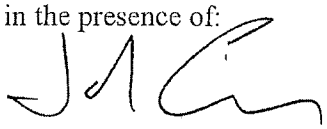
Saugeen First Nation
As represented by: Chief Randall Kahgee

Chief Randall Kahgee

Date Feb 21 2013

I have authority to bind the Saugeen First Nation.

SIGNED
in the presence of:



Witness

Feb 25, 2013
Date

Chippewas of Nawash Unceded First Nation
As represented by: Chief Scott Lee

Chief Scott Lee

FEB 25TH 2013
Date

I have authority to bind the Chippewas of Nawash Unceded First Nation.

Schedule A – Framework Agreement

05/07/2011 3:37:14 PM
Draft for Ratification
Version July 5, 2011

FRAMEWORK AGREEMENT

BETWEEN:

THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

-AND-

SAUGEEN FIRST NATION

(Collectively, the "Saugeen Ojibway Nation" or "SON")

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE
MINISTER OF NATURAL RESOURCES
("MNR")

(Together the "Parties")

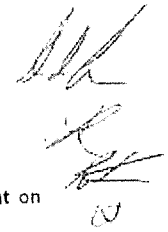
WHEREAS the Saugeen Ojibway Nation ("SON") has sustained itself historically by engaging in fishing for commercial, cultural, ceremonial, and subsistence purposes;

WHEREAS the relationship between SON and the Crown is marked and governed by Treaties, Promises, and Proclamations including Treaty 45 ½, Treaty 72 (1854), Treaty 82 (1857), and the Imperial Proclamation of 29 June 1847;

WHEREAS as expressed in *R v. Jones and Nadjiwon* (1993) 14 O.R. (3d) 421 (Ont. Prov. Ct.) SON's aboriginal and treaty rights to fish for commercial and ceremonial purposes were recognized and protected under Section 35 of the *Constitution Act*, 1982

WHEREAS the Parties have been working together through commercial fishing agreements since June 2000;

AND WHEREAS the Parties agree that the purpose of this Framework Agreement is to have the Parties, on a Government to Government basis, enter into a long-term Substantive Commercial Fishing Agreement by October 31, 2011 as an important step in their constructive, ongoing and harmonious relationship in order to continue the process of reconciliation.



NOW THEREFORE the Parties enter into this Framework Agreement on the following terms and conditions:

I. GOALS, PRINCIPLES, OBJECTIVES, AND COMMITMENTS

A. GOALS

The Goals the Parties intend to reach through this Framework Agreement are as follows:

a. To create a constructive, ongoing and harmonious, long-term relationship between SON and MNR by reaching agreements regarding the fishery and the waters defined in a long term Substantive Commercial Fishing agreement.

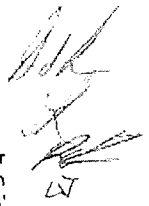
b. To accomplish this long term relationship, the Parties will engage in good faith to implement this Framework Agreement and the commitments made herein. The results of the implementation of and work under this Framework Agreement will be the basis for a long-term Substantive Commercial Fishing Agreement arrived at through good faith negotiations, mutual commitments and shared obligations.

c. The Parties understand that this Framework Agreement, and any Substantive Commercial Fishing Agreement that results, are part of a continuum of building and maintaining a new and positive relationship.

B. PRINCIPLES

The Principles that shall govern this Framework Agreement are as follows:

a. New Relationship: Willingness and commitment to forge a new relationship based on the Principles below, recognizing the past but seeking to build a more positive and beneficial future for the parties.



b. Mutual Respect: Willingness and commitment to listen to and hear each other and to act honourably and in good faith toward each other, including through meaningful recognition of the Parties' perspectives, constraints, values, and culture.

c. Mutual Understanding: Willingness and commitment to understand each other's cultures, responsibilities and limitations.

d. Mutual Participation: Willingness and commitment to create and implement mechanisms that achieve further participation between the Parties in decisions about commercial fishing in the waters that will be defined in a long-term Substantive Commercial Fishing Agreement.

e. Mutual Accountability: Willingness and commitment to create and implement mechanisms to ensure that the Principles and provisions of this Framework Agreement are carried out in their spirit and intent.

f. Mutuality Requires Balancing: Acceptance of the fact that there are many parties who hold interests in the waters around the Bruce Peninsula and their interests must be considered in any long-term Substantive Commercial Fishing Agreement between the Parties.

C. OBJECTIVES

The objectives of this Framework Agreement are:

a. To cultivate an improved relationship between the Parties through the establishment of meaningful processes, committees, and working groups in which SON has the capacity to participate;

b. Through those processes, committees, and working groups to provide for the implementation of collaborative initiatives that improve the mutual understanding and cooperativeness between the Parties for the sustainable management, and use of the fishery, that respects the Principles above; and,

c. To use best efforts to ensure that economic development, and capacity building is created and exists for SON and its members, while giving appropriate consideration to other interests in the fishery.

D. MUTUAL COMMITMENTS

SON and MNR agree that they share the following commitments:

1. Protection, conservation and sustainability of the resource;

2. That mutual trust and respect will be established by the implementation of meaningful processes to develop proposals, pursuant to this Framework Agreement, for inclusion in a long-term Substantive Commercial Fishing Agreement regarding:

   a. Mutual economic benefits for the parties;
   b. Capacity for SON;
   c. The setting of TAC based on sound scientific principles;
   d. Monitoring and enforcement;
   e. Implementation and governance of a long-term Substantive Commercial Fishing Agreement;
   f. The impact of stocking programs in the waters to be defined in a long-term Substantive Commercial Fishing Agreement;
   g. The Bays and other areas of fishing activity as agreed to by the parties;
   h. Communications and public education; and
   i. Such other issues as the Governance Committee may determine appropriate in the circumstances.

3. Engagement of the Federal Crown, and any other agency or ministry in a long-term Substantive Commercial Fishing Agreement or as agreed to herein;

4. Consideration of the interests of third parties in the waters to be defined in a long-term Substantive Commercial Fishing Agreement;

5. The Parties, in working toward a long-term Substantive Commercial Fishing Agreement, will use their best efforts and be guided by the principles and commitments listed above. In so doing the Parties agree to:

i. Identify and communicate with each other about issues of concern;

ii. Address those issues in a manner consistent with the Principles animating this Framework Agreement in a collaborative way; and

iii. Where there is a disagreement between the Parties and after reasonable efforts, they are unable to reach agreement, the matter will be referred to Dispute Resolution as set out below.

II GOVERNANCE AND IMPLEMENTATION

This Framework Agreement and the mutual commitments made herein will be governed by the following:

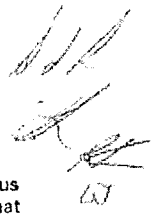
A. Governance Committee

1) A Governance Committee comprised of four representatives of SON and four representatives of MNR will be established. At least two of the representatives of SON will be the Chiefs of SON and of the four representatives of MNR, one shall be an Assistant Deputy Minister (ADM) of MNR. Quorum of the Governance Committee is two representatives from each Party with at least one Chief and one ADM

2) The Governance Committee will supervise, discuss and work collaboratively to meet the objectives, commitments and goals of this framework agreement set out herein.

3) The Governance Committee will work together on seeking the engagement of the Federal Crown, and any other agency or Ministry as agreed to herein, or in a long-term Substantive Commercial Fishing Agreement.

4) The Governance Committee will, as soon as practicable, establish budgets, work plans and working groups with sufficient resources to recommend proposals for inclusion in a long-term Substantive Commercial Fishing Agreement that address the commitments outlined in Section I-D of this Framework Agreement.



5) The Governance Committee will make decisions on a consensus basis that reflects the approval of both Parties. Where that consensus cannot be reached, the matter may be referred to Dispute Resolution as set out below.

6) The Governance Committee may agree upon the attendance of experts or advisors at its meetings from time to time.

B. Working Groups

1) The work of any Working Group may be combined, restricted or modified as the Governance Committee sees fit;

2) The Governance Committee will appoint representatives and if necessary advisors to the Working Groups, subject to agreement on funding;

3) Each Working Group will have joint chairs composed of a representative of each Party. The joint chairs will prepare agendas for Working Group's meetings;

4) The Working Group representatives for each Party will be given a copy of the Working Group records of each Working Group meeting and the work completed;

5) Each Working Group will complete the work set out in the approved work plan and shall meet in accordance with the approved work plan, and more often as required to complete the work set out in the work plan;

6) The quorum for any Working Group meeting is two Working Group representatives for SON and two for MNR, providing that notice of such meeting was sent at least one week in advance to all such representatives;

7) Each Working Group will make decisions on consensus as between the Parties through their Working Group Representatives. If consensus cannot be reached, then the matter will be referred to the Governance Committee;

3) Each Party may replace and appoint its Working Group representatives at anytime. The Parties agree that consistency and continuity in representatives and advisors are important.

III. TIMEFRAMES

1) The Parties will use best efforts to enter into a long-term Substantive Commercial Fishing Agreement by October 31, 2011.

IV. DISPUTE RESOLUTION

1) Disputes that arise in interpretation, application or implementation of this Framework Agreement are to be resolved by a meeting of the Governance Committee.

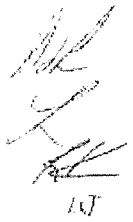
2) If, after reasonable efforts, the Governance Committee cannot resolve the dispute or matter in issue, it will be referred to a mutually appointed facilitator or mediator to assist the parties in resolving the dispute or matter in issue.

V. GENERAL PROVISIONS

A. WITHOUT PREJUDICE AND CONFIDENTIAL

1) This Framework Agreement and the work here under including the negotiation of a long-term Substantive Commercial Fishing Agreement will be conducted on the basis that they are confidential to the Parties and without prejudice.

2) In particular, the Parties agree that any documents shared in the negotiations shall be shared on a without prejudice basis and shall be kept confidential. The Parties acknowledge that such documents are subject to applicable access to information and privacy legislation, but nothing in this Agreement shall be construed as a requirement of any Party to make available information that is by law privileged or exempt from disclosure under the Freedom of Information and Protection of Privacy Act or otherwise.



B. TERMINATION

1) This Framework Agreement may be terminated:

(i) By mutual consent;

(ii) By either Party where in its reasonable opinion the Goals, Principles, Objectives or Commitments of the Framework Agreement are not being met; and then only after resort to facilitation or meditation which shall take place within thirty days of notice by one Party to the other of its opinion.

C. NON-DEROGATION

1) Nothing in this Framework Agreement shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal, or treaty rights of the SON as recognized and affirmed in section 35 of the *Constitution Act, 1982.*

D. FUNDING

1) The Governance Committee will, with input from Working Groups as required, develop a work plan and budget for the work to be undertaken under this Framework Agreement

E. BINDING

1) This agreement is binding upon the Parties and their successors.

NOW HEREIN THE PARTIES AGREE TO THIS FRAMEWORK AGREEMENT:

SIGNED
in the presence of:

Witness

Date:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Natural Resources
per:
Honourable Linda Jeffrey
Minister

Date:

SIGNED
in the presence of:

Witness

Date:

Saugeen First Nation
As represented by: Chief Randall Kahgee

Chief Randall Kahgee

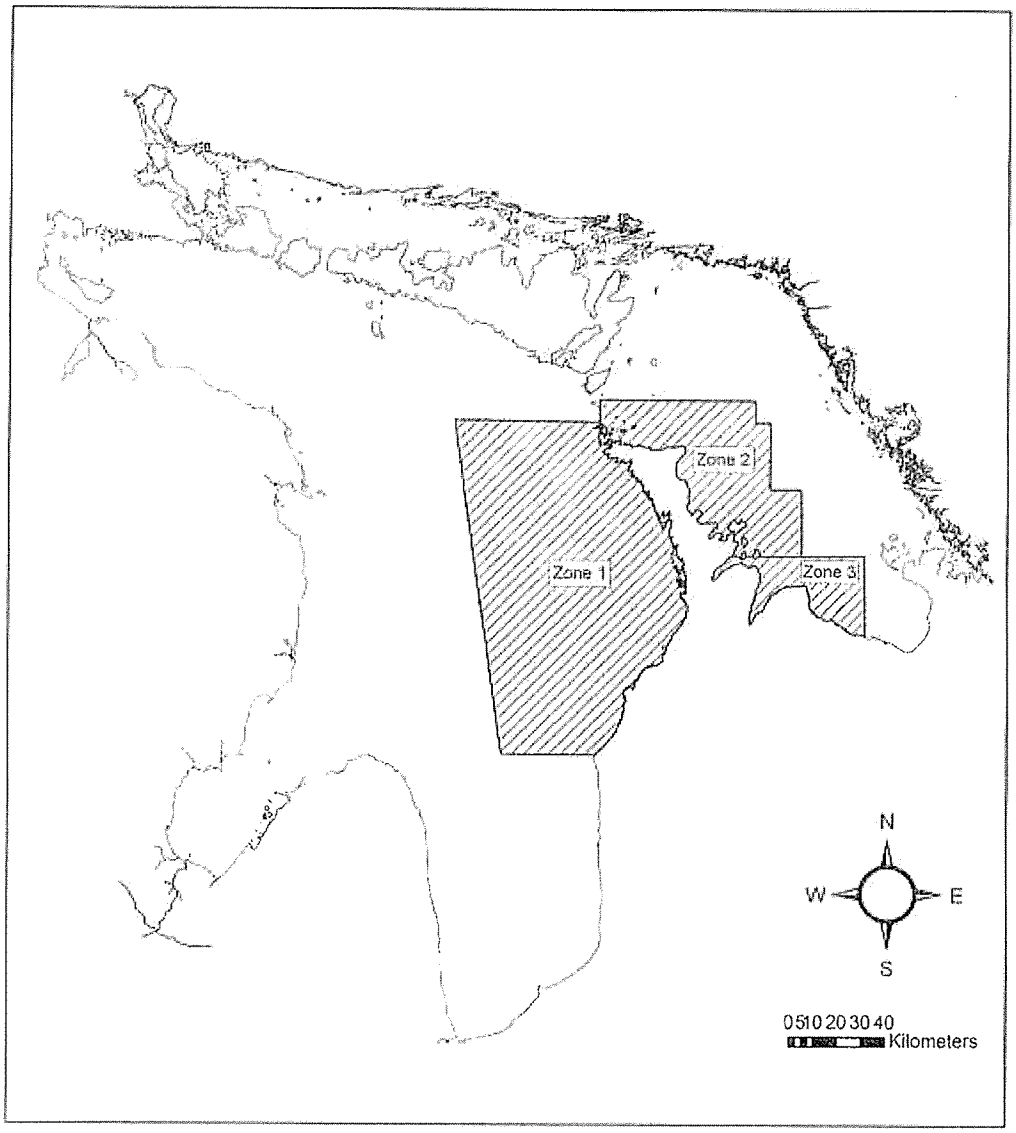
Date:

SIGNED
in the presence of:

Chippewas of Nawash Unceded First Nation, as represented by: A/Chief Scott Lee

I have authority to bind the Saugeen First Nation.

Schedule B – The Waters



Schedule C - Fishing in the Waters

1. In this Schedule, references to lines are references to lines drawn on the map attached at the end of this Schedule.

2. The following provisions apply to fishing in the Waters under this Agreement.

3. Where there are special provisions that apply to fishing in the Bays, those provisions are set out below; and if they are inconsistent with other provisions in this Schedule, they shall prevail.

4. In Owen Sound, no commercial fishing will occur in the waters at the end of the Bay that are inside the red line drawn perpendicular to the shore line from Balmy Beach to the other shore.

5. In Colpoys Bay, no commercial fishing will occur in the waters at the end of the Bay that are inside the red line that is drawn continuous from the road at the Government Dock to the southwest shore of Colpoys Bay.

6. 60 days after the Agreement comes into force, SON commercial fishing will recommence in the waters between the dotted lines and the solid red lines.

7. During 2012 and 2013,

    a. the Parties will jointly monitor activities in the waters described in paragraph 6 in order to determine how SON commercial fishing and other uses of those waters can occur safely at the same time; and
    b. SON will identify areas in the waters described in paragraph 6 that are of particular importance to SON fishers. .

8. SON and MNR will collaborate to prepare communications and public education materials about this agreement and about SON's commercial fishing activities and the importance of commercial fishing to the community to support SON commercial fishing and other uses of the waters occurring safely at the same time.

9. The information gathered under paragraph 7 shall also be provided to the Governance Committee.

10. In October 2013, the Governance Committee shall meet to consider the results of the joint monitoring activities described in paragraph 7 to determine whether there are any public safety, commercial fishing safety or other issues that need to be considered and addressed, and whether changes to this schedule need to be made regarding SON's fishing in the Bays.

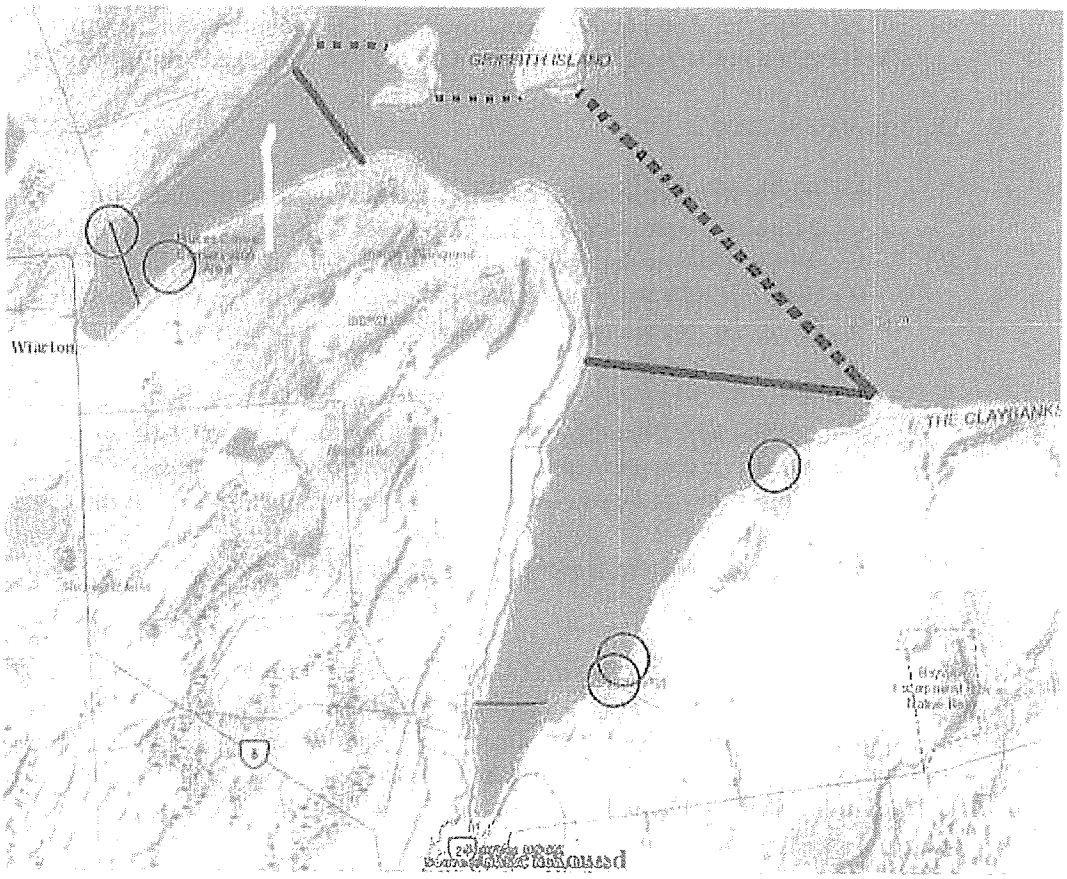
11. In 2014, SON commercial fishing will continue in the waters described in paragraph 6 unless otherwise agreed to by the Governance Committee .

12. Until the Governance Committee has had an opportunity to consider recommendations of the Stocking Working Group regarding the impacts, if any, of commercial fishing near the mouths of rivers or streams, during March, April, October and November, SON will make best efforts not to set nets or to target other species for commercial catch within a 1 kilometre radius of the mouth of Bothwells Creek, Colpoys Creek, Waterton Creek, Keefers Creek and Gleason Brook, as illustrated on the attached map.

13. All SON nets will be marked with a buoy according to SON standards and shall also have a pole and flag so as to be clearly visible to all vessel traffic.

14. SON commercial fishers shall use nets with a mesh size of 4.5 inches or greater for the purpose of fishing lake whitefish in the Bays, unless otherwise agreed by the Governance Committee.

15. Nets in the Bays shall be a maximum height of 50 meshes and a maximum length of 300 meters.



Schedule D – Total Allowable Catch and Data Exchange

Data Exchange for the purpose of developing TAC

1. The following data is provided by one party to the other solely for the purpose of developing TAC. In the event the data provided by one party is to be used for a different purpose, there will be a discussion with that party, or with the Governance Committee if necessary, before it is used for that purpose.

2. The following data from the previous calendar year's fishery will be exchanged annually no later than the last day of February of each calendar year.

3. MNR will provide the following fisheries data to SON:

    i. commercial harvest data from Lake Huron
    ii. offshore index netting data
    iii. recreational harvest data from Lake Huron, to the extent it is available
    iv. other data relevant to the setting of TAC that is requested by SON and is available

4. SON will provide the following fisheries data to MNR:

    i. commercial harvest data from the SON commercial fishery
    ii. offshore index netting data
    iii. other data relevant to the setting of TAC that is requested by MNR and is available

Process for Adjusting TAC on an Annual Basis

1. The parties and the TAC Working Group will follow the process set out below in order that the TAC Working Group may develop a timely annual recommendation on TAC to the Governance Committee:

    a. Improved data that reflects quality assurance and quality control will be shared by the parties with each other by the end of February
    b. SON and MNR representatives will analyze and model that data, using their preferred methods
    c. The TAC Working Group will meet in May to exchange the models used by the parties (including analysis, modelling technique and model output), thereby enabling constructive review by the parties
    d. The analysis and modelling will then be discussed with SON harvesters, councillors and senior managers
    e. SON and MNR will communicate each party's preliminary analysis and options for TAC with SON harvesters, councillors, senior managers and other parties

f. All relevant information will be provided to the TAC Working Group with the goal of making a joint recommendation on TAC to the Governance Committee by June 15
   i. If consensus on TAC is reached, the TAC Working Group will share its recommendation with the Governance Committee
   ii. If consensus on TAC is not reached, the SON and MNR representatives will provide their separate advice on TAC to all members of the Governance Committee

g. By the end of June, the Governance Committee will meet to consider and decide TAC based on the recommendation by the TAC Working Group or the advice received from SON and MNR representatives on the TAC Working Group

h. The Governance Committee shall amend this Schedule to reflect its decision with respect to TAC.

2. The TAC Working Group shall make annual recommendations to the Governance Committee on ways to strengthen the science behind fisheries stock assessment in order to support decisions on TAC by the Governance Committee. These recommendations will include identification of any key uncertainties to be addressed by the TAC Working Group in the subsequent year and any proposed actions, deliverables, deadlines and budget. The Governance Committee shall consider those recommendations.

Total Allowable Catch for the Waters

1. SON and MNR agree that the Waters shall be divided into the following zones for the purpose of this Agreement and the establishment of TAC, based on the assessment:

   Zone 1 is the area shown by the hatched marks on the map set out below.

   Zone 1 is described as follows: Inside a line beginning at the intersection of the water's edge on the eastern shoreline of Lake Huron (Main Basin) and the parallel of latitude 44°05'N; thence northerly along the western shoreline of mainland Bruce County to its intersection with the parallel of latitude 45°15'N; thence west along that parallel of latitude to its intersection with the line of longitude 81°45'W; thence north along that line of longitude to its intersection with the parallel of latitude 45°20'N; thence west along that parallel of latitude to its intersection with the International Boundary between Canada and the United States of America; thence southerly along that International Boundary to its intersection with the line of latitude 44°05'N; thence east along that parallel of latitude to the place of beginning.

   Zone 2 is the area shown by the hatched marks on the map set out below.

   Zone 2 is described as follows: Inside a line beginning at the intersection of the parallel of latitude 45°25'N and the line of longitude 80°55'W; thence south along that line of longitude to the parallel of latitude 45°20'N; thence east along that parallel of

latitude to the line of longitude 80°50'W; thence south along that line of longitude to the parallel of latitude 45°05'N; thence east along that parallel of latitude to the line of longitude 80°40'W; thence south along that line of longitude to the parallel of latitude 44°50'N; thence west along that parallel of latitude to the water's edge at Colpoys Bay; thence northerly and easterly and westerly along that water's edge to the parallel of latitude 45°15'N being at the northwestern extremity of the Bruce Peninsula; thence west along that parallel of latitude to the line of longitude 81°45'W; thence north along that line of longitude to the intersection of the parallel of latitude 45°25'N; thence east along that parallel of latitude to the place of beginning.

Zone 3 is the area shown by the hatched marks on the Map set out below.

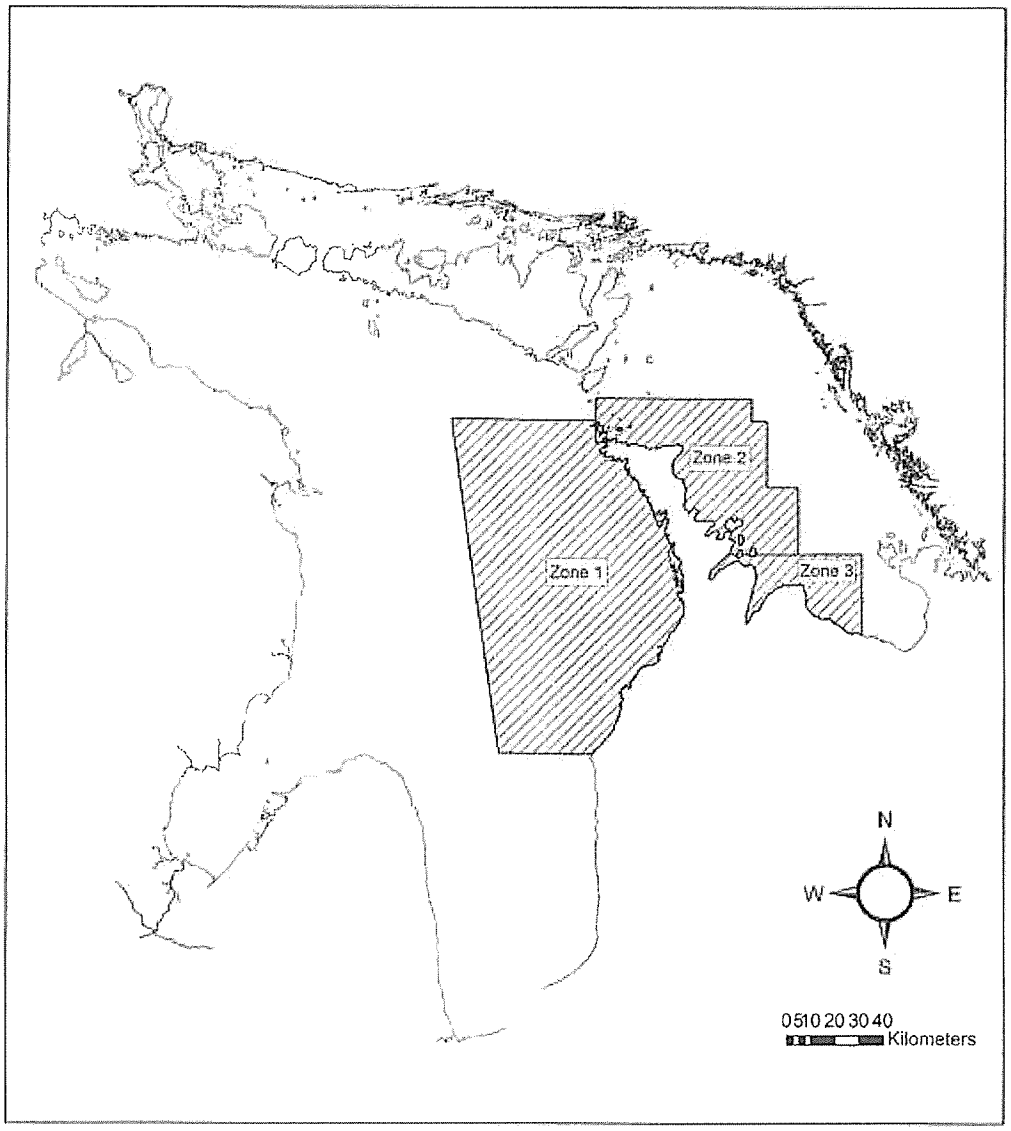
Zone 3 is described as follows: Inside a line beginning at the intersection of the parallel of latitude 44°50'N with the line of longitude 80°20'W; thence south along that parallel of longitude to the water's edge of southern Georgian Bay; thence westerly along that water's edge to the line of latitude 44°50'N in Colpoys Bay; thence east along that parallel of latitude to the place of beginning.

2. With respect to the establishment of TAC, there will be consideration of the status of biological fish populations, with associated distribution of the populations prior to the determination of TAC in the Waters.

3. Quantities of fish are expressed in round weight and in kilograms and represent the maximum quantity that can be taken in aggregate by all persons designated to fish by SON in the Waters.

4. The following is the TAC for 2012:

Species	Zone 1	Zone 2	Zone 3
Lake whitefish	292, 287	55,292	48,901


Zone 1
Zone 2
Zone 3
N
W
E
S
0510 20 30 40
Kilometers

Schedule E – Compliance

1. Compliance is a joint responsibility of the Parties, and the Parties agree to promote a cooperative compliance regime through collective efforts to identify and resolve compliance issues and concerns. The following is the Compliance Protocol that the Parties agree will, in accordance with their own mandates, govern joint compliance under this Agreement.

A. Compliance Protocol

a. *General Provisions*

2. SON agrees that any person authorized to fish by SON ("SON Commercial Fishers") will be monitored by SON in order to ensure compliance with this Agreement.

3. SON and MNR shall agree to a process for joint patrols, inspections and monitoring to ensure compliance with this Agreement.

4. The Parties will annually provide each other with statistics of their enforcement activities in the waters.

5. Each Party will have a designated compliance representative who is authorized and readily available to deal with compliance issues under this Agreement, and will inform the other party who is its representative.

6. If SON or MNR becomes aware that a person is not fishing in accordance with this Agreement, SON or MNR agree to immediately notify the other Party's designated compliance representative and the Parties will follow the steps set out in this Schedule.

7. MNR will, in accordance with its mandate, continue to enforce the *Fisheries Act*, the *Ontario Fisheries Regulations* or other relevant legislation in respect of persons other than SON fishers within the waters.

b. *Potential Violations*

i. Potential Violations by Persons other than SON Commercial Fishers

8. Where SON is of the view that a possible violation of the *Fisheries Act*, the *Ontario Fisheries Regulations* or other relevant legislation by a person other than a SON Commercial Fisher interferes with fishing under this Agreement, SON may bring it to the attention of MNR. If so, MNR will, in a manner consistent

with its statutory obligations and its enforcement policies, investigate the allegation within 30 days and shall inform SON:(i) what compliance action, if any, was taken and why; or,(ii) where no action was taken, the reason why not.

9. Despite paragraph 8, if a possible violation is serious because it raises concerns such as a risk to safety, the potential for conflict with other users or serious interference with the ability of SON Commercial Fishers to fish under this Agreement, MNR will investigate the allegation as soon as it is practicable to do so.

ii. Potential Violations by SON Commercial Fishers

10. Within 30 days of becoming aware or being informed that a SON Commercial Fisher may not be fishing in accordance with this Agreement, SON agrees to investigate the allegation, in accordance with its own practices, and inform MNR:(i) what compliance action it has taken; or,(ii) that compliance action was not required and why.

2. Dispute Resolution

11. Where either Party disagrees with a compliance action or the failure to take compliance action with respect to an alleged violation of this Agreement, the issue may be referred to the Governance Committee for resolution.

12. If the Governance Committee does not resolve a compliance issue within 30 days of the matter coming before it, or if the Parties agree that there has been a failure to abide by the terms of the agreement and SON has been unable to effect compliance, MNR may exercise its discretion to take enforcement action under appropriate legislation such as the *Ontario Fishery Regulations*, 2007.

13. The Parties may refer significant compliance issues that cannot be resolved by the Governance Committee for Dispute Resolution in accordance with paragraph 10 of the Agreement.

3. Exemption: Imminent Threats

14. Despite these provisions on joint compliance, if a SON Commercial Fisher is engaged in an activity that MNR believes poses an imminent threat to human health and safety, or an imminent threat to the sustainability of the resource, MNR may, immediately take action that MNR considers necessary to mitigate the threat and shall immediately inform SON of that action, but will otherwise follow the process as set out above.

15. Despite these provisions on joint compliance, if SON believes that the activities by a person who is not a SON Commercial Fisher will damage SON property or pose an imminent risk to the health and safety of SON Commercial fishers or the SON fishery SON may, in addition to any provision of this Agreement, take appropriate legal action, but will otherwise follow the process as set out above.

Schedule F – Working Group Terms of Reference

1. Capacity and Economic Development Working Group
2. Expert Facilitation Regarding TAC Determination Working Group
3. Expert Facilitation Regarding Fish Stocking Working Group

TERMS OF REFERENCE
CAPACITY AND ECONOMIC DEVELOPMENT WORKING GROUP

I. MANDATE AND PURPOSE

WHEREAS this Working Group ("WG") was established by the Governance Committee on July 5, 2011 pursuant to Section II(A)(4) of the Framework Agreement to be entered into between SON and MNR.

WHEREAS the WG is to be guided by the terms of reference set out herein and develop detailed proposals and processes in a strategic and business plan through which the capacity needs of SON can be met so that SON can derive a greater economic benefit in the resource by trying to establish a vertically integrated commercial fishery.

II. COMPOSITION OF THE WORKING GROUP [1]

The WG is combined of the following members:

OMNR	SON	MAA
David de Launay	Paul Jones	Deborah Richardson
Mark Elsey	Lorne Mandawoub	Pam Wheaton
	Jake Linklater	Lars Eddy

III. TERMS OF REFERENCE

The terms of reference for the Working Group are as follows:

1. To facilitate and complete through a Request for Proposal (RFP) a community based strategic plan for the SON fishery including goals, objectives and time lines for consideration and approval by the Governance Committee.

1 Alternates may be designated by the WG.

2. Commissioning, through a Request for Proposal (RP), a Business Plan, that will set out what is required for SON to derive greater economic benefits from the fishery including, but not limited to, the following:

    i. The equipment requirements of SON;
    ii. The cold storage requirements of SON including access to ice making for SON;
    iii. Processing of fishing;
    iv. Marketing of fish;
    v. Distribution of fish to the market;
    vi. Methods in which the revenues of SON fish may be enhanced;
    vii. Employment and training;
    viii. The costs necessary to address the capacity needs of SON in an economically viable and self-sustaining commercial fishery.

3. To identify the required government or non-governmental agencies necessary to support and implement these terms of reference.

4. To identify the required capital resources required to prepare the strategic and business plan for implementation for consideration by the Governance Committee.

IV. TIMELINES

5. The WG will develop a work plan pursuant to these terms of reference by the end of July, 2011 for consideration by the Governance Committee.

6. The WG will make best efforts to deliver the strategic and business plan by December 31, 2011.

Terms of Reference for

Expert Facilitation Regarding TAC Determination Working Group

SON-MNR Commercial Fishing Agreement

October 13, 2011

BE IT RESOLVED that the Governance Committee Agrees as follows:

I. PREAMBLES

WHEREAS the Saugeen Ojibway Nation ("SON") and the Crown in Right of Ontario represented by the Ministry of Natural Resources ("MNR") ("The Parties") have entered into two five year agreements to provide for the regulation and management of the commercial fishing activities of SON in a collaborative framework;

AND WHEREAS on July 5, 2011, the parties entered into a Framework Agreement to assist the parties in negotiating a long term substantive commercial fishing agreement;

AND WHEREAS the Governance Committee ("GC") has established a working group to make recommendations for a process for the determination of total allowable catch ("TAC") for the SON commercial fishery for consideration by the GC in accordance with Section D2(c) of the Framework Agreement;

AND WHEREAS the Parties wish to take a mutually respectful and collaborative approach to decision-making about TAC for the SON commercial fishery and that on October 13, 2011 the GC set the 2011 SON TAC and the timelines for these terms of reference as set out in Schedule "A";

AND WHEREAS the Parties wish to engage in facilitated technical discussions to assist them to resolve issues relating to the appropriate application of scientific methods in support of the determination of TAC for the SON commercial fishery;

AND WHEREAS the Parties currently disagree as to, among other things, the appropriate way to address uncertainties about fish population discrimination, population modelling, and risk assessment methodology as they relate to the determination of TAC for the SON commercial fishery.

II. DIRECTION AND OBJECTIVES

1. Upon appointment and retainer of the Facilitator, SON and MNR shall forward briefing packages to the facilitator and to each other within 3 weeks of the date of the facilitator's appointment, and no later than December 15, 2011 as set out in Schedule "A";

2. The TAC working group shall meet as soon as practicable pursuant to the directions given under these Terms of Reference after the exchange of documents set out above and review by the facilitator;

3. The TAC working group will:

    a. Meet, with the assistance of the facilitator, as set out below, to make recommendations for a process for the determination of TAC for the SON commercial fishery, including identifying areas of consensus and disagreement on the process by which TAC can be set for the SON commercial fishery, for consideration by the GC that may be included in a long term substantive commercial fishery including recommended work plans, time lines, and the resource requirements for any contemplated or recommended processes;

III. FACILITATED PROCESS – SPECIFIC TERMS OF REFERENCE

4. SON and MNR have agreed to engage an independent expert (the "expert facilitator") in accordance with the following terms of reference:

(i)The Parties shall jointly select the expert facilitator based on, a) his or her expertise in the area of natural resource management and neutral facilitation, and b) his or her independence from the Parties and neutrality with respect to the Parties' positions on the issues;

(ii)The expert facilitator shall convene and chair up to four days of meetings, which may be held by telephone or video conference, between the Parties to address concerns about the appropriate application of scientific methods used by both parties in making sound and informed determinations of TAC for the SON commercial fishery;

(iii)The meetings chaired by the expert facilitator and all communications relating to those meetings shall be confidential and, as provided in paragraph 7 below, without prejudice to the

Parties' legal rights and in accordance with the Framework Agreement signed by the Parties;

(iv) SON and MNR shall each send no more than three technical experts to participate in the facilitated meetings who shall make a serious effort in good faith to expeditiously identify the gaps between their positions on TAC issues, and to explore whether consensus is possible as to acceptable means of bridging those gaps to support informed and effective collaboration between them. MNR may send one observer to any facilitated sessions as may the Saugeen Ojibway First Nation and the Chippewas of Nawash First Unceded First;

(v) The expert facilitator shall perform the following roles and tasks in relation to paragraph 2 above:

a) review in advance of any facilitated meeting, the briefing packages forwarded by the parties as set out in Section II(1), above;

b) prepare, in advance of any facilitated sessions, a draft agenda designed to assist the participants to identify clearly their views on each of the issues, any consensus between the parties and to address any identified differences in their views constructively and collaboratively;

c) chair the facilitated meetings with a view to assisting the participants to reach consensus on all issues where possible, and to identify clearly any remaining significant differences between the participants' views on issues; and

d) to provide a written report to the Parties (of up to three pages single-spaced on each issue) within two weeks of the final facilitated meeting, that:

i) identifies areas of consensus between the participants on the issues;

ii) Identifies significant differences in the participants' final views on the issues;

iii) where significant differences remain between the participants' views on the issues, to provide the expert facilitator's own non-binding views on the need for, and the nature and scope of any further action that would be required to help reach consensus on a particular issue; and

5. If the facilitated meeting(s) do not result in consensus on an appropriate science-based approach, to assist the expert facilitator in making his or her report each Party shall provide the facilitator, within one week after the facilitation, with a submission of up to three single-spaced pages, setting out its views on how each of the issues should be resolved in order to permit sound, collaborative decision-making by the Parties.

6. Subject to paragraph (a), the Parties agree that, unless they subsequently agree in writing otherwise, neither the facilitator's report referred to in paragraph 3(4)(d), nor any other information exchanged or communication made in the course of the facilitation may be tendered as evidence in any court or quasi-judicial proceeding or otherwise used outside of the negotiation process;

(a) Information that is already publicly available, or that has been created exclusively by one Party independent of the facilitation and the negotiations between the Parties, may be used by that Party in any forum or proceeding.

7. The expert facilitator will not voluntarily disclose to anyone other than the Parties, anything said or done during the facilitation, nor any documents submitted during or for the facilitation including the facilitator's report referred to in paragraph 5(iii), without the written consent of both Parties. The expert facilitator shall not be called as a witness by any Party in any proceeding.

8. The fees and reasonable expenses of the expert facilitator shall be paid by MNR, which will engage the facilitator as an independent contractor on terms consistent with these Terms of Reference.

9. The parties agree that time is of the essence in meeting the objectives and directions of these terms of reference.

DATED AT TORONTO THIS THE 13TH DAY OF OCTOBER, 2011

Chief Randall Khapee
Saugeen Ojibway First Nation

Tracey Mill
Assistant Deputy Minister
Ministry of Natural Resources

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

"SCHEDULE A"

I. 2011 SON TAC AS AGREED BY OMNR/SON GOVERNANCE COMMITTEE

Area	TAC for Whitefish
Georgian Bay West	36,722 Round Kilograms
Georgian Bay South	65,000 Round Kilograms
Main Basin East	292,287 Round Kilograms

The areas are those set out in the map as attached in Schedule "B".

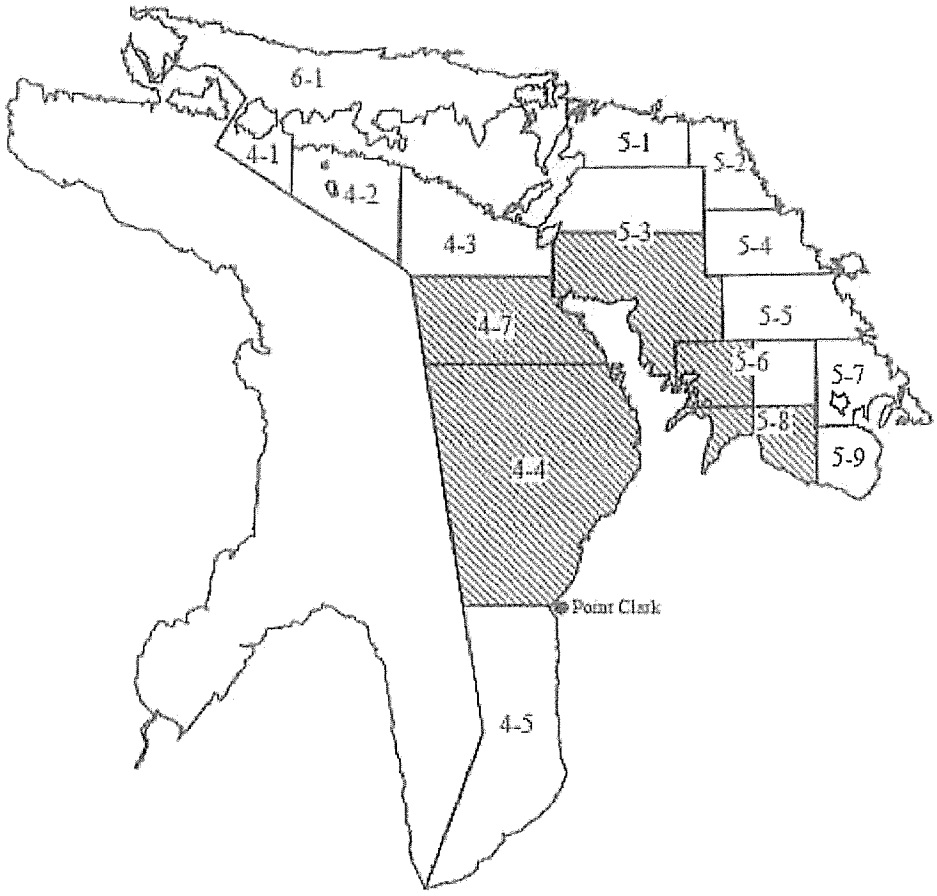
II. TIMELINES FOR FACILITATED TAC DETERMINATION WORKING GROUP

The TAC working group shall exchange information between themselves and the facilitator pursuant to these terms of reference no later than December 15, 2011.

The TAC working group shall comply with these terms of reference and deliver its recommendations contemplated herein no later than January 31, 2012 for consideration by the GC.

5

Schedule B – Map 1



Waters available to Saugeen Ojibway fishers subject to paragraph 9 and the other terms of this Agreement

Terms of Reference for Expert Facilitation Regarding Fish Stocking Working Group SON-MNR Commercial Fishing Agreement

BE IT RESOLVED that the Governance Committee Agrees as follows:

I. PREAMBLES

WHEREAS the Saugeen Ojibway Nation ("SON") and the Crown in Right of Ontario represented by the Ministry of Natural Resources ("MNR") ("The Parties") have entered into two five year agreements to provide for the regulation and management of the commercial fishing activities of SON in a collaborative framework;

AND WHEREAS on July 5, 2011, the parties entered into a Framework Agreement to assist the parties in negotiating a long term substantive commercial fishing agreement;

AND WHEREAS SON has expressed concerns about the implementation, objectives and effects, if any, of Fish Stocking in Lake Huron and Georgian Bay on SON's commercial fishery;

AND WHEREAS the Governance Committee ("GC") has established a working group to engage in facilitated technical discussions to assist them to a) identify areas of outstanding ecological concern, if any, relating to the objectives, implementation and effects of Lake Huron fish stocking programs, and b) provide recommendations for processes by which these areas of outstanding ecological concern could be effectively addressed for consideration by the GC; and

AND WHEREAS these Terms of Reference will assist the parties in addressing, based on the principles of mutual trust and respect, any disagreements in respect of fish stocking in the waters of Lake Huron in a substantive commercial fishing agreement.

II. DIRECTION AND OBJECTIVES

1. Upon appointment and retainer of the Facilitator, SON and MNR shall forward briefing packages to the facilitator as directed and agreed to by the Governance Committee;

2. The Fish Stocking working group shall meet as soon as practicable pursuant to the directions given under these Terms of Reference after the exchange of documents set out above and review by the facilitator

The Fish Stocking working group will, with the assistance of the Facilitator, as set out below:

- Review the available information in relation to objectives, implementation and effects of Lake Huron fish stocking programs;
- Identify areas of outstanding ecological concern, if any relating to the objectives, implementation and effects of Lake Huron fish stocking programs;
- Recommend the appropriate application of scientific methods by which these areas of outstanding ecological concern could be effectively addressed for consideration by the Governance Committee; and
- Address any other issues raised by the parties during the facilitated discussions consistent with the Framework Agreement.

III. FACILITATED PROCESS – SPECIFIC TERMS OF REFERENCE

3. SON and MNR have agreed to engage an independent expert (the "expert facilitator") in accordance with the following terms of reference:

(i) The Parties shall jointly select the expert facilitator based on, a) his or her expertise in the area of natural resource management and neutral facilitation, and b) his or her independence from the Parties and neutrality with respect to the Parties' positions on the issues;

(ii)The expert facilitator shall convene and chair up to a maximum of four days of meetings, which may be held by telephone or video conference, between the Parties to address the items outlined in section 3;

(iii)The meetings chaired by the expert facilitator and all communications relating to those meetings shall be confidential and, as provided in paragraph 7 below, without prejudice to the Parties' legal rights and in accordance with the Framework Agreement signed by the Parties;

(iv) SON and MNR shall each send no more than three technical experts to participate in the facilitated meetings who shall make a serious effort in good faith to expeditiously identify the gaps between their positions on fish stocking issues, and to explore whether consensus is possible as to acceptable means of bridging those gaps to support informed and effective collaboration between them. MNR may send one observer to any facilitated sessions as may the Saugeen First Nation and the Chippewas of Nawash First Unceded First;

(v) The expert facilitator shall perform the following roles and task in relation to paragraph 2 above:

a) review in advance of any facilitated meeting, the briefing packages forwarded by the parties as set out in Section II(1), above;

b) prepare; in advance of any facilitated sessions, a draft agenda designed to assist the participants to identify clearly their views on each of the issues, any consensus between the parties and to address any identified differences in their views constructively and collaboratively;

c) chair the facilitated meetings with a view to assisting the participants to reach consensus on all issues where possible, and to identify clearly any remaining significant differences between the participants' views on issues; and

d) to provide a written report to the Parties (of up to three pages single-spaced on each issue) within two weeks of the final facilitated meeting, that:

i) identifies areas of consensus between the participants on the issues;

ii) identifies significant differences in the participants' final views on the issues;

iii) where significant differences remain between the participants' views on the issues, to provide the expert facilitator's own non-binding views on the need for, and the nature and scope of any further action that would be required to help reach consensus on a particular issue, if any;

5. If the facilitated meeting(s) do not result in consensus on an appropriate science-based approach, to assist the expert facilitator in making his or her report each Party shall provide the facilitator, within one week after the facilitation, with a submission of up to three single-spaced pages, setting out its views on how each of the issues in or related to section 3 could be resolved for consideration by the Governance Committee as to how to effectively address areas of outstanding ecological concern as part of any substantive commercial fishing agreement.

6. Subject to section 4(v)(a), the Parties agree that, unless they subsequently agree in writing otherwise, neither the facilitator's report referred to in section 4(d), nor any other information exchanged or communication made in the course of the facilitation may be tendered as evidence in any court or quasi-judicial proceeding or otherwise used outside of the negotiation process;

(a) Information that is already publicly available, or that has been created exclusively by one Party, independent of or for the purpose of facilitation and the negotiations between the Parties, may be used by that Party in any forum or proceeding.

7. The expert facilitator will not voluntarily disclose to anyone other than the Parties, anything said or done during the facilitation, nor any documents submitted during or for the facilitation including the facilitator's report referred to in section 4(d), without the written consent of both Parties. The expert facilitator shall not be called as a witness by any Party in any proceeding.

8. The fees and reasonable expenses of the expert facilitator shall be paid by MNR, which will engage the facilitator as an independent contractor on terms consistent with these Terms of Reference. SON's participation on the Working Group will be expensed as part of the negotiation support funding provided by OMNR.

9. The parties agree that time is of the essence in meeting the objectives and directions of these terms of reference.

10. As minuted in the Governance Committee meeting of November 15, 2011, the total budget for the stocking working group is $8,300 of which $5000 is for expert facilitation.

DATED AT OWEN SOUND THIS THE 24th DAY OF APRIL, 2012

Chief Randall Kahgee
Saugeen Ojibway First Nation

Tracey Mill
Assistant Deputy Minister
Ministry of Natural Resources

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

EXHIBIT "C"

This is Exhibit ...C..... referred to in the affidavit of ...Paul Jones..... sworn before me, this .....15th..... day of ...August..... 20.13.

A COMMISSIONER FOR TAKING AFFIDAVITS

SCHEDULE A – MAP OF SON TRADITIONAL TERRITORY

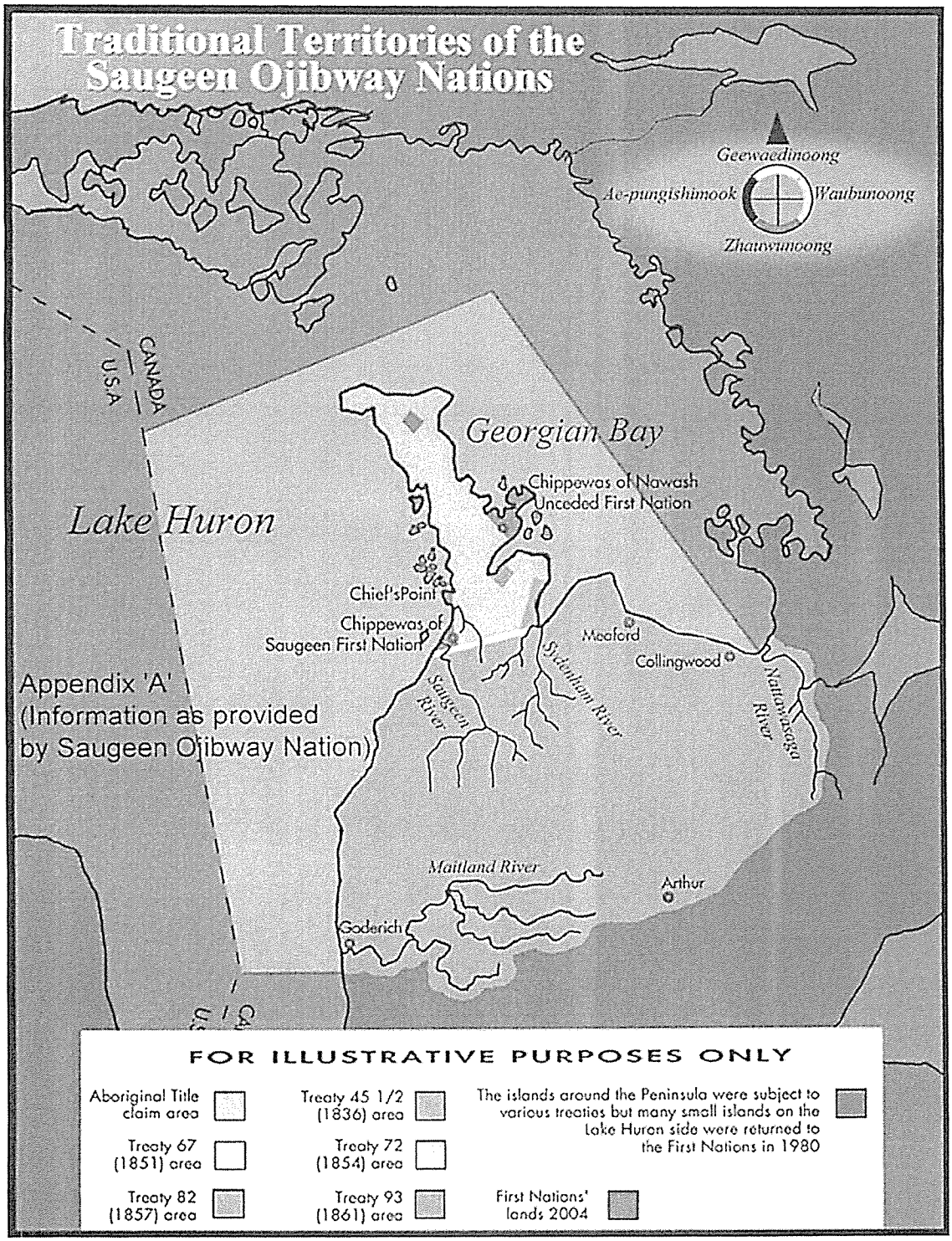


EXHIBIT “D”

This is Exhibit ..... D ..... referred to in the
affidavit of ..... Paul Jones .....
sworn before me, this ..... 15th .....
day of ..... August ..... 2013 .....
.....
A COMMISSIONER FOR TAKING AFFIDAVITS

Regina v. Jones et al.

[Indexed as: R. v. Jones]

14 O.R. (3d) 421
[1993] O.J. No. 893

Ontario Court (Provincial Division),
Fairgrieve Prov. Div. J.

April 26, 1993

Aboriginal peoples — Hunting and fishing rights — Member of Indian band charged with taking more lake trout than permitted by band's commercial fishing licence contrary to Ontario Fishery Regulations, 1989 — Defendants established existing aboriginal and treaty rights to engage in commercial fishing with priority over all other groups after conservation needs met — Band's priority not considered and band not consulted in setting lake trout quota — Quota unjustifiably infringed defendants' existing aboriginal and treaty rights — Regulations of no force or effect — Charge dismissed — Ontario Fishery Regulations, 1989, SOR/89-93.

Aboriginal peoples — Indian bands — Member of band and chief of band charged with illegal fishing — Chief not engaged in fishing himself — Chief not vicariously liable for conduct of members of band — Charge against chief dismissed.

The defendants, members of the Chippewas of Nawash, were charged with taking more lake trout than permitted by the band's commercial fishing licence contrary to the Ontario Fishery Regulations, 1989. The defendants argued that the quota imposed by the band's licence constituted an unjustified interference with the exercise of its constitutionally protected aboriginal or treaty right to engage in commercial fishing. The defendants submitted that their treaty and aboriginal right to harvest fish commercially gave them priority over other user groups in the allocation of any surplus fishing resources, once the needs of conservation had been met.

Held, the defendants should be acquitted.

There was no evidence that the defendant J, the chief of the band, engaged in fishing himself or was a party to any offence committed by the defendant N. There is no doctrine of vicarious liability that would hold a chief responsible for the misconduct of other members of his or her band. The charges against J should be dismissed.

The Crown conceded that the defendants had "an aboriginal right of some sort to fish commercially" and the evidence established an existing aboriginal right to fish for commercial purposes. They also had a treaty right of access to, and use of, their traditional fishing grounds. The evidence did not establish a clear expectation on the part

of the band of exclusivity throughout the area which encompassed their traditional fishing grounds.

The lake trout quota infringed the defendants' existing aboriginal and treaty rights. The band quota had been reached only part way through the fishing season, so the restriction clearly limited the income which the band members would have received had they been permitted to continue fishing. The band's fishing income was a crucial part of what was essentially a subsistence economy. The quota constituted an infringement of s. 35(1) of the Constitution Act, 1982.

The infringement was not shown to be justified. The objective sought to be achieved by imposing the quota on lake trout was conservation and proper management of the fishery resources. That was clearly a valid objective. A consequence of the constitutional recognition and affirmation given by s. 35(1) to the defendants' aboriginal and treaty rights to fish for commercial purposes was that the Saugeen Ojibway Nation (of which the defendant's band formed a part) had priority over other user groups in the allocation of surplus fishery resources, once the needs of conservation were met. In allocating quotas under the existing regulatory scheme, no attempt was made to extend priority to the defendants' band. In fact, anglers and non-native commercial fishermen were favoured. Other methods were available to achieve the conservation objectives which could have accommodated the appropriate priorities, such as the closure of the fishery to anglers, or preventing them from catching lake trout, or imposing "catch and release" procedures. Inadequate efforts were made to enlist the participation of aboriginal peoples in the planning process. The regulation imposing the restriction was thus of no force or effect.

R. v. Sparrow, [1990] 1 S.C.R. 1075, 56 C.C.C. (3d) 263, [1990] 3 C.N.L.R. 160, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 111 N.R. 241, *apld*

Delgawuukw v. British Columbia, [1991] 3 W.W.R. 97, 79 D.L.R. (4th) 185 (B.C.S.C.); Jack v. R., [1980] 1 S.C.R. 294, 48 C.C.C. (2d) 246; R. v. Agawa (1988), 65 O.R. (2d) 505, 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 28 O.A.C. 201 (C.A.), leave to appeal to S.C.C. refused 58 C.C.C. (3d) vi, *consd*

Other cases referred to

Bisaillon v. Keable, [1983] 2 S.C.R. 60, 7 C.C.C. (3d) 385, 37 C.R. (3d) 289, 2 D.L.R. (4th) 193, 4 Admin. L.R. 205, 51 N.R. 81; Nowegijick v. R., [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041; R. v. Bombay (1993), 18 W.C.B. (2d) 441 (Ont. C.A.); R. v. Denny (1990), 55 C.C.C. (3d) 322, [1990] 2 C.N.L.R. 115, 94 N.S.R. (2d) 253, 247 A.P.R. 253 (C.A.); R. v. Duncan (1991), 65 C.C.C. (3d) 546 (B.C.S.C.); R. v. Horseman, [1990] 1 S.C.R. 901, 55 C.C.C. (3d) 353, [1990] C.N.L.R. 95, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 108 N.R. 1; R. v. MacDonald (1986), 1 W.C.B. (2d) 48 (Ont. Dist. Ct.); R. v. Martin (1991), 2 O.R. (3d) 16, 63 C.C.C. (3d) 71, 43 O.A.C. 378 (C.A.); R. v. Simon, [1985] 2 S.C.R. 387, 23 C.C.C. (3d) 238, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15,

171 A.P.R. 15, 62 N.R. 366; R. v. Sioui, [1990] 1 S.C.R. 1025, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127, 30 O.A.C. 280, 109 N.R. 22; R. v. Taylor (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.) [leave to appeal to S.C.C. refused [1981] 2 S.C.R. xi]; R. v. Trudeau (1991), 14 W.C.B. (2d) 224 (Ont. Gen. Div.); R. v. White (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), affd (1965), 52 D.L.R. (2d) 481n (S.C.C.); Skoke-Graham v. R., [1985] 1 S.C.R. 106, 17 C.C.C. (3d) 289, 44 C.R. (3d) 289, 16 D.L.R. (4th) 321, 67 N.S.R. (2d) 181, 155 A.P.R. 181, 57 N.R. 321

Statutes referred to

Constitution Act, 1982, ss. 35(1), 52
Fisheries Act, R.S.C. 1985, c. F-14, s. 79(1), Part II
Indian Act, R.S.C. 1985, c. I-5.

Rules and regulations referred to

Ontario Fishery Regulations, 1989, SOR/89-93, ss. 4(a), 36(1), (2)

Treaties and proclamations referred to

Bond Head Treaty (1836)
Imperial Proclamation (1847)
Surrender No. 45-1/2 (1836)
Surrender No. 72 (1854)
Surrender No. 82 (1857)

Authorities referred to

Report of the Special Commissioners to Investigate Indian Affairs in Canada (1858)

TRIAL on charges of violating the Ontario Fishery Regulations, 1989, SOR/89-93.

Bruce E. Pugsley, for the Crown.

Peggy J. Blair, for defendants.

FAIRGRIEVE Prov. Div. J.:—At issue in this case is the constitutionality of a restriction imposed by the Ontario Ministry of Natural Resources upon commercial fishing by members of the Chippewas of Nawash Band.

Part of the Saugeen Ojibway First Nation, the Chippewas of Nawash live at Cape Croker, a reserve located on the west side of Georgian Bay on the Bruce Peninsula, a short distance northeast of Wiarton, Ontario. Both defendants are members of this band. The allegation is that they committed offences in 1989 by taking more lake trout than

permitted by the band's commercial fishing licence and that, by so doing, they engaged in fishing not authorized by their licence. While the alleged infractions may seem fairly minor from one perspective, the issues raised by the case are potentially of broader significance.

The defendants' position, forcefully advanced by Ms. Blair, is that the quota imposed by the band's licence constituted an unjustified interference with the exercise of its constitutionally protected aboriginal or treaty right to engage in commercial fishing. The defendants submitted that their treaty and aboriginal rights to harvest fish commercially gave them priority over other user groups in the allocation of any surplus fishery resources, once the needs of conservation had been met. Ms. Blair argued that the restrictions imposed by the Ministry were invalid because, in failing to recognize the priority to which the band's right was entitled, the regulation imposing the lake trout quota was unjustified and inconsistent with s. 35(1) of the Constitution Act, 1982. As such, she argued, pursuant to s. 52, the quota was of no force or effect.

With equal skill and vigour on behalf of the Crown, Mr. Pugsley conceded that the defendants had "some sort" of aboriginal right to fish commercially, but took the position that the quota and geographical limitations imposed by the band's licence from the Ministry did not infringe that right. His further and alternative position was that even if the regulations did infringe the right in question, such infringement was justified on the basis of conservation and resource management. Briefly stated, the Crown's position is that the constitutional principle that requires that priority be given to an aboriginal right to fish for food and ceremonial purposes has no application to a native commercial fishery, and that the defendants' position amounts to an unwarranted and unjust claim to monopolize a natural resource in which other user groups are also entitled to share.

I think that before proceeding to make particular findings, and prior to accepting or rejecting any of the various submissions that were made, this would be the appropriate place to express my gratitude to both counsel for their very helpful presentation of the case. The evidence included hundreds of historical documents requiring careful organization and explanation. Ms. Blair was ably assisted by Professor Darlene Johnston of the University of Ottawa Faculty of Law, a member herself of the Chippewas of Nawash. I should say that the product of Professor Johnston's exhaustive research was presented fairly by her with scholarly detachment and professional skill. Both Mr. Pugsley and Ms. Blair demonstrated an impressive grasp not only of the historical material, but also of the technical evidence relating to fisheries conservation. Lengthy, detailed written submissions were filed by both counsel, extracting the pertinent evidence, assembling the relevant authorities, and developing their submissions. Their efforts on behalf of their respective clients have eased my task considerably.

THE CHARGES AND THE ONTARIO FISHERY REGULATIONS

Howard Jones and Francis Nadjiwon are jointly charged in the information that between June 28 and July 4, 1989, they unlawfully did

(1) . . .sell a quantity of lake trout, exceeding the quota of lake trout set out on Commercial Fishing Licence OS-1472 for 1989, contrary to Ontario Fishery Regulations, 1989, s. 36(2), made pursuant to the Fisheries Act, R.S.C. 1985, c. F-14;

(2) . . .take fish without authority of a licence, contrary to Ontario Fishing Regulations, 1989, s. 4(a), made pursuant to the Fisheries Act, R.S.C. 1985, c. F-14.

Section 4(a) of the Ontario Fishery Regulations, 1989, SOR/ 89-93, authorized by the Fisheries Act, R.S.C. 1985, c. F-14, provides that no person shall engage in fishing unless authorized by the appropriate licence. Section 36(1) of the same regulations provides that the Minister of Natural Resources for Ontario may impose in a commercial fishing licence terms and conditions respecting, inter alia, the waters from which fish may be taken and the number, size and species of fish that may be taken. Section 36(2) further states that no holder of a commercial fishing licence shall violate any of the terms or conditions of the licence. Pursuant to s. 79(1) of the Fisheries Act, a contravention of any regulation is a summary conviction offence punishable by a fine not exceeding $5,000 or by imprisonment for a term not exceeding 12 months or by both.

THE FACTS OF THE ALLEGED OFFENCES

To prove the alleged offences, the Crown filed an agreed statement of facts and called two witnesses, the operators of fish stores in Wiarton and Tobermory who bought fish from the Cape Croker Indians, a term that was used interchangeably in the evidence to refer to the Chippewas of Nawash.

As set out in the agreed statement, both defendants are members of the Chippewas of Nawash Band of Indians, a band within the meaning of the Indian Act, R.S.C. 1985, c. I-5. With the Chippewas of Saugeen, the two bands constitute the Saugeen Ojibway First Nation. At the relevant time, the defendant, Howard Jones, was the Chief of the Chippewas of Nawash Band.

Through their chiefs, the Chippewas of Nawash have held a commercial fishing licence since at least the institution of the federal Fisheries Act. The area covered by the licence is within the traditional fishing grounds of the band in the waters of Georgian Bay adjacent to the reserve. Until 1984, terms of these licences were not subject to quota restrictions, but in 1984 quotas were introduced.

A species of hybrid lake trout called splake, bred from a cross between speckled trout and lake trout, are considered lake trout for purposes of the charges. Terms of the licence define lake trout to include common lake trout, splake and backcross.

On February 1, 1989, a commercial fishing licence No. OS-1472, was issued to Howard Jones, the chief of the band, with an expiry date of December 31, 1989. The licence provided a quota restriction on lake trout of 10,022 lbs. of lake trout, which represented the total amount of lake trout which the Chippewas of Nawash could take under the terms

of the licence. The licence also set out the specific waters of Georgian Bay for which the licence was valid.

On June 28, 1989, Chief Howard Jones advised the band fishermen who are designates under the licence that the quota had been reached. By letter, he also advised the Ministry of Natural Resources district office in Owen Sound that he had informed all designates under the said licence that no more lake trout were to be taken pursuant to the licence.

Through its monitoring of the records of fish sales, the Ministry of Natural Resources determined that the defendant, Francis Nadjiwon, between June 28 and July 4, 1989, caught and sold 1,113 lbs. of splake in excess of the quota. It was acknowledged in the agreed statement that as licensee, Howard Jones had the responsibility of monitoring the commercial fishing activities of the persons named as "designates" on the licence. It was also agreed that the excess splake were caught within the area authorized by the licence.

In addition to filing the agreed statement, the Crown called brief viva voce evidence. Thomas Howell operates a fish store in Wiarton and supplies fish for distribution elsewhere in the Province. He identified the "Monthly Return of Fish Purchased" forms he completed for the Ministry for June and July, 1989, relating to fish purchased from what was named as "Giighnogammig Fisheries" on one form and "Cape Croker" on the other, both being references to the Chippewas of Nawash. The forms showed purchases of splake on the following dates: 172 lbs. on June 28, 160 lbs. on June 29, 110 lbs. on June 30, and 52 lbs. on July 4. Although someone else had added the name "Francis Nadjiwon" to the forms, Mr. Howell stated that he used a generalized form for the 20 or so Cape Croker families bringing in fish, and that he could not recall from whom specifically these fish had been purchased. Given the admission by the defence in the agreed statement, it was not necessary that Mr. Nadjiwon's involvement in particular commercial transactions be otherwise established. Significant, however, was Mr. Howell's evidence that he had never had any dealings with the defendant, Howard Jones, concerning the purchase of fish.

The other witness called by the Crown was Wayne Raney, who operated a fish store in Tobermory. Although Mr. Raney bought fish from other Cape Croker fishermen as well, he identified the Ministry "Monthly Return of Fish Purchased" forms he completed for June and July, 1989, which related specifically to purchases from Francis Nadjiwon. They showed splake purchases of 50 lbs. on June 28, 50 lbs. on June 30, 77 lbs., curiously, on June 31, 92 lbs. on July 1, 100 lbs. on July 3, and 68 lbs. on July 4. The price for all the purchases was indicated as $2 per pound.

Mr. Howell also described the previous popularity of splake with his store's customers. His supply was unable to keep up with the demand that developed for splake, however, and as a result of his inability to meet it, the demand had declined in recent years. Mr. Raney also testified that the supply of splake had fallen off since 1984 because of the quotas introduced that year.

The remainder of the evidence, consuming almost all of the time at trial, was directed to the constitutional issue, rather than to proof of the alleged offences.

WHETHER THE OFFENCES HAVE BEEN PROVED

If a court can decide a case without having to consider any constitutional issues, it should do so: Bisaillon v. Keable, [1983] 2 S.C.R. 60 at p. 71, 7 C.C.C. (3d) 385; Skoke-Graham v. R., [1985] 1 S.C.R. 106 at pp. 121-22, 17 C.C.C. (3d) 289; R. v. Martin (1991), 2 O.R. (3d) 16 (C.A.) at p. 30, 63 C.C.C. (3d) 71 at p. 85.

Ms. Blair argued that there was no proof from the agreed statement or the testimony of the witnesses that the defendant, Howard Jones, either committed himself or was a party to either offence charged. Marshall Nadjiwon, one of the band fishermen called by the defence in relation to the constitutional issues, testified that Howard Jones had never fished in his life, and that he had simply been the chief at the time. I accept that evidence, and I agree with Ms. Blair's submission.

There is no doctrine of vicarious liability that would hold a chief responsible for the misconduct of other members of his or her band. While there was some evidence that at a meeting of the band's fishing committee which Chief Jones attended, it was decided that fishing beyond the terms of the licence would occur in order to produce a "test case" in which the band's claimed exemption from the Ministry's quotas might be litigated, the evidence fell short of establishing with the requisite degree of certainty that Chief Jones himself abetted or otherwise became a party to any offence subsequently committed by Francis Nadjiwon.

Mr. Pugsley cited the unreported judgment of Stortini D.C.J. in R. v. MacDonald (Ont. Dist. Ct., December 15, 1986) [summarized in 1 W.C.B. (2d) 48], as authority supporting his submission that as the named licence-holder, Chief Jones had a duty to supervise the designates under the licence and to see that its terms were enforced. In that case, however, Stortini D.C.J. made findings of fact that Mr. MacDonald, the licence-holder and owner of the tugboat used to fish outside the area permitted by his licence, had delegated his responsibilities as licensee to his employee, Mr. Greenslade, and that Mr. Greenslade was acting within the scope of his employment at the time the offence was committed. I do not think that the principle governing the vicarious liability of employers for the acts of their servants in the course of their employment has any application to imputing responsibility for a band member's infraction to the band's chief, even where the chief's name appears as the licence-holder on the band's commercial fishing licence.

That being the case, both charges against Mr. Jones are dismissed because the Crown has failed to prove that he is guilty of either offence.

Ms. Blair also submitted that Count 2 should be dismissed as against the defendant, Francis Nadjiwon, because the charge alleged the taking of fish "without authority of a licence", and the evidence established that at the relevant time there was in fact a licence. In my view, this submission is without merit. The charge that fish were taken "without

authority of a licence" is language completely apposite to an allegation that fish were taken outside, or in contravention of, the terms of a licence which may have been held. It has not been suggested that the defendants were misled by any ambiguity in the way the charge was framed, or that the charge was at any time misinterpreted by them as anything other than an allegation that fish were caught in excess of the limit specified in the licence. I see no ambiguity which could have produced any such misunderstanding.

While the rule prohibiting multiple convictions arising from the same delict would no doubt preclude Mr. Nadjiwon's convictions on both counts, I am satisfied that on the basis of the agreed statement of fact, the two offences charged against him have been proved beyond a reasonable doubt. In view of that finding, it will be necessary to consider the constitutional validity of the regulations violated by Francis Nadjiwon, which have been challenged by the defendants.

THE SPARROW ANALYTICAL FRAMEWORK

The issues raised here concerning the constitutionality of the government's regulation of a native fishery are of the same general nature as those considered by the Supreme Court of Canada in R. v. Sparrow, [1990] 1 S.C.R. 1075, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 111 N.R. 241. In their single judgment on behalf of all six judges who participated in the decision in that case, Dickson C.J.C. and La Forest J. examined the scope of s. 35(1) of the Constitution Act, 1982, provided a framework for analyzing whether a law or regulation infringed a constitutionally protected aboriginal right, and set out the analysis to be made to determine whether such interference was justified. Although Mr. Pugsley argued that many of the conclusions reached by the Supreme Court of Canada are not particularly relevant to a native commercial fishery, as opposed to the aboriginal right to fish for food or social and ceremonial purposes which was considered in that case, he does agree that the judgment provides a useful and appropriate framework for identifying and analyzing the issues arising here.

The starting point for any such analysis is s. 35(1) of the Constitution Act, 1982, found in Part II of the Act, entitled "Rights of the Aboriginal Peoples of Canada". It reads as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

In Sparrow, at p. 1106 S.C.R., pp. 285-86 C.C.C., Dickson C.J.C. and La Forest J. described how s. 35(1) applied to the assessment of aboriginal claims:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. . . . .

> The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

The Supreme Court accepted that the principle applicable to the interpretation of Indian treaties and statutes, namely, a liberal construction and the resolution of doubtful expressions in favour of the Indians, should also apply to the interpretation of s. 35(1). Fairness to the aboriginal peoples should be the governing consideration. At p. 1108 S.C.R., p. 287 C.C.C., they stated the "general guiding principle" in the following terms:

> . . . the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

In Sparrow, the court determined that reconciling the federal legislative power with the federal fiduciary relationship is achieved by demanding the justification of any government regulation that infringes upon or denies aboriginal rights. At p. 1110 S.C.R., p. 289 C.C.C., Dickson C.J.C. and La Forest J. stated:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

Following the Sparrow analysis, the evidence called at this trial and the submissions made by counsel were directed to the questions identified by the Supreme Court there as the relevant ones:

1. Is there an existing aboriginal or treaty right to fish commercially?

2. If so, does the lake trout quota infringe or deny that right?

3. If there is an infringement, has it been justified?

There was no dispute that Sparrow clearly placed on the defendants both the burden of establishing a constitutionally protected aboriginal or treaty right, and the onus of proving that there was a prima facie infringement of it. Equally clearly, the onus of justifying any

such infringement is on the Crown. I will proceed to consider the three questions stated above, bearing in mind where the burden of proof lies in each case.

1. Is there an existing aboriginal or treaty right to fish for commercial purposes?

At the conclusion of the essentially undisputed historical and anthropological evidence called by the defence to establish a relevant aboriginal or treaty right on the part of the defendants, the Crown conceded, as already noted, that the defendants did indeed have "an aboriginal right of some sort to fish commercially". Mr. Pugsley submitted that because of this concession, it was unnecessary to consider whether the right arose as an "aboriginal right" or a "treaty right", since, in either case, the right would be given constitutional protection by s. 35(1). This accords with the recent judgment of the Ontario Court of Appeal in R. v. Bombay (January 28, 1993, as yet unreported) [summarized in 18 W.C.B. (2d) 441], wherein Austin J.A., at p. 5, held that while Sparrow dealt with aboriginal rights, its language and analytical framework also apply to treaty rights. Mr. Pugsley further submitted that his concession that the right was "existing", within the meaning of s. 35(1), also made it unnecessary to address the issue of whether the right had been "extinguished".

The Crown's concession was helpful as far as it went, and it certainly was in accordance with the evidence which preceded it. At the same time, Mr. Pugsley went on to argue that the Ministry regulation in issue did not unduly interfere with the defendants' right, and that in any event, if there was an infringement, it was justified. In taking that position, Mr. Pugsley asserted that commercial fishing by the Chippewas of Nawash has until recently been "sporadic" and "limited" in nature, and he referred to evidence that when the quotas were introduced in 1984, very few Cape Croker residents were still involved in the fishery. In other words, it seems to me, the Crown was seeking to have the existing aboriginal right defined in terms of how it had come to be exercised in the prevailing regulatory context. I do not think that that is the right approach to take. Nor do I think that the focus can shift directly to the justification for whatever infringement was caused without having a fairly clear sense of the nature, extent and consequences of the infringement, all of which, to some degree, will reflect the content of the aboriginal or treaty right which was infringed.

In my view, one cannot usefully speak in the abstract about "some sort" of aboriginal right to fish commercially, without some understanding of its content and scope. As Dickson C.J.C. and La Forest J. stated in Sparrow at pp. 1111-12 S.C.R., p. 290 C.C.C.:

> The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. . . .
>
> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial

> to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

Although the difficulty in definition referred to may account for the Crown's reluctance here to state what the aboriginal right of the Chippewas of Nawash to fish commercially entails, I think some attempt must be made to delineate at least the general contours of what has been given constitutional protection. Despite the Crown's admission that the first of the Sparrow questions can simply be answered in the affirmative, that will not suffice as the complete answer. It will be necessary to determine what the admitted aboriginal right consists of.

Sparrow again provides some guidance as to how this right to fish commercially or for livelihood purposes might be ascertained. Dickson C.J.C. and La Forest J. stated, at p. 1091 S.C.R., p. 274 C.C.C., that the word "existing" in s. 35(1) made it clear that the protected rights were those which existed when the Act came into effect in 1982. At pp. 1092-93 S.C.R., pp. 275-76 C.C.C., they approved the conclusion of Blair J.A. in R. v. Agawa (1988), 65 O.R. (2d) 505 (C.A.) at p. 522, 43 C.C.C. (3d) 266 at p. 283, leave to appeal to S.C.C. refused 58 C.C.C. (3d) vi, that "existing" means "unextinguished", rather than defined according to the regulatory scheme in place in 1982. They also rejected a "frozen rights" approach, instead accepting that the phrase "existing aboriginal rights" must be given a flexible interpretation to permit their evolution over time. Dickson C.J.C. and La Forest J. agreed that the protected rights may be exercised in a contemporary manner "rather than in their primeval simplicity and vigour".

In Sparrow, the evidence established that the Musqueam Band had fished for salmon "from time immemorial" in an area of the mouth of the Fraser River, and that there was evidence of sufficient continuity of the exercise of the right to support the conclusion that the defendant was exercising an existing aboriginal right. After setting out the history of the regulation of fisheries in British Columbia, Dickson C.J.C. and La Forest J., at pp. 1097-99 S.C.R., pp. 279-80 C.C.C., rejected the Crown's contention that the regulations had displaced any aboriginal right:

> At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. . . . . .
>
> The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.
>
> There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguawh the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

The Supreme Court then went on to delineate the scope of what they found to be the existing Musqueam right to fish. The anthropological evidence established that their salmon fishery had always constituted an integral part of their distinctive culture, and that the Musqueam had always fished for reasons connected to their cultural and physical survival. The right to fish, they repeated, may be exercised in a contemporary manner.

The right at stake in this case differs from Sparrow in that the defendants here have asserted, and the Crown has conceded, an existing aboriginal or treaty right to fish for commercial or livelihood purposes. In Sparrow, the court confined itself to a constitutional recognition and affirmation of the Musqueams' existing aboriginal right to fish for food and social and ceremonial purposes which had been the focus of the inquiry by the courts below. Dickson C.J.C. and La Forest J. expressly declined, at pp. 1100-01 S.C.R., pp. 281-82 C.C.C., to expand their inquiry to include Mr. Sparrow's claim, disputed by the Crown, that he had an aboriginal right to fish commercially as well. What was disputed there has been admitted here. Ms. Blair has led considerable archival and historical evidence to establish the nature and scope of the defendants' admitted right to fish commercially.

Leaving aside for the moment the question of whether the right is properly characterized as aboriginal or treaty in nature, the right asserted by the defence amounted essentially to a claim that the Saugeen Ojibway First Nation as a whole, and not just the Chippewas of Nawash, have a collective ancestral right to fish for commercial and livelihood purposes in their traditional waters off the Bruce Peninsula, both in Georgian Bay on the east and in Lake Huron on the west. If that is accepted, it follows, I think, that any restrictions imposed on the exercise of this right, whether by means of geographical limitations, methods of fishing, quantity of fish harvested, or which members of the band may participate, would all constitute prima facie infringements that would have to be justified by the Crown according to the scheme in Sparrow. Having said that, I am inclined to agree with Mr. Pugsley that in the context of this particular prosecution, the issue is considerably narrower. The question to be decided is simply the constitutionality of the lake trout quota.

It is interesting that Mr. Pugsley has sought to characterize the defendants' claim as an exclusive right which would lead to a commercial monopoly throughout the area. Apart perhaps from waters immediately adjacent to the two reserves, I did not understand the defendants' position to be that no other users should be given access to the fishery. Rather, it seemed to me, what was being claimed was recognition of their constitutional priority and their right to participate in the management of the resource.

Ms. Blair argued that the right to be given constitutional recognition and protection here arises both as a treaty right and as an aboriginal right. The distinction is significant, she submitted, because a treaty right cannot be extinguished unilaterally, while an aboriginal right can be if there is a clear and plain intention on the part of the Sovereign to do so. I accept that treaty rights and other aboriginal rights are not mutually exclusive, and that a treaty can recognize pre-existing rights, as well as create new ones. While Mr.

Pugsley has conceded an aboriginal right, it may be significant to know whether there is also a treaty right at stake.

In R. v. Simon, [1985] 2 S.C.R. 387 at p. 409, 23 C.C.C. (3d) 238 at p. 256, Dickson C.J.C. rejected the contention that some form of land cession is necessary before an agreement can be described as a treaty, and accepted that "an exception, reservation or confirmation is as much a term of a Treaty as a grant". The Chief Justice also quoted with approval, at p. 410 S.C.R., p. 257 C.C.C., the following passage from the judgment of Norris J.A. in R. v. White (1965), 50 D.L.R. (2d) 613 at pp. 648-49, 52 W.W.R. 193 (B.C.C.A.); affirmed (1965), 52 D.L.R. (2d) 481n (S.C.C.):

> In the section [s. 88 of the Indian Act, R.S.C. 1970, c. I-6], "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.

Also at p. 410 S.C.R., p. 257 C.C.C., Dickson C.J.C. repeated the principle that "Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians". See also Nowegijick v. R., [1983] 1 S.C.R. 29 at p. 36, 144 D.L.R. (3d) 193 at p. 198.

In R. v. Horseman, [1990] 1 S.C.R. 901 at p. 907, 55 C.C.C. (3d) 353 at p. 357, Wilson J., dissenting in the result, stated:

> These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

Similar observations concerning the determination of whether a particular document is a treaty were made by Lamer J. in R. v. Sioui, [1990] 1 S.C.R. 1025, 56 C.C.C. (3d) 225. At p. 1035 S.C.R., p. 232 C.C.C., His Lordship stated that in determining the legal nature of a document recording a transaction with the Indians, the court should show "flexibility", taking into account "the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration". What is required, according to Lamer J., is "a broad and generous interpretation of what constitutes a treaty". At p. 1045 S.C.R., p. 240 C.C.C., he found the list of factors considered by the Ontario Court of Appeal in analyzing the historical background in R. v.

Taylor (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227, to be useful both to determine whether a document is a treaty and to its interpretation:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators,
5. the subsequent conduct of the parties.

Given Mr. Pugsley's reference to the recent "limited" nature of the exercise of the commercial fishing right by the defendants' band, Lamer J.'s comments, at p. 1066 S.C.R., p. 256 C.C.C., may also be relevant:

> Finally, the appellant argues that non-user of the treaty over a long period of time may extinguish its effect. He cites no authority for this. I do not think that this argument carries much weight: a solemn agreement cannot lose its validity merely because it has not been invoked. . . . Such a proposition would mean that a treaty could be extinguished merely because it had not been relied on in litigation, which is untenable.

The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became essential items. The trade developed further with the growing population of settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.

In Horseman, supra, despite the differing conclusions as to whether earlier treaty rights had been extinguished by a subsequent agreement, both the majority and dissenting judgments recognized the commercial nature of the original treaty right to hunt "for food". At pp. 928-29 S.C.R., pp. 373-74 C.C.C., Cory J. held that the treaty in question reserved hunting rights which included hunting for commercial purposes:

> The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based on those hunting rights. . . . . .
>
> The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life. . . . . .
>
> I am in complete agreement with the finding . . . that the original Treaty right clearly included hunting for purposes of commerce.

In Wilson J.'s dissenting judgment, at p. 908 S.C.R., p. 358 C.C.C., she referred to the dangers of "drawing neat distinctions between hunting for domestic use and hunting for commercial purposes". Her Ladyship saw the treaty as providing protection for the source of the Indians' livelihood, not limited simply to personal food consumption, stating at p. 919 S.C.R., p. 367 C.C.C.:

> The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit.

In this case, it has not been suggested that the evidence discloses any commercial activity by the Chippewas of Nawash which was directed at anything other than "sustenance" in this sense. Mr. Pugsley raised the spectre that the commerce needed to provide a meagre livelihood for the band could, if unregulated, develop into a profit-oriented monopoly, but that is not the aboriginal right which has been claimed or for which protection is sought.

To establish that the right should be characterized as a treaty right, Ms. Blair referred specifically to what came to be known as Surrender No. 45-1/2. By that agreement in 1836, the Saugeen Ojibway surrendered much of their territory, retaining as a reserve only the area north of a line that extended roughly from Owen Sound to the present site of Southampton. This area included all of the Bruce Peninsula. Chief Metigwob at the time stated that the principal men of the Saugeen Band had accepted this northward withdrawal "as there were many fish in the area", and that Sir Francis Bond Head, the Lieutenant Governor, had stated to the Saugeen Indians that they "own all the islands in

the vicinity of that neck or point of land he was about to reserve for them and that he would remove all the white people who were in the habit of fishing on their grounds". James Morrison, an expert in Ojibway history called by the defence, agreed that Bond Head had explained the purpose of the agreement as being, from one side, the acquisition of valuable agricultural land available for settlement by the increasing white population and, from the other, protecting the Indians from "the encroachments of the whites" and giving them "proper assistance" to enable them to become civilized. Mr. Morrison expressed his opinion that the Surrender of 1836 was meant to reserve the fisheries to the Saugeen, while excluding others from them.

During the 1830s, the Saugeen continued to enter into arrangements directly with third parties for the leasing of their fishing islands by directors of the Huron Fishing Company, which were then affirmed by licences of occupation by the Crown. No licences of occupation were issued to confirm the arrangement in 1845 that the Saugeen chiefs made with one Cayley, whose name figured prominently in the documents from that period. Mr. Lytwyn, an historical geographer called by the defence, gave his opinion that the colonial government could issue such licences in respect of Crown lands, but could not do so in relation to the Saugeen's fisheries because they had not been surrendered.

The historical evidence supports the conclusion that, from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area. When the Chief Superintendent of Indian Affairs visited the settlement the next year, he wrote:

> The fishing is bountifully supplied and has attracted the notice of white people who annoy the Indians by encroaching on what they consider their exclusive right and on which they rely much for provisions.

Chief Superintendent Jarvis also wrote in 1838:

> This fishery has attracted the notice of the white traders who resort hither at certain seasons to the great annoyance of the resident Indians who claim the exclusive privilege of fishing at the spot.

According to the correspondence that was filed, a delegation of chiefs went to Toronto in 1839 to present a petition alleging that they had been "defrauded" by persons who had taken possession of their fishing grounds, and seeking protection "from the intrusions and frauds of wicked white men". The band also sought a "written paper" that they could "show to any white man who attempted to settle upon the Indian land".

In the Imperial Proclamation, dated June 29, 1847, evidently intended as a response to the request for documentary confirmation of their title, the Ojibway were granted a deed of title to a tract of land described to include the entire peninsula "bounded on the north, east and west by Lake Huron, including any Islands in Lake Huron within seven miles of . . . the mainland". Mr. Lytwyn testified that the seven-mile limit and all the islands within that limit essentially captured the entire fishery at the time since, in 1847, there

was no deep-water fishing in Lake Huron or Georgian Bay. He also described the "unique" declaration as "the clearest expression [he had] ever seen" to protect the Indians' traditional fishing grounds.

In 1851, the Governor General made a further proclamation setting apart certain tracts of land for the Indians, and providing for legislation to protect them from trespass. With respect to the Saugeen and Owen Sound Indians, specific reference was made again to the peninsula "together with all the Islands within seven miles of the coast".

In 1854, by Surrender No. 72, most of the land on the peninsula and the area to the south were surrendered to the Crown, with five much smaller reserves being retained, including Cape Croker, the Saugeen reserve, and the Owen Sound reserve. The surrender stated expressly, however, that "no islands are included in this surrender". Three years later, in 1857, as a result of Surrender No. 82, the Owen Sound reserve was ceded to the Crown, with the people from the reserve moving north to Cape Croker.

Although the Saugeen Ojibway Nation had by this time been divided into separated reserves, there was evidence of continuing recognition of their joint interest in the fisheries around the peninsula. Funds obtained from the rent for the Fishing Islands on the west side continued to be paid jointly to the Saugeen and Cape Croker Indians. The 1858 Report of the Special Commissioners to Investigate Indian Affairs in Canada referred to the Cape Croker reserve as "common to the Saugeen and Owen Sound Bands", but also stated that the 1854 surrender "made them distinct Bands, recognized as having separate and exclusive interests in the different Reserves on the two sides of the Peninsula". As part of the information concerning the "Chippewas of Newash or Owen's Sound", the report observed that "the fisheries, though not equal to those on the western side of the Peninsula, are considerable, and will consititute no inconsiderable part of the means of subsistence available for the Band". The same report also referred to the three principal islands off the Cape Croker reserve, White Cloud Island, Griffiths Island and Hay Island, as "unsurrendered".

In 1894, the Indian agent at Cape Croker wrote to the Deputy Superintendent of Indian Affairs in connection with the surrender of White Cloud Island and the assurances given to the Indians that "it would in no way affect their fishing limits". Band council minutes confirmed their view that the fishing rights around the island had been reserved, although there were claims by lessees that they were "molested" and "annoyed" by Cape Croker Indians.

I agree with the defendants' submission that the evidence supports the conclusion that the Bond Head Treaty of 1836, confirmed by the Imperial Proclamation of 1847, extended treaty protection of the Saugeen Ojibway's use of their traditional fishing grounds surrounding the peninsula. Ms. Blair described the treaty right as a "right of ownership and possession". I think it is more accurately stated as a right of access to, and use of, their traditional fishing grounds. Apart perhaps from the waters immediately adjacent to their settlements and the fishing islands reserved to themselves and used as

fishing stations, the evidence did not establish a clear expectation on their part of exclusivity throughout the area which encompassed their traditional fishing grounds.

I also think Ms. Blair's submission that in addition to the treaty right, the defence had also proved that "aboriginal title to the waters surrounding the Bruce Peninsula remains with the Saugeen Ojibway First Nation" overreaches in a similar way. There is a distinction to be drawn between the nature of a right to fish in waters which constitute traditional fishing grounds and aboriginal title at common law in relation to land. In my view, it is again not a question of "title" or "ownership", it is a question of the right to fish in those waters and to enjoy the benefit of the resource to be found there: see R. v. Denny (1990), 55 C.C.C. (3d) 322, [1990] 2 C.N.L.R. 115 (N.S.C.A.).

Given the Crown's concession that there is an aboriginal right to fish for commercial purposes which has not been extinguished, it is not necessary to review the historical evidence leading to that conclusion. Ms. Blair set it out in considerable detail in her written submissions, and it has not been contested by the Crown. What the evidence disclosed was a relentless, incremental restriction and regulation of the admitted aboriginal right, despite continuing protests, petitions, objections and resistance by the defendants' band. Much of the conflict appeared to have its source in the apparently inadvertent failure of the first Fishery Act to make any special provision for the treatment of native fisheries or existing treaty rights. The evidence documented as well a protracted intragovernmental policy clash between Fisheries and Indian Affairs. The former generally prevailed, and the fisheries came under increasingly stricter controls. The Crown did not suggest that the evidence established any clear and plain intention on the Sovereign's part to extinguish the Saugeen Ojibway's aboriginal commercial fishing right. Neither did it disclose any consent on the Ojibways' part to the restriction of their right by the licensing system and the controls placed on the waters that could be fished, the species and amounts that could be taken, and which members were authorized to participate in the fishery.

Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds. Apart from the waters adjacent to the two reserves and their unsurrendered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language, the nature of the aboriginal right exercised is one directed "to a subsistence use of the resource as opposed to a commercially profitable enterprise". It is the band's continuing communal right to continue deriving "sustenance" from the fishery resource which has always been an essential part of the community's economic base.

2. Does the lake trout quota infringe the defendants' existing aboriginal or treaty right?

The next question to consider is whether the restriction placed on the number of lake trout infringed that right. In Sparrow, supra, at pp. 1111-12 S.C.R., pp. 289-90 C.C.C., Dickson C.J.C. and La Forest J. stated:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of the s. 35(1) analysis. . . . . .

To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. . . . Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

The regulation in issue in Sparrow was, as just stated, a net length restriction, and the questions posed by the Supreme Court in relation to whether it constituted a prima facie infringement of the Musqueams' food fishing right are not necessarily the most appropriate when the restriction is a lake trout quota allegedly infringing a commercial fishing right.

It is to be noted that in the first paragraph of the passage just quoted, Dickson C.J.C. and La Forest J. appeared to equate "interference" with an existing aboriginal right with a "prima facie infringement of s. 35(1)". On the next page, in the second quoted paragraph, they set out a list of questions directed at determining whether the interference in fact amounts to an infringement. The questions listed include the "reasonableness" of the restriction, whether the hardship caused by the regulation was "undue", and whether the infringement "unnecessarily" infringed the protected interests. All of these questions might have appeared more relevant to the question of whether the interference was justified, not whether any interference occurred. In any event, Their Lordships ultimately concluded that if the regulation had an "adverse restriction" on the exercise of their right to fish for food, then it would be found to be a "prima facie interference". In R. v. Bombay, supra, the Court of Appeal, per Austin J.A. at p. 5, cited Sparrow as authority simply for the proposition that "if interference is established, that will constitute a prima facie infringement of s. 35(1)".

In the context of the Cape Croker Band's right to fish commercially, there can be little doubt that the limit on the number of lake trout they could lawfully catch imposed an "adverse restriction" on the exercise of their right. The band's quota had already been

reached by the end of June, only part way through the fishing season, and had the direct consequence of terminating the exercise of their right in relation to the species the band preferred to harvest. The restriction clearly limited the income which the band members would have received had they been permitted to continue fishing for splake.

In terms of assessing whether the quota caused "undue hardship", it is difficult both to know what degree of hardship was "due" and to isolate the impact of the lake trout quota from the other restrictions imposed as part of the same regulatory scheme. The financial hardship caused to the band by the curtailed commercial activity, however, was documented by the evidence. The band's fishing income is a crucial part of what was essentially a subsistence economy. More limited access to the resource caused by the quota produced greater deprivation and, predictably, contributed to the negative consequences of increased unemployment and poverty on both an individual and communal level.

There can be no doubt that the quota had a serious adverse restriction on the exercise of the band's right and, as such, constituted an infringement of s. 35(1). That finding leads inevitably to what both parties regarded as the real issue in this case.

3. Has the infringement been justified?

In Sparrow, at p. 1109 S.C.R., p. 287 C.C.C., Dickson C.J.C. and La Forest J. made clear that "[l]egislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1)". At p. 1111 S.C.R., p. 289 C.C.C., in stressing the importance of "context and a case-by-case approach to s. 35(1)", they stated:

> Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

While there is, then, no single test of universal application, the Supreme Court of Canada did go on to make certain general statements applicable to this stage of the inquiry. At p. 1113 S.C.R., pp. 290-91 C.C.C., Their Lordships stated:

> If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the

> exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial. . . . . .
>
> The justification of conservation and resource management . . . is surely uncontroversial. . . . . .
>
> . . .it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

The defendants here did not challenge the Crown's position that the objective sought to be achieved by imposing the quota on lake trout was conservation and proper management of the fishery resources. Lake trout is a particularly vulnerable species. Due to over-fishing and natural causes, lake trout were virtually wiped out by the 1950s, and more recently fell prey to the lamprey eel. The Ministry of Natural Resources biologists explained that the lake trout quotas placed on commercial fishermen were an important part of the effort aimed at reducing mortality rates for lake trout and encouraging the rehabilitation of a self-sustaining population. The restriction clearly had a valid objective.

In Sparrow, at pp. 1114-15 S.C.R., pp. 291-92 C.C.C., Dickson C.J.C. and La Forest J. went on to explain the second part of the justification analysis, once a valid legislative objective has been found. Because the Supreme Court was also dealing with a fishing right, albeit not for commercial purposes, many of the court's statements bear directly on the issues in this case and warrant repetition at some length:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretative principle derived from Taylor, supra and Guérin [Guérin v. R., [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321]. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocation problems that arise regarding the fisheries.

Dickson C.J.C. and La Forest J. then accepted the statement made by Dickson C.J.C. in Jack v. R., [1980] 1 S.C.R. 294 at p. 313, 48 C.C.C. (2d) 246 at p. 261, where he expressed agreement with the "general tenor" of the appellant's position

> . . . which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

At p. 1116 S.C.R., p. 293 C.C.C., the court applied this order of priorities to the aboriginal right at issue in Sparrow:

> The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

While the focus in that passage was the Musqueams' food requirements, the earlier reference to the Jack order of priorities suggests that "Indian fishing", coming immediately after "conservation", would include native commercial fishing protected by s. 35(1) as well. If it did not, it would be difficult to see any sense in which it had special constitutional status. Moreover, Jack's reference to the lower priorities to be given "non-Indian commercial fishing" and "non-Indian sports fishing" suggests that Indian fishing rights of either nature are to be included in "Indian fishing" generally and given priority, again assuming that they are protected by s. 35(1).

Mr. Pugsley cited R. v. Agawa, supra, to support his contention that a valid conservation purpose itself was sufficient to justify a limitation on an aboriginal right. I note that the Court of Appeal's judgment was given prior to Sparrow's justification analysis. Although Mr. Pugsley argued that the refusal of leave to appeal in Agawa expressed the court's implicit approval of it, I am inclined to speculate that the refusal reflected the court's reluctance to revisit issues that had already been authoritatively decided in Sparrow a few months earlier.

Mr. Pugsley also argued that I was bound by R. v. Trudeau, Ontario Court (General Division), October 18, 1991, unreported [summarized in 14 W.C.B. (2d) 224], a summary conviction appeal where DiSalle J. found that no treaty commercial fishing right had been established, but stated that if it had been, licence and quota restrictions were necessary reasonable limits based on conservation and resource management in accordance with "the test in R. v. Agawa and R. v. Sparrow". The Supreme Court has stated that whether the justificatory test has been met will depend on the particular facts and context of each case, so I do not think that Mr. Justice DiSalle's conclusion in that case necessarily dictates the result here. It may be of significance, however, that DiSalle J. did acknowledge the applicability of the Sparrow test to a treaty commercial fishing right.

In Sparrow, at pp. 1117-18 S.C.R., p. 294 C.C.C., Dickson C.J.C. and La Forest J. also quoted with approval from the decision of the Nova Scotia Court of Appeal in R. v. Denny, supra, per Clarke C.J.N.S. at pp. 340-41 C.C.C., concerning the link between allocation and justification:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

The guidance provided by the Supreme Court of Canada as to the scrutiny of a conservation plan according to the justificatory standard again merits lengthy quotation. At p. 1119 S.C.R., p. 295 C.C.C., Dickson C.J.C. and La Forest J. stated as follows:

> We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.
>
> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the

> question of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

There has been some resistance in the case law to the application of the justification analysis to native commercial fishing. In Delgamuukw v. British Columbia, [1991] 3 W.W.R. 97 at p. 392, 79 D.L.R. (4th) 185 (B.C.S.C.), McEachern C.J.B.C. expressed what he described as "an early judicial opinion", and one that was clearly obiter, on the subject:

> In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is, to hunt and fish and collect the products of the land and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices. . . . . .
>
> In my view, using fishing as an example, it would be contrary to the rational evolution of aboriginal rights, and contrary to principle, to enhance an aboriginal right by providing priority over all other users (after justified conservation), and then to enlarge or extend the prioritized aboriginal right to commercial activities when many aboriginals are already employed in this industry. It would be foolish to suggest, for example, that the prioritized aboriginal rights of an Indian participating in the commercial fishing industry would be exempt from the regulations which govern non-Indian licensees.

McEachern C.J.B.C. concluded that the aboriginal rights established in that case did not include commercial practices.

What distinguishes the situation here is that the Crown has conceded that the Chippewas of Nawash have constitutional protection of a right which does include commercial practices. It is not, therefore, a matter of "enhancing" or "enlarging" the right protected by s. 35(1), but of giving the right that already exists appropriate recognition and affirmation. I disagree with McEachern C.J.B.C.'s reference to many aboriginals being employed elsewhere in the industry as relevant to either the delineation of an existing aboriginal right or to the protection of the exercise of that right by the aboriginals who choose to exercise it. I do not think that a constitutional claim to priority for a collective right can be ignored merely because some aboriginal people work elsewhere in

the fisheries. That could itself merely reflect restrictions on the native fishery having limited employment opportunities there or result from any number of personal reasons quite unrelated to the native fishery. It seems entirely possible that if priority were given to their community's right, people in such circumstances might decide to participate in, and benefit from, its exercise in a way that had not formerly been feasible. In any event, while Sparrow has acknowledged the difficulties in applying the justification test to infringements of a right to fish for commercial purposes, I do not see any support there for a different principle that would allow the constitutional status of aboriginal rights which include commercial practices simply to be disregarded.

In McEachern C.J.B.C.'s view, the underlying purpose of recognizing aboriginal rights is "to sustain existence in an aboriginal society". If by that His Lordship means simply the physical survival of the communal group in a state of what has been referred to as "primeval simplicity", I do not think that view is consistent with the recognition of a right which includes commercial practices and the sharing of the economic benefit of a resource to which the priority of their claim has been acknowledged.

The issue, again, is not whether regulation, in general, of the defendants' commercial fishing right can be justified on the basis of conservation and resource management. That much is conceded. Rather, the question is whether the particular restrictions imposed, and specifically, the lake trout quota imposed by the band's 1989 licence, have been justified by the Crown.

I accept that a consequence of the constitutional recognition and affirmation given by s. 35(1) to the defendants' aboriginal and treaty rights to fish for commercial purposes is that the Saugeen Ojibway Nation has priority over other user groups in the allocation of surplus fishery resources, once the needs of conservation have been met. I am also satisfied that the evidence relating to the allocation of the quotas under the existing regulatory scheme has made no attempt to extend priority to the defendants' band. Scrutiny of the government's conservation plan discloses that anglers and non-native commercial fishermen have in fact been favoured, and that the allocation of quotas to the Chippewas of Nawash, much less the Saugeen Ojibway as a whole, did not reflect any recognition of their constitutional entitlement to priority over other competing user groups.

It is apparent that the quota system is rationally connected to the valid regulatory objective of conservation, in that it bears directly on the goals of reducing the mortality rates for lake trout and other species, and achieving a self-sustaining fish stock. The evidence also establishes that the Ministry has identified a surplus in the stock of lake trout. If that had not been the case, the management plan would presumably not have permitted the growth of the recreational fishery without effective controls on the number of fish which can be taken by anglers, who are subject only to daily catch limits of three fish without any overall restrictions. In the absence of a surplus, the plan would also not have allowed non-native commercial fishermen to harvest lake trout either, even as part of so-called "incidental" catches.

While the conservation objective could justify on biological grounds a management plan which included total, across-the-board quotas for various species, the evidence suggests that specific quotas for individual licensees were fixed arbitrarily. Donald Hughes, a M.N.R. biologist, conceded in cross-examination that the quotas imposed for particular species, and their allocation among different licence-holders, were not biological decisions, but reflected the political and social realities at the time. Biologists, he testified, take a global perspective and are concerned with the size of the whole pie, not who gets which slice. As a practical matter, the activities of tens of thousands of sports fishermen could not be controlled as readily as the limited number of commercial fishermen. Moreover, the anglers had certain expectations concerning their entitlement to the proceeds of the publicly financed fish planting program which were difficult for the managers of the plan to ignore. The commercial fishery, then, was more easily targeted to bear the brunt of the conservation effort, and the native fishery was evidently regarded as just one part of the industry to be treated in the same way as other commercial licence-holders.

While the allocation process adopted when the quota system was introduced in 1984 may have reflected social and political realities at the time, it is not at all apparent that the constitutional realities played any role at all. Neither has it been demonstrated that since that time appropriate adjustments have been made in response to a belated recognition of the priority of the band's right.

The initial quotas imposed in 1984 became the reference point for later, albeit uneven increases to various licence-holders. The initial quotas were intended to reflect the average catch for the best three of the previous six years, regardless of what was the desirable surplus according to biological considerations. The Cape Croker fishery, like most other native fisheries, had incomplete production records for the years examined by the M.N.R. for purposes of fixing the quotas, and there were no data at all for the years 1977 to 1980. When the lake trout quota was allocated in 1984, the evidence suggests that despite the fact that the band was the only commercial licence-holder covering an entire community, and despite the fact that the band's fishery was the only one in the area dependent on lake trout for its livelihood, the band was simply given an incidental quota, not a production quota, in the same way and of a similar magnitude as other individual commercial licence-holders. The evidence does not support a finding that any special regard was given to the nature of the band's fishery operation, quite apart from the question of any constitutional priority over other users.

There appear to be other ways as well in which the Ministry failed to take into account the nature of the Cape Croker fishery. At the same time that the band's licence imposed a tight restriction on the lake trout harvest, the band's "preferred" species and focus of its fishery operation, the licence authorized substantial quotas for other species which the band was unable to utilize. While perhaps more anecdotal than scientific, one of the band fishermen, Marshall Nadjiwon, testified that they could only take a fraction of their whitefish allotment because the bountiful splake had driven the whitefish out of the waters in which the band members were permitted to fish. Similarly, although there was a large quota for chub, a deep-water fish, the Cape Croker fishery was essentially an

inshore fishery without a deep water capacity. The band's boats were too small, and they lacked the other equipment needed to take their chub allowance under the licence.

The defendants challenged not only the quotas, but the geographical restrictions imposed by the licence as well. It was argued that in scrutinizing the management plan, it would not be realistic to compartmentalize the various restrictions without recognizing the impact of the licensing scheme as a whole. I am inclined to agree. The waters in which the band members were permitted by their licence to fish were limited to a small area adjacent to the Cape Croker reserve, much smaller than their traditional fishing grounds which extended to waters on both sides of the peninsula and within which native fishermen had traditionally been free to follow the fish to find the most productive places for fishing. The area covered by their licence did not extend far enough to allow them to take their chub quota, even if they had been equipped to do so. Moreover, although the licensing scheme gave the band exclusive commercial fishing rights in the small area authorized by the licence, it did not exclude sport fishermen or prevent their taking lake trout from those waters.

Considerable evidence and much argument was directed to the defendants' assertion that the aboriginal commercial fishing right at issue extends to the Saugeen Ojibway Nation as a whole, and not simply to the Chippewas of Nawash or the few band fishermen named as designates on the band's commercial fishing licence. I think Mr. Pugsley is probably right when he suggests that, strictly speaking, that issue is irrelevant to the Cape Croker fishery's lake trout quota impugned here. At the same time, I accept that exclusion of aboriginal fishermen from the fishery by the licensing scheme can be considered as one more indication of the reasonableness of the conservation plan. What is suggested is that in refusing to authorize commercial fishing by band members living on the Saugeen reserve on the west side of the peninsula, the Ministry displays the same indifference to the constitutional status of their right which allowed them to impose the specific lake trout quota. The same point is applicable, I think, to the Ministry's effort to limit the number of Cape Croker residents who can fish under authority of the licence. Despite the collective nature of their aboriginal and treaty rights, and also despite the legislative changes in 1982 allowing women who had married outside the band to return to the reserve, leading to an increase in the reserve population from 900 to 1600 persons, the 1989 licence still authorized fishing by only the chief and eight designated fishermen. Again taking the position that it was incumbent on the Crown to justify only the lake trout quota, Mr. Pugsley really made no attempt to justify all the other regulatory restrictions.

I accept the defendants' submission that the evidence established that the effect of the Ministry's quota system has been to allocate to non-native fishermen the vast preponderance of fish available for commercial harvest. The failure to regulate the recreational fishery in accordance with the same conservation plan has had the inevitable effect of shifting a greater share of the resource to that user group. In neither respect has the Crown demonstrated that the plan or, in the case of the largely uncontrolled sport fishery, the developments permitted outside the plan, recognized that s. 35(1) required that priority be given to the aboriginals' stake in the fishery resource.

The evidence also established that other methods were available to achieve the conservation objectives, which could have accommodated the appropriate priorities. Reference was made to programs including the closure of the fishery to anglers or preventing them from catching lake trout specifically, or imposing "catch and release" procedures, all of which have evidently been implemented successfully in the Parry Sound area, although they have not been used in southern Georgian Bay. It may be that for political reasons such programs would not be popular, but that does not permit the constitutional priorities to be overlooked. If there is a perceived need to maintain and encourage a sport fishing industry for other economic reasons, altogether outside the aim of conservation, it may warrant consideration of compensation to the band for the diversion of its proper share of the resource to another user group. It seems to me that the transfer of the economic benefit of the fishery achieved by the regulatory scheme is tantamount to "expropriation", and considering the factors suggested by Sparrow, the absence of "fair compensation" weighs against the Crown.

It has also not been proved that there was appropriate consultation with the Saugeen Ojibway at the time the conservation measures were adopted. Instead, the evidence suggests inadequate efforts to enlist the participation of the aboriginal peoples in the planning process, and certainly a failure to respond to the protests and objections made when the band considered its rights to have been disregarded. In the years since the imposition of the quotas, even following the clarification of the effect of s. 35(1) by the Supreme Court of Canada, the evidence does not disclose any serious attempt by the Ministry to reconsider the restrictions imposed at a time when their constitutional implications were perhaps not so clearly understood.

In assessing the conservation plan, I think the evidence compels the conclusion that the measures adopted have not infringed the protected right as little as possible. While the evidence was conflicting on the question, it is not at all clear that the lake trout quota has played a significant role in stabilizing the mortality rate for that species in the area. Dr. Spangler, a Fisheries Professor from the University of Minnesota called by the defence, testified that the quota allocated to the Cape Croker fishery could have been doubled or tripled without adversely affecting the rate of rehabilitation for lake trout. That being the case, it is impossible to characterize the restriction as infringing the right as little as possible.

Even making allowances for the complexities and difficulties from the perspective of the Ministry, the evidence does not provide the requisite justification of the infringement of the defendants' constitutionally protected right by the limit imposed on their harvest of lake trout. It follows that the regulation imposing the restriction is of no force or effect.

CONCLUSION

In my view, it is not the function of a summary conviction trial court hearing charges under the Ontario Fishery Regulations, 1989 to state what scheme for allocating fishery resources might meet the appropriate justificatory standard. Apart from lacking the technical expertise, there are other users with claims to be made and interests to be

considered who have no standing in a prosecution of this nature: see R. v. Duncan (1991), 65 C.C.C. (3d) 546 (B.C.S.C.). In the particular context of the Georgian Bay and Lake Huron fishery, there are complications arising from the fact that certain fish stocks, and lake trout specifically, currently depend on government hatcheries and plantings. It may also be that the aboriginal community derives direct or indirect economic benefit from a tourist industry that operates in part as a result of the recreational fishing available. Quantifying that benefit may be problematic. All these matters are undoubtedly appropriate subjects to be considered during the process of negotiation and consultation between the government and the Saugeen Ojibway, a process that does not involve the court.

What should be stated, however, is that a high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s. 35(1) of the Constitution Act, 1982, particularly after the judgment of the Supreme Court of Canada in Sparrow, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.

As a practical matter, the court cannot compel good faith or recognition of changed constitutional realities. All that can be done here is to state the conclusion that the quota restrictions do not meet current constitutional standards and are, accordingly, unenforceable against the defendants. The imposition of a prohibition against the purchase of lake trout from band members pending negotiations and a new arrangement which recognizes the priority of their aboriginal and treaty rights would, in my view, also be unconstitutional. It would also fail to reflect the high standard of honourable dealing which the public expects its government to take in respect of the rights of aboriginal people.

Howard Jones and Francis Nadjiwon are found not guilty, and the charges are dismissed.

Defendants acquitted.

EXHIBIT "E"

affidavit of Paul Jones
sworn before me, this 15th
day of August 2013
A COMMISSIONER FOR TAKING AFFIDAVITS

NEGOTIATING THE LAW: TRADITIONS & TREATIES on MANITOULIN ISLAND

Wakegijig

> My Brother Chiefs - I mean you who live at Manitowaning, we shall tell you what we think, and we want to hear what you think. We do not consider this Island has been ceded to the government.[1]

Mashequongai

> My friends, we do not think alike. We who live on this side of the Island consented to give up the Island to the government, but you refused to do so. You spoke of your children and their future condition. You spoke anxiously about them. We also think of ours, and trust they may do well, and be treated well always by the whites. We already have a treaty with the government and we are not going to throw it away. The future will tell what Indians will be better off.[2]

INTRODUCTION

Aboriginal[3] and non-Aboriginal people often have conflicting objectives in the control and use of land[4]. Divergent aspirations concerning land not only exist between these peoples, but also within both Aboriginal[5] and non-Aboriginal[6] groups. The allocation of land both between, and within, Aboriginal and non-Aboriginal groups is an issue that has occupied the inhabitants of what is now known as Canada for close to 400 years. Throughout this period, allocations of land have been attempted in numerous ways. The parties have pursued treaties[7], executive proclamations[8], scrip[9], unilateral legislation[10], reserve and royal commissions[11], segregation[12], assimilation[13], litigation, land claims processes[14], expropriation[15], and war.[16] These interactions have been carried out in different circumstances, under a constantly shifting balance of power, with diverse objectives and motivations. These

assorted dealings have occurred in villages, cities, council houses and legislatures, on Canada's prairies, mountains, woodlands and lakes. The issue of allocation continues to involve Aboriginal and non-Aboriginal people in discussions that attempt to settle ownership, occupancy, use and enjoyment of land in Canada.

The tangle of conflicting objectives in land allocations has fostered complex questions about the legitimacy and fairness of these distributions between the continent's original inhabitants and its more recent settlers.[17] In the not too distant past, Aboriginal peoples used the entire continent of North America for their physical, spiritual, emotional, and social sustenance.[18] In the pursuit of this lifestyle, First Nations had an intimate knowledge of every feature on the face of the land.[19] They had regard for more than the land's physical appearance and interacted as relatives with the earth's animate and inanimate members.[20] They held the land collectively and each group developed values, norms, customs and laws to govern its use.[21] These traditions taught the people how to take from the land while respecting the interactions and interdependence of the non-human world. The ancient and enduring relationships that Aboriginal peoples have with the land are now profoundly restricted. Their territories have been reduced to such an extent that their maintenance of these relationships is severely threatened. Contemporary First Nations require a significantly larger land base to preserve and continue their

distinct way of life.

The non-Native inhabitants of Turtle Island (North America)[22] recently immigrated to this continent[23] for a variety of reasons.[24] Columbus sailed to North America in pursuit of a western route to India and mistook the islands in the Gulf of Mexico for his destination.[25] The English, French, Dutch and Spanish saw opportunity in the fur trade, religious proselytization and colonization.[26] Many migrated to escape persecution, pressures,[27] war or human rights violations in their homelands.[28] Some came involuntarily as slaves.[29] As with Aboriginal peoples, there is a history among some of these peoples of using land for physical, spiritual, emotional and social sustenance.[30] However, such history has often been overshadowed by another legacy that has viewed land solely as a commodity.[31] For the most part, there has been an ascendancy of this materialist perspective, where land has little value beyond its potential to contribute to the market economy. In these circumstances the worth of land is narrowly measured by its dollar value and its potential for conversion to a monetary standard. This approach has fostered the draw-down and liquidation of "nature's capital", stored in the trees, minerals, animals and fish, and transformed these resources into the houses, cars, factories and cities in which most people now live.[32] This change has estranged many residents of North America from the land and its non-human relationships. The continued extraction of economic benefit from the land often excludes other uses and relationships

to ensure that profit is maximized through allocation to its "highest" material use. This is because the recognition of other less lucrative interests in land could undermine its economic worth and threaten the financial position of those who have invested in this particular valuation. Since the accumulation of profits from land and resource use looms so large in contemporary society, a large land amount of land is required to preserve and continue this way of life.[33]

Since both Aboriginal and settler communities require a significant land base to pursue their objectives, can their current discrepant objectives in regard to land be reconciled? Some would clearly say this is not possible. Power (economic and political) Ideological , Institutions

If so, how can such diverse viewpoints be accommodated? This work explores the potential for reconciliation by examining each group's objectives in relation to land use, and seeks to reveal where mutual understanding can be developed to resolve conflicting claims. However, this study also cautions that mutual understanding will only lead to a fairer sharing of the land if there is a simultaneous realignment of power in resolving the parties' disagreements. As such, this examination highlights Aboriginal and non-Aboriginal perceptions of land, and underlines the reasons First Nations should have more power to influence land allocation. The objective is to build a better groundwork for

mutual understanding in settling rights to land between the two groups.

In revealing differing perspectives in land allocation, this study explores the issues that First Nation and non-Native people must confront in order to resolve and successfully allocate land between each other. Historical and contemporary attempts to settle land right in and around Manitoulin Island[34] will be investigated to identify and assess alternative patterns of land and water allocation between Aboriginal and non-Aboriginal society. Manitoulin Island is situated close to the north shore of Lake Huron in Ontario, Canada. Geologically, it part of the shield-fringe area of the Canadian north and is an extension of the Niagara escarpment. The island is 85 miles long and varies in width from 35 miles at the east to 10 miles at the west end. The First Nations of the Island often call it Odawa-miniss, meaning Isle of the Odawas. There are approximately 9,000 First Nations people currently living on Manitoulin Island, comprising half the total population.[35] An examination of the historical treaties entered into on Manitoulin between the Crown and First Nations will demonstrate the heterogeneous nature of interests in land, and the difficulties which flow from this complexity.

Furthermore, recent discussions about the use of land on Manitoulin Island provide a case study that reveals a intricate web of intersecting interests in the contemporary allocation of land. These events are illustrative of more general patterns in

relation to the land title settlement process and, as such, serve as a useful model for those concerned about the future allocation of land in North America.

A question that recurs throughout this inquiry is the extent to which the parties to the treaties have created an allocation that satisfies their immediate objectives without unduly compromising their primary long-term goals. This study suggests that a satisfactory realization of each parties' aspirations is limited and yet at the same time facilitated by the multiplicity of goals that each party holds. Since the resolution of land rights pivots on the intertwining of objectives both within and between parties, it is suggested that this alignment and divergence of positions creates risks to certain fundamental aspirations of both First Nations and settler society.

The essential implication of this analysis is that the principles currently employed in dispute resolution endanger those elements of traditional Native culture which encourage autonomy from modern non-Native society. This hazard exists because the intersection of Native and non-Native perspectives occurs at a point of convergence in the values of Native and non-Native society which gives merit to the benefits of "western" material culture. While this bisection of objectives can reveal understanding on these issues of mutual recognition, this alignment can also conceal and marginalize concerns of equal importance to First Nations. An alignment of ambition on one point

of shared understanding can obscure other goals of First Nations communities thereby inadvertently pushing the parties towards the assimilation of Aboriginal people. As noted, the concerns of First Nations that are often concealed and marginalized under the prevailing procedures in land allocation relate to the maintainance of their sovereignty and the preservation of their traditional culture.

This work is divided into three parts. Part I is concerned with the Indigenous people of Manitoulin Island and the principles they have traditionally used to regulate relationships to the land. Part II, which forms the bulk of this study, examines the various parties' objectives in signing treaties on Manitoulin, as revealed by specific negotiations and the historical events that influenced them. Part III explores recent negotiations to resolve disputes about the fulfilment and interpretation of the terms of the treaties on Manitoulin Island.

In Part I, chapter one examines the background of human history around Lake Huron and outlines Aboriginal views towards land in this area. Chapter two investigates the viewpoints that Native and non-Native people had in entering into treaties around Lake Huron and identifies the principles the parties agreed upon to pursue these agreements. In Part II, chapter three looks at the treaties that were entered into in 1836 between Sir Francis Bond Head and the Anishnabe people. Chapter four investigates the period of 1837-1860 to describe the circumstances that led to the

treaty of 1862. Chapter five covers the treaty of 1862 and details the parties' objectives in signing or opposing the agreement. Chapter six, which explores cultural persistence and survival from the end of the treaties to the present, deals with traditional justice, the survey and patenting of land on Manitoulin Island, and the continuation of cultural practices. This will lead the reader to a better appreciation of the influence that Native traditions have on contemporary First Nations and the effect this has on current land allocation methods. Finally, Part III deals with the recent land title settlement process on Manitoulin Island. Chapter seven addresses the conflicting aspirations of the various parties to the contemporary land claims process. It investigates contemporary First Nation and non-Native objectives in regard to the allocation of land, the tactics and strategies used by each interested party to secure their goals, the relationships of each party and how these relations lead to agreements, and the risks and benefits that rest on the parties involved in land title settlement. This will highlight the complex intersection of diverse ambitions of those involved in the land claims process. Chapter eight concludes by extracting the lessons this study holds for the future allocation of land between Aboriginal and non-Aboriginal people in North America.

[1] Public Archives of Canada, Record Group 10 (hereinafter referred to as PAC RG 10) Vol. 284, Speech of Wakegijig, January 19, 1863, upon the subject of the surrender of three quarters of Manitoulin Island through treaty.

[2] PAC RG 10, Vol. 284, Speech of Mashequongai to Wakegijig, January 19, 1863, upon the topic of why he chose to surrender land on Manitoulin Island.

[3] I will treat the words Aboriginal, Native and First Nations as synonymous and interchangeable as a general description of the original inhabitants of North America. When I am describing a specific Native person or group I will attempt to use their Nation's name: eg. Anishnabe, Haudenosaunee, etc. I will use the words Indian, Metis and Inuit to refer to the legal definition of such groups in Canadian law. An overview of the varied legal definitions for Aboriginal peoples is found in Jack Woodward, Native Law (Toronto: Carswell, 1989) at 1-12.

[4] This work will use the word "land" instead of "property" to describe relationships and responsibilities in regard to the use, occupation, enjoyment or ownership of the earth and its resources. The word "property" has specific legal meanings that contain many notions that are antithetical to First Nation's understanding of land use. One must be careful not to apply "inappropriate terminology from general property law" to Aboriginal interests in land: Guerin v. The Queen (1985) 13 D.L.R. (4th) 321 (S.C.C.) at 339. The debate over whether the categorization of Aboriginal land rights as property is appropriate has been pursued in common law judicial and academic commentary. Those interested in pursuing this debate, which is outside of the focus of this paper, should refer to the following commentaries for an introduction: David W. Elliot, "Aboriginal Title" in Bradford Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, 1st ed. (Ottawa: Carleton University Press, 1989) at 48-121; Peter A. Cumming & Neil H. Mickenburg, eds., Native Rights in Canada (Toronto: General Publishing, 1972); Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (New York: Oxford University Press, 1989); Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989); Brian Slattery, The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of the Territories ((Saskatoon: Native Law Centre, 1979); John Hurley, Children or Brethren: Aboriginal Rights in Colonial Iroquoia (Saskatoon: Native Law Centre, 1986).

[5] There have been highly contested internal discussions inside native communities about how land should be apportioned and used. For example, at the time the Trudeau Liberal government proposed that special Indian rights should be eliminated. See Sally M. Weaver, Making Canadian Indian Policy: The Hidden Agenda (Toronto: University of Toronto Press, 1981)]. Two very different voices came forward. One voice suggested that Trudeau was right: see

William Wuttunee, Ruffled Feathers (Calgary: Bell Books, 1971). The other voice argued Trudeau's proposal was wrong: see Harold Cardinal, The Unjust Society (Edmonton: Hurtig, 1969).

At a more general level, First Nations communities have alternated between following policies of cooperation and separation. There has not been widespread commentary on the internal differences First Nations people have concerning land. However, there is a small but growing literature on the internal complexity and objectives within First Nations politics: see generally Janet Silman, ed., Enough is Enough: Aboriginal Women Speak Out (Toronto: The Women's Press, 1988); Frank Cassidy & Norman Dale, After Native Claims: The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia (Lantzville: Oolichan Press, 1988); E.J. Dickson-Gilmore, "Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation" in Robert A. Silverman & Marianne O. Nielsen, eds., Aboriginal Peoples and Canadian Criminal Justice (Toronto: Butterworths, 1992) at 259; John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations (1993) 43 University of New Brunswick Law Journal.

[6] Broadly speaking, non-native communities have fluctuated between pursuing policies of assimilation and segregation in relation to First Nations access to land. See John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Ian Getty & Antoine Lussier, eds., As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies (Vancouver: University of British Ccolumbia Press, 1990) at 29.

For non-native examples of the different policies proposed to deal with issues of land allocation between Native and non-Native people, see Richard Daniel, A History of Native Claims Processes in Canada 1867-1979 (Department of Indian and Northern Affairs, February 1980); Lloyd Barber, "Indian Claims Mechanisms" (1973-1974) 38 Saskatchewan Law Review 11; Canada, Statement of Government of Canada on Indian Policy (Ottawa: Queen's Printer, 1969); Canada, In All Fairness: A Native Claims Policy (Ottawa: Queen's Printer, 1981); Canada, Report of the Task Force to Review Comprehensive Claims Policy, Living Treaties: Lasting Agreements (Ottawa: Queen's Printer, 1988); Canada, Comprehensive Claims Policy (Ottawa: Queen's Printer, 1987); Canadian Bar Association, Report of the Canadian Bar Association on Aboriginal Rights in Canada: An Agenda for Action (Ottawa: Queen's Printer, 1988); British Columbia Task Force, The Report of the British Columbia Task Force (Vancouver: Queen's Printer, June, 28, 1991); Canada, Building a New Relationship with First Nations in British Columbia: Canada's Response to the Report of the B.C. Claims Task

Force, (Department of Indian and Northern Affairs: Ottawa, 1991). The foregoing are examples of the variations in national policies; of course, there is even greater diversity amongst non-Native people who are not formally associated with the government.

[7] For an introduction to treaties between First Nations and non-native people, see generally George Brown & Ron Maguire, Indian Treaties in Historical Perspective (Ottawa: Department of Indian and Northern Affairs, 1979) and Daniel G. Kuhlen, A Laypersons Guide to Treaty Rights in Canada (Saskatoon: University of Saskatchewan, 1985). For the text of many of these treaties, see Canada: Indian Treaties and Surrenders, from 1680-1890 (Ottawa: Printer to the Queen's Most Excellent Majesty, 1891-1912; reprinted Toronto: Coles, 1971).

[8] An example of the most significant executive proclamation is The Royal Proclamation of October 7, 1763, R.S.C. 1985, App. II, No. 1. The Royal Proclamation allocates property between First Nations and settlers on a territorial basis.

[9] People of mixed Aboriginal and non-Native ancestry on the Canadian prairies were known as the Metis. The Crown severally limited its recognition of Metis Land rights. Land allocation proceeded through the issuance of alienable certificates called scrip which were to be redeemable for public lands. Since scrip was alienable, it was often traded for money which left the Metis without a land base. For a description of the history of Metis land rights, see generally Don Purich, The Metis (Toronto: James Lorimer, 1988); Paul Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 Osgoode Hall Law Journal 457; Thomas Flanagan, "The History of Metis Aboriginal Rights: Politics, People and Policy" (1990) Canadian Journal of Law and Society 71.

[10] A familiar example of unilateral legislation is the Indian Act R.S.C. 1985, c. I-5, where an entire regime of land allocation in regard to Indians on reserves is promulgated. The federal Indian Act interacts with provincial legislation, policy and regulation in the allocation of land. For example, lands in Quebec were set aside as Indian reserves through orders-in-council pursuant to statutes of the Colony of Canada (see A.G. Canada v. Giroux (1916), 30 D.L.R. 123 (S.C.C.) at 135) but are administered according to the provisions of the Indian Act.

[11] For example, in British Columbia First Nations land rights were allocated by a Reserve Commission without strong Aboriginal or federal government participation. This occurred between 1873 and 1910: see Robert Cail, Land, Man, and the Law: The Disposal of

Crown Lands in British Columbia 1871-1913 (Vancouver, University of British Columbia Press, 1974). These reserves were adjusted and confirmed in 1913 through two Royal Commissions, the McKenna-McBride and Ditchburn-Clark Commissions. For a history of these commissions, see Dunstan v. Hell's Gate Ent. Ltd. (1986), 22 D.L.R. (4th) 568 (B.C.S.C.). The most recent example of this process is found in the five volume Report of the Royal Commission on Aboriginal Peoples (Ottawa: Supply and Services, 1996).

[12] The allocation of land rights through segregation is illustrated by a communication from Lieutenant-Governor Sir Francis Bond Head where he recommended that all Indians in Upper Canada be sent to Manitoulin Island. He stated: "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." PAC RG 10, vol. 391, Bond Head to Lord Glenleg, August 20, 1836.

[13] The allocation of land through assimilation is evidenced by Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs in the 1920's, when he stated "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 into the body politic, and there is no Indian question, and there is no Indian department." In Georges Erasmus, "Introduction" in Boyce Richardson, ed., Drum Beat: Anger and Renewal in Indian Country (Toronto: Summerhill Press, 1989) at 11.

[14] Contemporary land claims settlements have occurred in Canada's North: see James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32.; Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18.; Western Arctic (Inuvialuit) Claims Settlement Act, S.C. 1984, c. 24, as am. S.C. 1988, c. 16, s.1.; Gwich'in Land Claim Settlement Act, S.C. 1992, c.53.; Nunavut Land Claims Agreement, S.C. 1993, c.29. For commentary on these various agreements, see generally Wendy Moss, "The Implementation of the James Bay and Northern Quebec Agreement" in Brad Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1989) at 684; Andrew Thompson, "Land Claim Settlements in Northern Canada: Third Party Rights and Obligations" (1991) 55 Saskatchewan Law Review 127; John Merritt & Terry Fenge, "The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration" (1990) 15 Queen's Law Journal 255. For a history and critique of the land claims process in a specific instance, see J.R. Miller, "Great White Father Knows Best: Oka and the Land Claims Process" (1991) 7

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[15] While First Nations would prefer consent in the allocation of land between themselves and non-Native people, there are many examples of Indian land being expropriated: see Bruce A. Clark, Indian Title in Canada (Toronto: Carswell, 1987) at 73-74. For example, section 35 of the Indian Act, supra note 10, currently permits land allocation through expropriation. For judicial commentary on this section, see Kruger v. R. (1986), 17 D.L.R. (4th) 591 (F.C.A.) leave to appeal refused, 62 N.R. 102n (S.C.C.); R. v. Stevenson [1986] 5 W.W.R. 737 (Man.Q.B.), leave to appeal refused [1987] 1 W.W.R. 767 (Man. C.A.).

[16] The allocation of rights to land between Native people and settlers through war is evidenced by Desmond Morton, The Last War Drum (Toronto: Hackett, 1972) which provides an account of the North-West Rebellion of 1885 and includes the interpretation that this rebellion was partly about Aboriginal loss of property. For other descriptions of military encounters where allocation of land was a significant issue, see generally Robert S. Allen, His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815 (Toronto: Dundurn Press, 1992); Francis Jennings, The Invasion of America: Indians, Colonialism and the Cant of Conquest (Toronto: W.W.Norton, 1975); Alanis Obomsawin (Director) Kanehsatake: 270 Years of Resistance (Montreal: National Film Board, 1993) (documentary film). It is important to note here that it is generally agreed that Indians were not conquered in these wars: see Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 733.

[17] For an overview of first person accounts by Aboriginal peoples concerning their checkered history with non-Native people through different periods and the questions they have about the justice of their treatment, see Peter Nabokov, ed., Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492-1992 (Toronto: Penguin Books, 1992).

[18] Now, in Canada, Aboriginal peoples have a land base that is 1% of Canada's total land mass. There are approximately 2240 seperate parcels of reserve land that make up a little less than 3 million hectares of land: see James Frideres, Native Peoples in Canada: Contemporary Conflicts (Scarborough: Prentice Hall, 993) at 153.

[19] When non-Native people first came to this continent they relied upon Native people to guide them on the rivers and lakes and over the land. An interesting account of the "explorers" reliance on First Nations to guide them through the country is

found in Michael Bliss, "Guided Tour" (February/March 1990) The Beaver 16.

[20] While it is trite to observe that communities are not homogeneous in their conceptions of how to allocate land, there is sometimes a tendency to caricature First Nations' views about land when they are placed in a cross-cultural context. People focus on differences between the parties, rather than at the same time turning their attention to the differences present within groups and to the similarity across groups at certain points. For example, much has been made of the individual versus collective orientation to land of non-native and native people. Such a categorization may hide as much as it reveals.

[21] See John Borrows, "With or Without You: First Nations Law (in Canada)" 41(1996) McGill Law Journal 629; John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 University of Toronto Law Journal (forthcoming).

[22] The name given to North America by many of the continents original inhabitants. See infra Chapter 1 notes 20-24 and accompanying text for a more detailed description of why North America is called Turtle Island.

[23] F. Abele & D. Stasiulis, "Canada as a White Settler Colony: What About Natives and Immigrants" in W. Clement & G. Williams, eds., The New Canadian Political Economy (Kingston: McGill-Queen's Press, 1989).

[24] See Louis Hartz, The Founding of New Societies (London: Longman's, 1964) who described non-Native North American society in terms of "colonial fragments".

[25] In a well known example, Columbus mistook the Islands in the Gulf of Mexico for India: see Bernard Quaritch, The Spanish Letter of Columbus to Luis de Sant' Angel, 1493 (London: B. Quaritch, 1893) in William Graebner & Leonard Richards, eds., The American Record: Images of the Nations Past, Vol. 1 (New York: Alfred Knopf, 1982) at 10-16.

[26] Ambitions in coming to North America have been well described by Roberta Hamilton, Feudal Society and Colonization: The Historiography of New France (Gananoque: Langdale Press, 1988); see also W.J. Eccles, France in America (Toronto: Fitzhenry & Whiteside, 1972) at 29-59. British objectives in colonization are found in W.S. Shepperson, British Emigration to North America: Projects and Opinions in the Early Victorian Period (Minnesota:

University of Minnesota Press, 1957).

[27] See Wallace Notestien, The English People on the Eve of Colonization, 1603-1630 (1954) for a description of the pressures on English society that led to migration. See N. MacDonald, Immigration, Settlement and Canada: Immigration and Colonization 1841-1903 (Toronto: MacMillan, 1966) for a description of some of the specific reasons of why people came to Canada.

[28] Many people have come to North America to escape war or human rights violations in their homelands, or as political refugees. See H.J.M. Johnston's, British Emigration Policy, 1815-1830 (Oxford: Clarendon University Press, 1972) for a description of early efforts to remove immigrants to North America.

[29] See Vincent Bakpetin Thompson, The Making of the African Diaspora in the Americas, 1441 - 1900 (White Plains, NY: Longman, 1987); J.E. Inikori, Forced Migration: The Impact of the Export Slave Trade on African Societies (London: Hutchinson, 1982); Paul Finkleman, Slavery in the Courtroom: An Annotated Bibliography of American Cases (Washington: Library of Congress, 1985).

[30] For a review and critique of non-Native traditions of land and non-economic sustenance, see Arthur Bester, Backwoods Utopias: The Sectarian and Owenite Phases of Communitarian Socialism in America, 1663-1829 (Philadelphia: University of Pennsylvania Press, 1950); Sidney Ahlstrom, A Religious History of the American People (New Haven: Yale University Press, 1972); Leo Marx, The Machine and the Garden (New York: Oxford University Press, 1964); Richard Labeaux, Young Man Thoreau (Amherst: University of Massachusetts Press, 1977).

[31] There is strong law and economics literature that views land as a commodity: see Richard Posner, Economic Analysis of Law, 3d ed. (Boston: Little Brown, 1986) at 1-27; Werner Z. Hirsch, Law and Economics: An Introductory Analysis (Toronto: Academic Press, 1979) at 19. There is a growing literature applying law and economics to issues of land allocation between First Nations and non-Native people. For a critique of this literature, see Robin P. Malloy, "Letters from the Longhouse: Law, Economics and Native American Values" (1992) Wisconsin Law Review 1569. Leading articles within this literature include Douglas W. Allen, "Homesteading and Property Rights: or How the West was Really Won" (1991) 34 Journal of Law and Economics 1; Fred S. McChesney, "Government as Definer of Property Rights: Indian Lands, Ethnic Externalities and Bureaucratic Budgets" (1990) 19 Journal of Legal Studies 297; Terry L. Anderson & Peter J. Hill, "The Race for Property Rights" (1990) 33 Journal of Law and Economics 177.

[32] William Cronon, Nature's Metropolis

[33] William Rees, The Ecological Footprint

[34] For more demographic information on contemporary Manitoulin Island First Nations, see Akwesasne to Wunnumin Lake: Profiles of Aboriginal Communities in Ontario (Toronto: Ontario Native Affairs Secretariat, 1992) at 208-209, 210-211, 220-221, 248-249 & 258-259.

[35] For a broad historical introduction to the relationships between Native and non-Native peoples in the geographical area of this study, see Tony Hall, Land, Law and the Lord in the Indian Affairs of Upper Canada, 1791-1858 (Ph.D. Thesis, University of Toronto, 1983) [unpublished]; James Ralph Hardy, The Ojibway: 1640-1840 - Two Centuries of Change from Sault Ste. Marie to Coldwater Narrows (M.A. Thesis, University of Waterloo, 1978) [unpublished]; Franz M. Konnecke, The History of Parry Island and the Anishnabe Community in Georgian Bay 1850-1920 (M.A. Thesis, University of Waterloo, 1984) [unpublished]; Peter S. Schmalz, The Ojibwa of Southern Ontario (Toronto: University of Toronto Press, 1990); Donald B. Smith, The Mississauga, Peter Jones and the White Man: The Algonkians Adjustment to Europeans on the North Shore of Lake Ontario to 1860 (Ph.D. Thesis, University of Toronto, 1975) [unpublished]; Robert J. Surtees, Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System (Ph.D. Thesis, Carleton University, 1982) [unpublished]; Leo Waisberg, The Ottawa: Traders of the Upper Great Lakes, 1715-1800 (M.A. Thesis, McMaster University, 1977) [unpublished].

PART I

CHAPTER ONE

THE HISTORICAL BACKGROUND: ABORIGINAL RESOURCE USE OF MANITOULIN ISLAND AND ITS CONTIGUOUS LANDS AND WATERS

In order to understand the Aboriginal people of Manitoulin Island and their views towards land it is first necessary to understand these people in the context of their entire pre-contact world.[1] It is only in very recent history that Manitoulin Island has become the focal place for its Indigenous inhabitants to relate to their world. Before colonial encroachment First Nation cultures of the Upper Great Lakes used various parts of the land and waters in different ways at distinctive times in their communal life-cycle. As a result, one can not comprehend traditional First Nation use of Manitoulin Island by focusing on this place alone. One must also appreciate their use of the lands and waters surrounding Manitoulin in order to fully discern the influences that dictated their perspective towards the territory they inhabited. This understanding includes not only their historic use of resources but also embraces their organization and rules relative to resource use. Understanding First Nation traditional teachings about land in a broader geographical setting is necessary because many of the factors that affect First Nations' perspectives in this matter find their origin in practices developed or learned in places contiguous

[1] For a discussion of the various approaches to understanding Aboriginal people and a critique of employing "western" bias in these undertakings, see Bruce G. Trigger, Natives and Newcomers: Canada's Heroic Age Reconsidered (Kingston-Montreal: McGill-Queen's Press, 1985).

to Manitoulin. We will see that the philosophies their ancient use generated have influenced their perspectives towards resources down to the present day. We will now turn to this examination.

The land and waters of Lake Huron surrounding Manitoulin Island have been used and occupied by Indigenous populations since at least 7,000 B.C.[2], and were settled by the ancestors of the historic Algonkian and Iroquois peoples.[3] The specific sub-groups of Algonkians that resided around Lake Huron were the Odawa[4], Potawatomi[5], and Ojibway[6].

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[2] George Quimby, Indian Life in the Upper Great Lakes Region: 11,000 B.C. to A.D. 1800 (Chicago: University of Chicago Press, 1960) at 2 & 38; see also Thomas E. Lee "The Antiquity of the Sheguiandah Site" (1957) 71 Canadian Field-Naturalist 117 at 123-126. Lee speculates that the remains of an ancient quarry, workplace and human habitation may indicate that "30,000 years may be a conservative estimate for the older components [of occupation] of the Sheguiandah site" on Manitoulin Island.

[3] After the Sheguiandah settlement ended in approximately 1,500 B.C., the next evidence of human habitation is from 800 to 1,600 A.D. These people were known as the Peninsular Woodland Culture (Quimby, supra note 2), or the Terminal Woodland Culture: J.V. Wright, Ontario Prehistory (Toronto: National Museum of Man, 1972) at 91-92.

[4] The Odawa are also known as Otaouan or Ottawa. I refer to these people as the Odawa because that is what they prefer to be called. Historically, the Odawa had four known subdivisions, the Sinago, Kiskakon, Sable and Nassauakueton (Christian A. Feest, "Ottawa" in Bruce G. Trigger, ed., Handbook of North American Indians, vol. 15 (Washington: Smithsonian Institute, 1978) at 772. See also Vernon Kinetz, The Indians of the Western Great Lakes (Ann Arbor: University of Michigan Press, 1940) at 246.

[5] For a history of the Potawatomi, see R. David Edmunds, The Potawatomis, Keepers of the Fire (Norman: University of Oklahoma Press, 1978).

[6] Ojibway is the common title applied to these people in Canada, and Chippewa is the name most frequently employed in the United States. Throughout their history, the Ojibway have gone by different European descriptions in various regions of the Great Lakes. Contemporary western terminology still applies some divisions to the Ojibway. On the north shores of Lakes Ontario and Erie the Ojibway are called Mississaugas, on the south shore of Lake Huron they are sometimes named Saugeens, while at the confluence of Lakes Huron and Superior around Sault Ste. Marie they are often known as the Saulteaux.

Ojibway are further classified by their geographical location

These people often refer to themselves collectively as the Anishnabe, meaning "the people" or "the first humans". Historically, the Anishnabe lived in communities[7] as clans affiliated with each other in a loose confederacy that in modern times has been named the Council of the Three Fires[8]. The Odawa occupied Manitoulin Island and Michilimackinac at the north-west corner of the lake[9]; the Potawatomi lived to the far south where Lake St. Clair drains into Lake Erie[10]; and the Ojibway resided on lands surrounding the rest of the lake from Saginaw Bay on the western shores, to Georgian Bay on the east, to the immediate north of Manitoulin Island towards the northern straits where Lake Huron meets Lake Superior. Many of the people of these three Nations are still found living in mixed "Three Fires" communities in their ancient homelands[11] and, in particular, representatives of all three

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as Southeast Chippewas of Michigan's lower peninsula and adjacent Ontario, the Chippewas of Lake Superior, the southwest Chippewas of interior Minnesota, the Northern Chippewa of the Laurentian uplands above the Great Lakes, and the Plains Chippewa or Bungees: see Edmund Jefferson Danziger, Jr., The Chippewa of Lake Superior (Norman: University of Oklahoma Press, 1978) at x & 8.

[7] See Helen Hornbeck Tanner, Atlas of Great Lakes Indian History (Norman: University of Oklahoma Press, 1982) at 58-59.

[8] See Diamond Jenness, The Indians of Canada (Ottawa: Queen's Printer, 1967) at 277.

[9] Odawa groups also sometimes merged themselves with Ojibway communities in other places around Lake Huron: for example, see Franz M. Koennecke, Waskosing the History of Parry Island an Anishnabe Community in the Georgian Bay 1850-1920, (M.A. Thesis, University of Waterloo, 1984) [unpublished] at 174-176.

[10] The Potawotomi later lived in other places around Lakes Erie and Huron and took refuge amongst many of the Ojibway bands in what is now southern Ontario, see James A. Clifton, A Place of Refuge for All Time: Migration of the American Potawotomi into Upper Canada, 1830-1850 (Ottawa: National Museum of Man, 1975).

[11] People of the Three Fires are also found in places other than at Lake Huron. Odawa people live in Kansas and Oklahoma because of the Removal Policies of the U.S. government in earlier periods. Potawatomi people also live in Oklahoma for the same reason, though

groups are found living on Manitoulin Island today.

The sub-group of Iroquoian people who lived around Lake Huron were the Wendat Confederacy[12]. The Wendat were a group of four tribes that were known as the Attignawantan[13], the Arendarhonon[14], the Attigneenongnahac[15] and the Tahontaenrat[16]. These four groups originally lived in eighteen to twenty-five villages on the eastern shores of Georgian Bay off Lake Huron,[17] numbering some 18,000 to 40,000 inhabitants. The Wendat people no longer have an exclusively Wendat community in the Lake Huron region because in 1648 they were dispersed through war with the Haudenosaunee or Five Nations Iroquois Confederacy.[18] After the Wendat were dispersed, some of them lived on Manitoulin Island as an identifiable group for a time. However, as time passed individual Wendat people and families left their confederacy and settled among the Anishnabe[19], with the result that some inhabitants of Manitoulin Island possess Wendat ancestry.

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there are still some communities in their Michigan and Wisconsin traditional territories. Contemporary Ojibway communities can also be found surrounding Lakes Superior and Michigan, and on the north shores of Lakes Erie and Ontario.

[12] These people are commonly called the Huron people. For a description of these people and their history, see Bruce G. Trigger, The Children of Aataentsic: A History of the Huron People to 1600 (Kingston: McGill-Queen's Press, 1976).

[13] The People of the Bear, ibid. at 30.

[14] Nation of the Rock, ibid.

[15] Conjectured to mean "Cord", "Barking Dogs" or "Deer", ibid.

[16] Conjectured to mean "White Thorns", "White Canoe" or "One White Lodge", ibid.

[17] Another Iroquoian group, the Tionnontate, also lived on the southern shores of Georgian Bay, but they were a small group and did not figure prominently in the treaty history of the region. For a brief description of the Tionnontate, ibid. at 91-94 & 820-825.

[18] Contemporary Wendat communities can be found in Oklahoma and Quebec.

[19] See Trigger, supra note 12 at 820-825.

The Anishnabe and Wendat peoples have lived around Lake Huron and on Manitoulin Island since time immemorial. They have a strong and ancient attachment to this area partly because some of their traditions indicate that the north-western shore of Lake Huron, to the immediate west of Manitoulin Island, was where they originated.[20] Michee-Makinakong, now called Michilimackinac, was understood to be the centre of the world and the place where the earth was created.[21] This was where sky-woman[22] recreated the earth through a giant turtle rising to the surface of the waters and breathing life into the soil that was brought up from the depths of the ocean by a muskrat. The earth grew as plants put in the soil by sky-woman created other life. As the plants died, soil formed around the edges of the turtle and covered the turtle's back until the place where its back was is called Miche-Makinakong or Michilimackinac.[23] Such a tradition makes it easy to see why both the Anishnabe and Iroquois peoples referred to America as "the Great Island"[24] or Turtle Island. Through these understandings of their genesis both groups claim the Great Lakes as their home from

[20] However, some people state that the Anishnabe came from east of the Great Lakes in the period before contact: see Andrew J. Blackbird, History of the Ottawa and Chippewa Indians of Michigan (Ypsilanti, Michigan: Ypsilanti Job Printing House, 1887) at 79.

[21] Basil Johnston, Ojibway Heritage (Toronto: McClelland & Stewart, 1976) at 14.

[22] Skywoman was known as Nokomis (grandmother) by the Anishnabe, and as Aataentsic by the Wendat: see Johnston, ibid. at 17 and Trigger, supra note 12 at 77.

[23] Miche-makinock means great turtle, though others felt this was a mistranslation and that Michilimackinac received its name as a memorial to an extinct group of people called the Mi-shi-ne-macki-naw-go who used to occupy the island: see Blackbird, supra note 20 at 19.

[24] Rev. Frederick Baraga, Chippewa Indians: As Recorded by Rev. Frederick Baraga in 1847 (New York: Studicia Slovenica, 1976) at 8.

time immemorial.

The early inhabitants of Lake Huron's shores used the resources of the land and the surrounding waters to provide for their sustenance.[25] Lake Huron provided First Nation peoples with an abundant yield of fish[26], water fowl[27], and water life[28], while the adjacent lands contained a generous variety of plants[29] and animals[30] for their diet. Each group used these resources in an unique and distinctive way which resulted in an allocation of land which avoided excessive conflict. A brief examination of each Nation will demonstrate how they distributed and regulated resources internally and in conjunction with their neighbours.

ANISHNABE RESOURCE USE

The general pattern of life for the Anishnabe was characterized by a seasonal progression through various resource uses at different periods of the year. In the winter the Anishnabe would gather in small immediate lineal groups; in the spring they would assemble into larger

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[25] See Tanner, supra note 7 on Map 4 at 20-21.

[26] Charles E. Cleland, "The Inland Shore Fishery of the North Great Lakes: Its Development and Importance in Prehistory" (1982) 47:4 American Antiquity at 761.

[27] The use of fowl for sustenance is evidenced by the many ancient stories and traditions which deal with catching ducks, geese, and other water fowl: see Alethea K. Helbig, ed., Nanabozhoo: Giver of Life (Brighton, MI: Green Oak Press, 1987) at 111-114, 115-118, 121-122, 128-129, 130-132, 133-135, 140-141 & 144-145.

[28] For example, otters were relied upon for sustenance: see Reuben Thwaites, ed., Louis Armand Baron De Lahontan, New Voyages to North America, vol. 1 (Chicago: A.C. McLurg, 1925) at 113.

[29] Richard A. Yarnell, Aboriginal Relationships Between Culture and Plant Life in the Upper Great Lakes Region (Ann Arbour: University of Michigan, 1964).

[30] Charles E. Cleland, The Prehistoric Animal Ecology and Ethnozoology of the Upper Great Lakes Region (Ann Arbour: University of Michigan Museum of Anthropology, 1966).

extended family groups; then in the summer months they would converge into larger communities before breaking up and returning to their smaller familial groups again in the late fall.[31] While the Odawa, Potawatomi and Ojibway all practised this cyclical mode of life, each group had a different emphasis in their resource use throughout their cycle.

The Odawa of Manitoulin and the Potawatomi of lower Lake Huron were partially an agricultural people who grew corn, beans and squash which often provided up to one-half of their nutritional requirements.[32] Each community cultivated their crops in a main village which was inhabited throughout most of the year by the women, children and older men.[33] The agricultural endeavours of the Odawa and Potawatomi were supplemented by fishing, hunting and gathering.[34] Parties would wander 100 miles or more from their villages to hunt and fish and gather fruits during the summer.[35] In the winter, groups of eight to ten men would go on extended hunting expeditions to provide meat for their

[31] For a well written and interesting description of this pattern, see Donald Smith, Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians (Toronto: University of Toronto Press, 1987) at 1-17.

[32] Quimby, supra, note 2 at 88; J.R. Wrightman, Forever on the Fringe: Six Studies in the Development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 94-95; Louise Phelps, ed., Pierre F.X. Charlevoix, Journal of a Voyage to North America, 2 vols. (Chicago: The Caxton Club, 1923) at 107-108.

[33] Trigger, supra note 12 at 134.

[34] On Odawa hunting, see Claude C. Le Roy Bacqueville De La Potherie, "History of the Savage Peoples Who Are Allies of New France" in Emma H. Blair, ed., The Indian Tribes of the Upper Mississippi Valley and the Region of the Great Lakes (Cleveland: Arthur H. Clark, 1911) at 281-283. On Potawatomi hunting, see Jacques C. Sabrevois De Bleury, "Memoir on the Savages of Canada as Far as the Mississippi River" (1902) 16 Wisconsin Historical Collection at 363-376.

[35] Trigger, supra note 12 at 134.

community.[36] Each Odawa group had several chiefs with their own jurisdiction to co-ordinate these activities and manage the affairs and resources of their people.[37]

The other Nation of the Three Fires, the Ojibway, were mostly a hunting and gathering group, and cultivated crops only on a very limited scale. At times they too, with the Odawa, would use and occupy Manitoulin Island.[38] The Ojibway gathered and harvested small crops consisting mainly of corn[39], berries[40], maple sugar[41] and rice[42]. The Ojibway hunted for a variety of animals including lynx, marten, fisher, rabbit, bear, deer, beaver, and moose.[43] The Ojibway regulated their hunting by leaving young animals to replenish the stock in the areas

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[36] Ibid.

[37] H.P Biggar, ed., The Works of Samuel De Champlain, vol 3 (Toronto: University of Toronto Press, 1936) at 96-97.

[38] Peter Schmalz, The Ojibwa of Southern Ontario (Toronto: University of Toronto Press, 1991) at 4, 16, 21 & 25.

[39] "The Mississague live on a river bearing their name, which comes into the Lake on the north side...The members of this tribe all come together in the spring on the bank of this river to plant corn, which ripens later", see Antoine Denis Raudot, "Memoir Concerning the Different Indian Nations of North America", Letter 45, Kinetz, supra note 4 at 371.

[40] Ibid. at 322.

[41] William Warren, History of the Ojibway Nation (St Paul: Minnesota Historical Society, 1885; reprinted Minneapolis: Ross & Haines, 1970) at 263-264.

[42] Rice was much more important to the Ojibway of Lake Superior: see Stuart Berde, "Wild Ricing: The Transformation of an Aboriginal Subsistence Use", in J. Anthony Parades, ed., Anishnabe: 6 Studies of Modern Chippewa (Tallahassee: University Presses of Florida, 1980) at 101 and D. Wayne Moodie, "Manomin: Historical-Geographical Perspectives on the Ojibwa Production of Wild Rice" in Kerry Abel & Jean Friesen, eds., Aboriginal Resource Use in Canada: Historical and Legal Aspects (Winnipeg: University of Manitoba Press, 1991) at 71-79.

[43] George Copway (Kahgegagahbowh), The Traditional History and Characteristic Sketches of the Ojibway Nation (London: Charles Gilpin, 1850) at 25-41.

they hunted.[44] The Ojibway also fished for sturgeon[45], whitefish[46], and trout by means of spears[47], nets[48], angling[49] and fish weirs[50]. Both hunting and fishing were regulated through traditional fishing sites that were respected by other Anishnabe and were not used without the assent of the family holding the interest in the site[51]. The Ojibway

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[44] Kinetz, supra note 4 at 237.

[45] Tim E. Holzkamm, Victor P. Lytyn & Leo G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy" in Abel & Friesen, eds., supra note 42 at 119.

[46] In describing the whitefish fishery at Sault Ste. Marie, an early Jesuit writer observed:

> It is at the foot of these rapids, and even amidst these boiling waters that extensive fishing is carried on, from spring until winter, of a kind of fish usually found only in Lake Superior and Lake Huron. It is called in the native language Atticameg, and in ours "whitefish", because in truth it is very white; and it is most excellent, so that it furnishes food, almost by itself, to the greater part of all these peoples.

Dablon in The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610-1791, vol. 54, 1669-1770 (Cleveland: Burrow Brothers, 1869-1901) at 129-131.

[47] "Their spears and poles...manage to strike a fish fifteen feet below the water": Johann Khol, Kitchigami (London: Chapman & Hall, 1860; reprinted St.Paul: Minnesota Historical Society, 1985) at 311.

[48] Dablon, supra note 46.

[49] Holzkamm, Lytyn & Waisberg, supra note 45 at 123.

[50] Trent University, Press Release, "Orillia Weir 4500 Years Old Trent Research Team Finds" (12 June 1974). "The weir in Orillia is one of the oldest structures, if not the oldest, of its type ever documented in North America, he [Professor Johnson] explained. One site that is believed to be approximately the same age is the Boylston Street weir in the Boston area."

[51] "The beaver dams - so persons conversant with the subject assured me - all have owners among the Indians, and are handed down from father to son. The sugar camps, or surcreries, as the Canadians call them, have all an owner, and no Indian family would think of making sugar at a place where it had no right. Even the cranberry patches, or places in the swamp and bush where the berry is plucked, are family property; and the same with many other things. If this be so, and has been so, as seems very probable, since time immemorial, we can easily imagine how the irruption [sic] of the white men into their country must have been a tremendous insult and infringement of law in the eyes of the Indians." Johann Khol, Kitchigami (London: Chapman & Hall, 1860) at 421.

also augmented their produce through trade[52], though they were not as heavily reliant upon it as were the Odawa.

The Ojibway managed their resources through kinship allocations[53], agreed upon through discussion and consensus[54]. The Odawa, Potawatomi and Ojibway had well developed totemic or clan systems to allocate resources among themselves. Each family was classified by a totem, and the totem was designated by taking a symbol from nature. The totem descended in the male line[55] and marriage was usually not permitted in the same totem.[56] This system was the foundation of Anishnabe social relationships and facilitated the allocation of resources within and between the groups.[57] The totem fulfilled this function by creating reciprocal social obligations among fellow clan

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[52] Charles Bishop, The Northern Ojibwa and the Fur Trade: An Historical and Ecological Study (Toronto: Holt, Rinehart & Winston, 1974). For a critique and reply to Bishop's thesis, see Eleanor M. Blain, "Dependency: Charles Bishop and the Northern Ojibwa" in Abel & Friesen, supra note 42 at 93-105.

[53] "Each family of this tribe has a certain hunting region, to which the members of the family have a particular or exclusive right": Baraga, supra note 24 at 25.

[54] "A Band Civil Chief had no coercive force. Control over affairs depended entirely upon personal prestige and the demands of the moment....Civil Chiefs, usually men who inherited their position, also presided at band councils and represented their people at common and grand councils. All men and women past the age of puberty were included in open discussions of the band council...": Danziger, supra note 6 at 23.

[55] Though sometimes totems were chosen rather than inherited if the circumstances were expedient for it: see Richard White, The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815 (Cambridge: Cambridge University Press, 1991) at 16-20.

[56] Warren, supra note 41 at 42.

[57] See C. Callender, Social Organization of the Central Algonkian Indians (Milwaukee: Milwaukee Public Museum, Pub. No. 7, 1962) in Leo Waisberg, The Ottawa: Traders of the Upper Great Lakes, 1715-1800 (M.A. Thesis, McMaster University, 1977) [unpublished] at 128-131. For a more general description of the clan or totem system of organization, see Johnston, supra note 21 at 59-80 and Warren, supra note 41 at 41-53.

members, thereby establishing a horizontal relationship with different communities and creating allegiances that extended beyond the confines of the village home community. For example, wherever persons of one clan travelled throughout the "Three Fires" territory, they could anticipate that they would have a social and material alliance with members of their clan situated in some cases as far as 1000 miles away.

Within these clan jurisdictions the Anishnabe and their neighbours had formulated ways to allocate resources in hunting grounds, fishing grounds, village sites, and harvesting/gathering sites. Hunting grounds were assigned to families and there were different regions assigned each year for conservation purposes.[58]

The allocation of land and natural resources use among the Anishnabe in pre-contact times[59] has been summarized by one author as follows:

> Among the Ottawas and Chippewas, the band - a group of extended families identified with a specific locale - was the centre of the allocation system...[The band] owned the common goods on which their members subsisted...they owned the right to harvest wild animals, fruits of the land and fish. The band apportioned this

[58] Biggar, supra note 37 at 210 and 319.

[59] One has to be careful about assuming that observations about Aboriginal resource use by post-contact writers are valid for pre-contact Aboriginal society. There is a debate in the anthropological literature that states that the allocations I am about to describe in the next few pages developed as a result of the fur trade, and were not practiced before contact: see T.G. Brasser, "Group Identification Along a Moving Frontier", Verhandlugen des XXXVIII Internationalen Amerikanistenkongresses (Munich: BndII, 1971) at 261. While there is no doubt that contact had a significant impact on Aboriginal customs, the effect of this event usually was to intensify pre-existing uses, before changing them over a longer period of time: see Trigger, supra note 12 at 214-228. As an Anishnabe person, I have been taught that the types of resource allocations I will describe existed long before contact.

> general right among its members by assigning to families and groups of families "territory" in which they harvested common goods. The right to take the scarcest and most crucial goods - animals for winter hunting - was assigned to small groups as an exclusive right to harvest game within a specified territory. Rights to more abundant goods, maple sugar and fish for example, were assigned to larger groups on a less exclusive basis...Family hunting territories grew out of scarcity as a way to increase efficiency and decrease competition for food.[60]

These allocation measures helped to reduce conflict and ensure there was a relatively equal supply of food for all members of the community. These practices were facilitated by conservation procedures which left hunting areas "fallow" from year to year. For example, some areas were only hunted every third year, while other areas were hunted every second year.[61] As mentioned earlier, other conservation practices involved preserving the supply of animals by leaving a certain number of animals in a region to repopulate the land.[62]

Another author has described First Nations' distribution of fishing rights in a way that harmonizes with the above communal methods of resource distribution, and corresponds to the traditional fishing practices used by the Odawa and Ojibway. While describing other groups which resembled the Anishnabe in social and cultural practices, this author has written:

in the case of extraordinarily plentiful fishing sites - especially major inland water falls during spawning runs - several major villages might gather at a single spot to share the wealth. All of them acknowledged a mutual right to use the site for that specific purpose, even though it might otherwise lie within a single village's territory. Property rights, in other words,

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[60] Robert Doherty, Disputed Waters: Native Americans and the Great Lakes Fishery (Lexington: University Press of Kentucky, 1990) at 15-16.

[61] Baron De Lahontan & Reuben Thwaites, eds., New Voyages to North America, vol 1 (Chicago: McClurg, 1905) at 210 & 319.

[62] Ibid. at 481-483.

shifted with ecological use.[63]

The framework of allocation that was based on specific ecological uses was also reflected in the distribution of property between village sites:

In order to use the sparse resources of the north woods efficiently, members of the Ottawa and Chippewa bands migrated seasonally to locations where they could find adequate resources. In time, these movements settled into well-established patterns, an annual round. The pattern varied from place to place, depending on the flora and fauna and the amount of farming practised by a band or a group, but its basic rhythms remained. From late spring through early fall, the Ottawas and the Chippewas lived in relatively large groups on the shores of the Great Lakes, where fish provided plenty to eat. ...In the fall these large gatherings separated into smaller kin-linked groups...migrating to family hunting grounds usually located about fifty miles inland along the banks of a river. ...The same families appeared to have used the same winter camps year after year and had developed a sense of ownership.[64]

The above examples of the shifting allocation of lands and resources in traditional Anishnabe society evidence the conjunctive operation of exclusive and collective resource utilization. As a result, while land was used solely by members of a clan or totem for some purposes, for other purposes this same land was to be shared with the entire community of many clan segments. The Anishnabe's ecologically specific system of land use can be summarized as follows:

What does the word ownership mean from the standpoint of Ottawa-Chippewa culture? Certainly it cannot be equated with the white system of individual possession in fee simple, including the right to lease and sell property. Among the Indians, ownership was vested in a group, which owned harvest rights through traditional use...Tradition held such systems together. Under ordinary

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[63] William Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England (Toronto: McGraw, Hill, Ryerson, 1983) at 63. See also J.H. Coyne, Galinee's Narrative 1670-71 vol IV (Toronto: Ontario Historical Society, 1903) at 73 for a description of this phenomenon occurring among the Ottawa and Ojibway at Sault Ste. Marie.

[64] Doherty, supra note 60 at 11-12.

> circumstances, the participants were largely unaware of the existence of such a system at all...The system came into play and people became aware of it only when something changed: resources became scarce or valuable in some new way; outsiders trespassed and harvested resources where they had no right to do so.[65]

The Odawa-Ojibway system of land use was therefore one that was ecologically specific to the scarcity of a particular resource and to the traditional use of the land by totemic families and villages. Hunting, fishing, and village selection was apportioned among the Anishnabe to allow sharing and exclusion to occur simultaneously.

The Anishnabe had devised comparable practices with the Wendat to allocate land and resources among themselves in trade[66] and trade resources[67]. The Anishnabe and Wendat people were able to develop an extensive commercial network. The Odawa were intermediaries in this trade, being located on excellent water communication routes in a region that was between the agricultural villages of the southern Wendat and western Potawatomi, and the hunting communities of northern Ojibway.[68] These patterns of exchange resulted in a symbiotic economic and political relationship between the Odawa, Potawatomi, Ojibway and Wendat people which led to a sharing and mingling of conceptions of resource use.[69] As a result, these Nations were able to allocate resources through shared conceptions of ownership.[70] The effect of

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[65] Ibid. at 14.
[66] Trigger, supra note 12 at 64.
[67] Ibid. at 65.
[68] Ibid. at 164-176.
[69] Waisberg, supra note 57 at 10, 20, 44 & 47.
[70] See Robert Doherty, supra note 60 at 9-22 for an excellent summary of shared concepts of property ownership between the Odawa and the Ojibway; see also Trigger, supra note 12 at 62-65, 91-104 & 170-174 for a similar discussion for property-like cultural concepts which

these shared aboriginal understandings in the allocation of land and resources was to maintain a well developed system for the distribution of rights to the use, occupation and enjoyment of land. While these shared perceptions did not always result in continual peace and tranquillity[71], they did allow for a greater degree of harmony and exchange than would have existed without these concepts.

WENDAT RESOURCE USE

Now that we have examined the resource use and allocation customs of the Anishnabe, and how they related to the Wendat through trade, we are in a position to analyze Wendat systems of resource allocation. As will be recalled, the Wendat confederacy were some 18,000 to 40,000 people on the eastern shores of Lake Huron at the Peninsula between Lake Simcoe and Georgian Bay. This location was very accessible to Manitoulin Island from the Penetanguishine Peninsula. The Wendat resided in agricultural villages throughout the entire year. They would generally move their villages every ten to twenty years as the soil productivity depleted in the surrounding fields. There were eighteen to twenty five such villages, each with a population of between 1,500 to 2,000 people.[72] Most villages were built on higher ground for defensive purposes and were close to a stream which aided in transportation and fishing.[73] The villages were connected to one another

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the Hurons shared with their neighbours.

[71] "The Ottawas had disputes with practically all the rest of the tribes around them, with the exception of the Chippewa and Menominee. Their quarrels with the Huron, however, never broke into open warfare." Kinetz, supra note 4 at 262.

[72] Trigger, supra note 12 at 32.

[73] Ibid.

by some two hundred miles of roads.[74]

The Wendat's material wealth resided in agriculture, fishing, and trade, with hunting only contributing a small supplement to their economy. The women primarily worked the fields and produced three-quarters of the food the Wendat ate.[75] Corn was the main staple of their diet, and it was prepared for consumption in over twenty different ways.[76] Other crops which supplemented their fare were beans[77], squash[78], peas[79], watermelons[80], pumpkins[81] and sunflowers[82]. Women also gathered uncultivated foods such as berries[83], nuts[84], fruit[85], onions[86] and maple syrup[87]. The women cultivated and gathered a surplus of this food to preserve for trade and winter use.[88]

The men contributed to the Wendat economy through hunting, fishing

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[74] Ibid.
[75] Ibid. at 34.
[76] Brebeuf, supra note 46, vol. 10 at 103.
[77] Gabriel Sagard, Sagard's Long Journey to the Country of the Hurons (Toronto: Champlain Society, 1939; reprinted New York: Greenwood Press, 1968) at 103-110.
[78] Conrad E. Heidenreich, Huronia: A History and Geography of Huron Indians, 1600-1650 (Toronto: McClelland & Stewart, 1971) at 173.
[79] Sagard, supra note 77 at 103-109.
[80] Kinetz, supra note 4 at 18, quoting Cadillac Papers, Michigan Pioneer and Historical Collections (Lansing, 1904-1905) vol. 33-34.
[81] Sagard, supra note 77 at 105.
[82] Kinetz, supra note 4 at 18.
[83] Berries such as blueberries, strawberries, raspberries, cranberries and cherries were gathered: ibid. citing Sagard, supra note 77 and Biggar, supra note 37.
[84] Nuts such as acorns, hazelnuts and walnuts were collected: ibid.
[85] Fruit such as plums, wild apples, pears, grapes were gathered: Sagard, supra note 77.
[86] Ibid.
[87] William M. Darlington, ed., James Smith: An Account of the Remarkable Occurrences in the Life and Travels of Col. James Smith (Cincinnati: Robert Clarke & Co., 1870) at 36-37 & 69.
[88] Trigger, supra note 12 at 36.

and trade. Since game animals were scarce in Huronia,[89] there was much reliance placed on trade with the Anishnabe to secure meat for food and skins for clothing.[90] When the men did hunt they mostly sought deer which they rounded up communally by corralling them in triangular enclosures in the forests.[91] Beaver, muskrats, turtles, cranes, geese and rabbits were also very modest complements to the Wendat menu.[92] Since game was sparse, fishing was a more significant activity for the Wendat. Species such as whitefish, trout, sturgeon, pike, red mullet and herring all formed part of their acquisitions.[93]

The Wendat system of government, which upheld the allocation and use of village sites, fields, hunting grounds, and trade routes amongst themselves and with the Anishnabe, was centred in their clan systems. Organizational life spread out from the clan to the level of village, and from there to the tribe, and eventually to the confederacy. There were eight clans: turtle, bear, wolf, deer, hawk, porcupine, snake and beaver. These clans "provided a sense of unity which cut across tribal divisions and gave additional stability to the Huron confederacy".[94] These clans were matrilineal[95] and matrilocal which allowed each village to retain its offices and headmen because these

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[89] Kinetz, supra note 4 at 20.
[90] Trigger, supra note 12 at 37, 175 & 216.
[91] For a description of how this was done, see Biggar, supra note 37 vol. 3 at 83-85.
[92] On beaver hunting, see Lahontan, supra note 61 at 321-322. On muskrat and turtle hunting, see Sagard, supra note 77 at 322-324. On geese and crane hunting, see ibid. at 302-303. On rabbit hunting, see ibid. at 306-307.
[93] Sagard, supra note 77 at 252-260.
[94] Trigger, supra note 12 at 54.
[95] Ibid. at 46.

positions were passed to the male incumbent's brothers or a sister's son, rather than to his own offspring.

Each village consisted of one or several clan segments, depending upon its size.[96] Each clan segment had two headmen, one for civil affairs and the other for war. The internal affairs of each clan segment were administered by its civil headman in consultation and consensus with the heads of the various households. Village decision-making revolved around the meeting of the various clan segments who lived in the villages.

Villages were allied with other closely situated villages to make up a tribe. As will be recalled, there were four tribes in the Wendat confederacy, the Attignawantan, Arendarhonon, Attigneenongnahac and Tahontaenrat. Each tribe made decisions by village headmen making their views known at tribal councils. The Confederacy Councils made decisions through the civil headmen who made up the various tribal councils. The result of this organization was that most of the clan segments from the different villages were represented in Confederacy decision-making. If there was no pressing business, general assemblies seem to have been held annually, and there was an elaborate ceremony which accompanied the calling of these conferences.[97]

The social function of these various levels of Wendat government in the allocation of resources can be illustrated by their role in the transfer of possessions. Trade was the means by which goods were allocated within the Confederacy and between the Wendat and Anishnabe.

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[96] Ibid. at 54.
[97] Brebeuf, supra note 46 at 251-263.

As has been discussed, the Wendat would trade their highly valued corn, along with wampum and fish nets, to the Anishnabe in return for meat and skins.[98] The allotment and distribution of each group's resources was done in accordance with structured systems of rules.[99] Rights to a particular trade route belonged to those who discovered it, and the control of a major trade route was usually passed along to the headman of the discoverers' clan segment to secure greater control of the route.[100] The sharing of the route with one's clan would benefit the individual who discovered it, since protection by the clan could better ensure its preservation. One seventeenth century observer noted the allocation of resources in trade occurred as follows:

> Besides having some kinds of Laws maintained among themselves, there is also a certain order established as regards foreign Nations. And first, concerning commerce: several families have their own private trader, and he is considered Master of one line of trade who was the first to discover it. The children share the rights of their parents in this respect, as do those who bear the same name; no one goes into it without permission, which is given only in consideration of presents; he associates with him as many or as few as he wishes. If he has a good supply of merchandise, it is to his advantage to divide it with few companions, for thus he secures all that he desires, in the Country; it is in this that most of their riches consist.[101]

Within this system one observes that the rights to use the resource belonged to those who developed it. Furthermore, trade routes could only be shared with the consent of the "owner" of the resource, and then only upon the giving of gifts. There were also practices

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[98] Kinetz, supra note 4 at 45.

[99] Trigger, supra note 12 at 64 has stated: " Among the Hurons themselves, trade was governed by elaborate rules. The rights to a particular route were said to belong to the family of the man who discovered it...and [they] had legal title to it...".

[100] Ibid.

[101] Supra note 46 vol. 10 at 223-225.

established to protect each families' right to use their trade routes.

The same author wrote:

> But if any one should be bold enough to engage in trade without permission from him who is Master, he may do a good business in secret and concealment; but, if he is surprised by the way, he will not be better treated than a thief - he will only carry back his body to his house, or else he must be well accompanied. If he returns with his baggage safe, there will be some complaint about it, but no further prosecution.[102]

The allocation and distribution of Wendat trade routes thus had provisions for vesting and enforceability which were easily discernable and formed an important aspect of Wendat society. These laws applied equally to individuals and Nations.[103]

SUMMARY

Thus, we are able to observe that both Anishnabe and Wendat systems of land and resource use revolved around the clan. While the clan's composition was different within each society, both groups' clans distributed privileges of resource collection according to established customary use. Resource use could be exclusive for some purposes but shared for others, depending upon the scarcity and importance of the object being used. The systems of distribution or resource allocation within the Anishnabe and Wendat peoples, and between these two groups in trade, operated successfully for hundreds of years. A remarkable cultural symbiosis marked the operation of this system, and allowed each group to possess some measure of certainty to meet their needs from the resources surrounding them.

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[102] Ibid.
[103] Kinetz, supra note 4 at 46.

CHAPTER TWO

CONSTITUTIONAL PRINCIPLES REGULATING INTERACTION BETWEEN FIRST NATIONS AND THE CROWN

It is only in very recent history that Aboriginal occupants of the Lake Huron region have had contact with people who held divergent objectives in land use. In particular, the French and English viewed land differently from Manitoulin Island's Aboriginal occupants, and this had a significant impact on First Nations' land use. Similarly, the contrast of First Nations' conceptions of land with those of the Colonists had a profound influence on non-Native land allocation. The interaction of Native and non-Native ideas about land required the formulation of "sui generis"[1] principles to regulate the distribution of land and resources between them. These principles were developed through practiced experience and negotiation, and represented a North American synthesis of Aboriginal and non-Aboriginal laws and conventions. The agreements reached to guide the parties in the distribution of land are partially found in the companion records of the Royal Proclamation and the Treaty of Niagara.

The Royal Proclamation holds a specific meaning for First Nation peoples that has often been overlooked because it has not been viewed

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[1] Sui generis means forming a kind by itself; unique, literally of its particular kind: Funk and Wagnall's Standard College Dictionary (Toronto: Fitzhenry and Whiteside, 1978) at 1339. Slattery has argued, when speaking about the sui generis nature of Aboriginal land rights, "[i]t is an autonomous body of law that bridges the gulf between native systems of tenure and the European systems applying in the settler communities. It overarches and embraces these systems without forming a part of them.": Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 745.

as a manuscript that is integrated with the Treaty of Niagara. The Proclamation cannot be interpreted using its written words alone because this would conceal the fact that there were other conditions that formed its substance. These conditions were the product of both societies' precepts. The combination and mingling of Aboriginal and European perspectives came together through negotiation and agreement in 1764 at Niagara. Non-Native society recorded their understanding of the agreed upon arrangements to allocate land in a written document. First Nations chose to chronicle their perception of these agreements through methods such as contemporaneous speeches, physical symbols, and subsequent conduct. The Treaty of Niagara must gain greater prominence in understanding the Royal Proclamation because this method avoids inappropriately privileging written literacy above oral knowledge.[2]

A contrast of First Nations' understanding about the Proclamation and the Treaty of Niagara with academic and judicial commentary will provide the basis for the interpretation of this agreement in this chapter. The principles codified in these alliance-building arrangements underlie the treaties and other agreements that were later entered into between First Nations and the British Crown. These principles were incorporated into the terms and conditions of the treaties later entered into on Manitoulin Island. This chapter will examine the development of precepts between the Crown and the First

[2] For an introduction to the sophistication of oral literacy in the First Nations, see Penny Petrone, Native Literature in Canada: From the Oral Tradition to the Present (Toronto: Oxford University Press, 1990).

Nations of Manitoulin that were to guide the parties' relationship. The Royal Proclamation and the Treaty of Niagara will be at the centre of this examination.

HISTORICAL BACKGOUND TO THE PROCLAMTION AND TREATY OF NIAGARA

The traditional lifestyle of First Nations around Lake Huron was altered after their first contact with non-indigenous people in the early 1600's when the French intruded on Aboriginal territory.[3] The French established Jesuit missions near the shores of Georgian Bay in present-day Midland, Ontario, and had contact with the Odawa on Manitoulin through exploration and trading.[4] Contact with the French led the Huron, Odawa and Ojibway into war against the Haudenosaunee[5] for the control of trade on the upper Great Lakes. Early Haudenosaunee success in these campaigns resulted in the dispersal of the Wendat, Ojibway and the Odawa and a disruption of occupancy of Manitoulin island in 1652.[6] While many Ojibway and Odawa permanently fled west after the Haudenosaunee defeated them, some quickly returned to their island homeland along with individual Wendat refugees.[7] As a result, the Odawa,

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[3] Wendat people who lived in present-day Simcoe County, Ontario, in the 1600's had "first direct contact...in 1609, while a formal alliance was completed between them [Wendat and French] seven years later": Bruce G. Trigger, The Children of Aataentsic: A History of the Huron People to 1600 (Kingston: McGill-Queen's Press, 1976) at 247.

[4] F.W. Major, Manitoulin: The Isle of the Ottawas (Gore Bay: Recorder Press, 1974) at 2-3.

[5] Also known as the Five Nations Iroquois at that time.

[6] Rev. J. Paquin, S.J. Modern Jesuit Indian Missions in Southern Ontario (undated manuscript) at 70; see also Conrad Heidenreich, "The Great Lakes Basin" in R.C. Harris, ed., The Historical Atlas of Canada, vol. 1 (Toronto: University of Toronto Press, 1987) plate 35.

[7] Leo Waisberg, The Ottawa: Traders of the Upper Great Lakes, 1715-1800 (M.A. Thesis, McMaster University, 1977) [unpublished] at 29; Rueben G. Thwaites, The Jesuit Relations and Allied Documents

Ojibway and Potawatomi were eventually able to subdue the Haudenosaunee and force them out of southern Ontario by the 1700's[8], at which point the Anishnabe resettled on Manitoulin Island. We do not hear much of the Wendat as a group on Manitoulin after this period, since they had fled elsewhere. However, some Wendat intermingled with the Anishnabe of Manitoulin, and their cultural values and ideas regarding land continued to develop and have an effect on resource use.

After the defeat of the Haudenosaunee, patterns of land use on Manitoulin were not as intensive as they had been in the past.[9] By the 1760's the influence of the French was replaced by the British because they defeated the French in the Seven Years War, known in America as the French and Indian War, and known to First Nations as the Beaver War.[10] A large proportion of First Nation people around the Great Lakes, with the notable exception of the Haudonoshonee, supported the French in their fight against the British for control of the region.[11] The

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(Cleveland: Burrow Brothers, 1896-1901) at 133; F.W. Major, supra note 4 at 4.

[8] Peter Schmalz, The Ojibwa of Southern Ontario (Toronto: University of Toronto Press, 1936) at 16-34; Peter Jones (Kahkewaquonaby), History of the Ojibway Indians with Special Reference to their Conversion to Christianity, (London: A.V. Bennett, 1861) at 111-128; George Copway (Kahgegagahbowh), The Traditional History and Characteristic Sketches of the Ojibway Nation (London: Charles Gilpin, 1850) at 68-94.

[9] Only the Sinago remained on the island: Waisberg, supra note 7 at 126.

[10] J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989) at 59-80.

[11] First Nations generally supported the French because they were territorially less intrusive than the British. The French primarily had only trade routes and forts in First Nation country. This was more palatable to First Nations than were the British encroachments because the British had large settlements on the eastern seaboard which displaced thousands of First Nation peoples from their lands. As one

people of Lake Huron were no exception. Despite the loss of the war by their French allies in 1760, First Nation people did not consider their sovereignty extinguished by this event. One British Colonial official observed this to be the case when he wrote:

> The Six Nations, Western Indians [Anishnabe, etc] & c. having never been conquered, Either by the English or French, nor subject to the Laws, consider themselves as free people.[12]

A First Nation perspective reflecting the view that they were not conquered was made by Minavavana, an Ojibway Chief from west of Manitoulin at Michilimackinac. Minavavana declared:

> Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread, and pork and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.
>
> Englishman, our Father, the king of France, employed our young men to make war upon your nation. In this warfare, many of them have been killed; and it is our custom to retaliate, until such time as the spirits of the slain are satisfied. But, the spirits of the slain are to be satisfied in either of two ways; the first is the spilling of the blood of the nation by which they fell; the other, by covering the bodies of the dead, and thus allaying the resentment of their relations. This is done by making presents.
>
> Englishman, your king has never sent us any presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does these things, we must consider that we have no other

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historian has confirmed:

> To many Indian nations the French were the merchants and soldiers who did not want to take possession of their lands, but merely trade for fruits of the forest; the British, though some of them were merchants, were also largely agricultural settlers who inexorably dispossessed the original inhabitants with their expanding farm settlements. Ibid. at 68.

[12] William Johnson to the Lords of Trade, 8 October 1764 in E. B. O'Callaghan, ed., Documents Relative to the Colonial History of the State of New York, vol VII (Albany: Weed, Parsons, 1856) at 665.

> father or friend among the white man, than the king of France. ...
>
> ...you have ventured your life among us, in the expectation that we should not molest you. You do not come armed, with an intention to make war, you come in peace, to trade with us, to supply us with necessities, of which we are in much want. We shall regard you therefore as a brother; and you may sleep tranquilly, without fear of the Chipeways. As a token of our friendship we present you with this pipe, to smoke.[13]

This speech is notable in many respects as a statement of the government to government relationship which First Nation peoples were proposing to the British. Minavavana recounted some of the principles of peace and co-existence being formulated by First Nations. First, it is significant that the Ojibway stated unequivocally that they were "not yet conquered". They considered their allegiance as being to the Great Spirit, and not to any European power. Second, it is important to note that the Ojibway regarded themselves and the English as being reliant on one another for trade and peace, and therefore their power relationship was regarded as being parallel. Finally, the Ojibway stated that the British had to fulfil certain obligations, such as the giving of gifts, in order to attain even a state of co-existence with them.

In the early stages of First Nation/settler association, the English failed to comprehend some of the diplomatic fundamentals that First Nations required in the definition of their relationship. One example of the British failure in this regard concerned the presentation of gifts. The French had followed the diplomatic customs First Nations

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[13] Quoted in Wilbur R. Jacobs, Wilderness Politics and Indian Gifts: The Northern Colonial Frontier, 1748-1763 (Lincoln: University of Nebraska Press, 1966) at 75.

preferred to formalize relations, and were thus able to maintain peace by supplying gifts to all their First Nation allies. Therefore, when the British did not meet all the conditions that First Nations set for co-existence this resulted in conflict.[14]

Presents were important to First Nations because they were regarded as a necessary part of diplomacy which involved accepting gifts in return for others sharing their lands.[15] The cessation of presents caused some First Nations, led by an Odawa man named Pontiac,[16] to resume fighting the British again in 1764.[17] This continued aggression by First Nations against the British illustrates that First Nations used their sovereignty to uphold the official diplomatic

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[14] Not all English people in North America in the 1760's misunderstood First Nation diplomacy. Colonial officials like William Johnson and George Croghan understood that First Nations would not accept the cessation of presents. However, after the Beaver War they were subordinates to General Jeffrey Amherst who did not appreciate the First Nations' power and sovereignty. Since Amherst set colonial policy, his notions temporarily determined the British response to First Nations' exigencies. See Richard White, The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815 (Cambridge: Cambridge University Press, 1991) at 256-268. For a discussion of French adherence to Iroquois diplomatic customs, see R. A. Goldstein, French-Iroquois Diplomatic and Military Relations, 1609-1701 (The Hague: Mouton, 1969).

[15] See Bruce M. White, "A Skilled Game of Exchange: Ojibway Fur Trade Protocol" (1987) Minnesota History 229-240.

[16] Pontiac's discontent was expressed as follows:

> And as for these English, - these dogs dressed in red, who have come to rob you of your hunting grounds, and drive away the game, - you must lift the hatchet and drive them away. Wipe them from the face of the earth, and thus you will win my favour back again, and once more be happy and prosperous. The children of your great father, the King of France, are not like the English.

Miller, supra note 10 at 74.

[17] "Although many historians would refer to the bloody and unsuccessful uprising as the Conspiracy of Pontiac, it was only another angry response by hunter-gatherers to the encroachments of farmers: ibid.

conditions they imposed upon the British to direct the structure of their relationship. The British later instituted the exchange and giving of gifts to First Nations to recognize and affirm their alliance with them.[18]

First Nations/settler policies constructing their relationship were further developed through the Articles of Capitulation of Montreal drawn up in 1760, three years before the end of the Seven Years War. The Articles, while mainly concerned with the French surrender in North America, were also framed to insulate First Nations from British interference. Despite the Articles apparently being drafted without First Nation input, they reflected First Nations' perspectives as much as if First Nations were present and in agreement at the signing because of the relative power they possessed in 1760.[19] These articles supported First Nations in their view about the right to use their sovereignty in decisions about the use and allocation of their land.

Article 40, agreed to by British Major-General Amherst and French Lieutenant Governor the Marquis de Vaudreuil, demonstrates the awareness of both the French and the English that First Nations were

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[18] See generally Wilbur R. Jacobs, Diplomacy and Indian Gifts: Anglo-French Rivalry Along the Ohio and Northwest Frontiers, 1748-1763 (Stanford: Stanford University Press, 1950).

[19] The Supreme Court of Canada recently recognized this fact when it stated:

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.

R. v. Sioui (1990), 70 D.L.R. (4th) 427 (S.C.C.) at 448.

autonomous, and that their land could not be appropriated or allocated without Aboriginal consent.[20] The Article stated:

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit, if they chose to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion....[21]

This article verified French and English policy that First Nations should be maintained in their lands and not be molested in their use. The capitulation agreement represented the promise that First Nations' territory was not to be reduced, nor was their sovereignty to be subsumed, by alliance with either the French or the English. Both the French and the English wanted to maintain the cooperation of First Nations because of the military and economic power that First Nations

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[20] The principal reason why First Nations' consent was required is that the continent's original inhabitants represented a threat to European colonies in North America. First Nation cooperation was needed in order for Europeans to prosper. During this period, if First Nations' lands were taken from them without their consent, costly wars and trade embargoes would seriously inhibit the party that was attempting to secure Aboriginal land in this way. Furthermore, the requirement of consent follows principles of international law present during this period which suggested that rights to Indigenous people's land could not be acquired without their consent, see Sameul Pufendorf, De Jure Naturae et Gentium Libri Octo, Carnegie Classics of Internation Law (Oxford: Clarendon Press, 1934) at 364-66. Of course, there were competing theories that posited that rights to Aboriginal peoples land could be aquired by method's other than consent. See the works of Francisco de Vitoria and Hugo Grotius as examples: Francisco de Vitoria, Relictiones: de Indis de Jure Belli (Washington: Carnegie Classics of International Law, 1971); Hugo Grotius, De Jure Praedae Commentarius in J.B. Scott The Classics of International Law, vol 1 (Oxford: Clarendon Press, 1950), Maureen Davies, Book Review of The Classics of International Law ("Aspects of Aboriginal Rights in International Law") in Bradford Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, rev. 1st ed. (Ottawa: Carleton University Press, 1989) at 19-24.

[21] James Sullivan, ed., The Papers of William Johnson, vol III (Albany: New York University State Press, 1921-1962) at 457.

continued to possess. There was a realization that non-interference with First Nations' territory and jurisdiction was the best way for the colonies to benefit from the strong influence that First Nations could still exercise over colonial affairs.[22] As a result, until the early 1760's First Nations maintained much of their ability to determine where and how they would use land and resources. First Nations' control over the lands and resources began to change with the introduction of the Royal Proclamation.

THE ROYAL PROCLAMATION

A principal incident concerning First Nation land use and government after the Articles of Capitulation was the promulgation of the Royal Proclamation of 1763[23] and the associated Treaty of Niagara. Immediately prior to the Proclamation, First Nation land in the Ohio valley, and elsewhere in the west, had been increasingly threatened by European speculation and settlement.[24] As a result of rapid European

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[22] The power which First Nations could wield against the French and the English was one of the reasons the colonial powers did not interfere with the Indians. As Lamer, J. records:

> One of the extracts from Knox's work which I cited above reports that the Canadians and the French soldiers who surrendered asked to be protected from Indians on the way back to their parishes. Another passage from Knox...relates that the Canadians were terrified at the idea of seeing Sir William Johnson's Indians coming among them. This proves that in the minds of the local population the Indians represented a real and disturbing threat. The fact that England was also aware of the danger the colonies and their inhabitants might run if the Indian's withdrew their cooperation is echoed in the following documents...

See Sioui supra note 19 at 450.

[23] R.S.C. 1985, App. ii, No. 1.

[24] In particular, a company called the Ohio company had been formed to profit from the speculation on over half a million acres in the Ohio valley. See Miller, supra note 10 at 69. See also Brian Slattery, "The Hidden Constitution: Aboriginal Land Rights in Canada" (1984) 32 American Journal of Comparative Law 361 at 369.

settlement on the eastern seaboard of the North American continent,[25] First Nation peoples in the southern Great Lakes region began to feel pressures to leave their traditional homelands and resettle west of the Mississippi River.[26] Often, both First Nations and settlers used crass power and force to confront these difficulties.[27] The discontent caused by this conflict necessitated the formulation of diplomatic principles to mediate First Nation/settler contention.[28] For First Nations the lamentable alternatives to generating foundational principles of co-existence were resettlement, or the defence of their territory at the high cost of persecution and bloodshed. The First Nations of the southern Great Lakes region saw such conflict as antithetical to their interests.[29]

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[25] Peter Schmalz, The History of the Saugeen Indians (Ottawa: Ontario Historical Society, 1977) at 15-16.

[26] See J.J. Borrows, A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government (LL.M. Thesis, University of Toronto, 1991) [unpublished] at 42-82.

[27] For descriptions of war and conflict between First Nations and settlers in North America, see generally Goldstein, supra note 14; F.W. Rowe, Extinction: The Beothucks of Newfoundland (Toronto: McGraw, Hill, Ryerson, 1977); S.F. Wise, "The American Revolution and Indian History" in J.S. Moir, ed., Character and Circumstance: Essays in Honour of Donald Grant Creighton (Toronto: Macmillan, 1970); Robert Allen Wooster, The Military and the United States Indian Policy, 1865-1903 (New Haven: Yale University Press, 1988).

[28] See generally Bruce Clark, Native Liberty, Crown Sovereignty: The Existing Right of Aboriginal Self-Government in Canada (Montreal: McGill-Queen's University Press, 1991); see also Richard White, The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815 (Cambridge: Cambridge University Press, 1991) at 223-365.

[29] Chief Pontiac stated to other First Nation peoples in a formal council-of-war on 23 May 1763:

> My brothers! I begin to grow tired of this bad meat which is upon our lands. I begin to see that this is not your case, for instead of assisting us in our war with the English, you are actually assisting them. I have already told you, and I now tell you again, that when I undertook this war, it was only your interest that I sought, that I knew what I am about. This year they [the English]

To alleviate conflict, the Royal Proclamation was declared to delineate boundaries and define jurisdictions between First Nations and the Crown. [30] The Proclamation attempted to convince First Nations that the British would respect existing political and territorial jurisdiction by incorporating First Nations understandings of this relationship in the document. The Proclamation does this by implying that no lands would be taken from First Nation peoples without their consent.[31] However, in order to consolidate the Crown's position in

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must all perish.

Penny Petrone, First Peoples, First Voices (Toronto: University of Toronto Press, 1983) at 29.

[30] The Royal Proclamation followed an earlier proclamation of 1761 that recognized First Nations as allies holding both "Possessions" and "Rights" which were to be supported and protected by the British. The Proclamation of 1761 states:

Whereas the peace and security of Our Colonies and Plantations upon the Continent of North America does greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon said Colonies...

We therefore taking this matter into Our Royal Consideration, as also the fatal Effects which would attend a discontent amongst the Indians in the present situation of affairs, and being determined upon all occasions to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them, Do hereby strictly enjoin and command that neither yourself nor any Lieutenant Governor...pass any Grant or Grants to any persons whatever of any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved to or claimed by them...

Quoted in Peter A. Cumming & Neil H. Mickenberg, Native Rights in Canada, 2d ed. (Toronto: Indian-Eskimo Association, 1972) at 285

[31] The principle of First Nation consent being recognized by the British in this period is found in a letter from the Secretary of State, Lord Egremont, to George III, 5 May, 1763:

Tho'...it may become necessary to erect some forts in the Indian Country, with their CONSENT yet his Majesty's Justice and Moderation inclines Him to adopt the more eligible Method of conciliating the Minds of the Indians by the Mildness of his Government, by protecting their Persons and Property and securing

North America, words were also placed in the Proclamation which did not accord with First Nations' viewpoints of the parties' relationship to one another, and to the land. For example, the British inserted statements in the Proclamation that claimed "dominion" and "sovereignty" over the territories First Nations occupied. In placing these divergent notions within the Proclamation the British were trying to convince Native people that there was nothing to fear from the colonists, while at the same time trying to increase political and economic power relative to First Nations and other European powers. The British perceptively realized that alleviating First Nations' "Discontent" [32] required that Native people believe that their

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to them all the Possessions, Rights and Privileges they have hitherto enjoyed, and are entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only.

Adam Shortt & Arthur G. Doherty, eds., Documents Relating to the Constitutional History of Canada 1759-1791 (Ottawa: Public Archives of Canada, 1918) at 128-129.

[32] An illustration of the level of hostility, and the desire on the part of both parties to remove enmity between them, is found in the following anecdote, recorded by an nineteenth century Ojibway writer:

For two years after the ending of Pontiac's war, the fear of Indian hostility was still so great that the British traders dared not extend their operations to the more remote villages of the Ojibways, and La Pointe, during this time, was destitute of a resident trader. To remedy this great evil, which the Indians, having become accustomed to the commodities of the whites, felt acutely, Ma-mong-e-sa-da, the war chief of this village, with a party of his fellows, was deputed to go to Sir Wm. Johnson, to ask that a trader might be sent to reside among them. He is said to have been well received by their British father, who presented him with a broad wampum belt of peace, and gorget. The belt was composed of white and blue beads, denoting purity and the clear blue sky, and this act settled the foundation of a lasting good-will, and was the commencement of an active communication between the British and the Ojibways of Lake Superior.

William Warren, History of the Ojibway of Lake Superior (St. Paul:

jurisdiction and territory were protected; however, the British also realized that the colonial enterprise required an expansion of the Crown's sovereignty and dominion over the "Indian" lands. Thus, while the Proclamation seemingly reinforced First Nation preferences that First Nation territories remain free from European settlement or imposition, it also opened to door for the erosion of these same preferences.

The Proclamation uncomfortably straddled the contradictory aspirations of the Crown and First Nations when recognizing Aboriginal rights to land by outlining a policy that was designed to extinguish these rights. These rights and their potential removal were affirmed by three principles or procedures: 1) colonial governments were forbidden to survey or grant any unceded lands; 2) colonial governments were forbidden to allow British subjects to settle on Indian lands or to allow private individuals to purchase them, and 3) there was an official system of public purchases developed in order to extinguish Indian title.[33] In implementing these principles an area of land was designated as First Nation territory. The boundaries were determined by past cessions and existing First Nation possessions.[34] These principles codified pre-existing First Nation/Colonial practice and reflected some First Nation preferences in maintaining territorial integrity and decision making power over their lands[35]. These principles

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Minnesota Historical Society, 1885; reprinted Minneapolis: Ross & Haines, 1970) at 218-219.

[33] Slattery, supra note 24 at 369.

[34] Ibid.

[35] The principles of the Proclamation reproduced the official protocol demanded by First Nations in diplomatic relations with

simultaneously worked against First Nation preferences by enabling the Crown to enlarge its objectives by creating a process to take land away from First Nations.

The implications of this policy were that First Nations, for the most part, would not be integrated with the European population, as immigration would be directed to the south and the east where First Nations had already ceded their lands.[36] While the Proclamation did make provision for future surrenders of land,[37] the wording of the document made it unclear as to whether First Nations would have the political power required to exercise autonomy through their own sovereignty or under British jurisdiction. The document's schizophrenia in wavering between Aboriginal sovereignty and subordination is evidenced by the Proclamation's description of "Nations or Tribes with whom we are connected, and who live under our protection".[38] The status of First Nation/Crown jurisdiction was also confused in the Proclamation by the implication that British civil[39]

Colonial officials. "Treaty protocol was of Indian manufacture." Francis Jennings, The Invasion of America: Colonialism and the Cant of Conquest (New York: W.W.Norton, 1975) at 123. For a further description of First Nation requirements in early North American diplomacy, see generally Francis Jennings et al, eds., The History and Culture of Iroquois Diplomacy (Syracuse, NY: Syracuse University Press, 1985).

[36] Ibid. at 72.

[37] "But that, if at any time Any of the said Indian lands reserved to the said Indians should be inclined to dispose of the said Lands, the same shall be purchased solely for Us, solely in our Name, at some public Meeting or Assembly of said Indians..." The Royal Proclamation 1763 R.S.C. 1985 App. II, No. 1.

[38] Ibid.

[39] That such provisions were intended to take the lands reserved to Indians out of British civil governmental jurisdiction is found in a letter from the Lords of Trade to Sir William Johnson, the Northern Superintendent of Indian Affairs, 11 July 1766:

and criminal[40] jurisdiction would not be administered on First Nation lands, while at the same time the Proclamation allowed for people to be charged with British offences committed in Indian territory[41]. Therefore, the Proclamation illustrates the British government's attempt to exercise sovereignty over First Nations while simultaneously trying to convince First Nations that they would remain separate from European settlers and have their jurisdiction preserved.[42]

The different objectives that First Nations and the Crown had in the formulation of the principles surrounding the Proclamation is the reason for the different visions embedded within its text. Britain

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...The subject matter of the several letters we have received from you has reference to the whole state of that Interior Part of His Majesty's Dominions in America which is by the Royal Proclamation of October 7, 1763, precluded from settlement and taken out of the jurisdiction of the civil Governments....

Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763: The Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38 Saskatchewan Law Review 123 at 135.

[40] "And we do further expressly enjoin and require all Officers whatever, as well Military as Those employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the Use of said Indians, to seize and apprehend all Persons whatever, who, standing charged with Treasons, Misprisons or Treason, Murders, or other Felonies and Misdemeanours, shall fly from Justice and take Refuge in said territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take Trial for the same." The Royal Proclamation, supra note 37.

[41] Ibid.

[42] When the Proclamation was enacted the Lords of Trade in England decided that "no particular form of Civil Government " would be established in the areas that were reserved for Indians. Lords of Trade to the King, 8 June 1763 in Kenneth M. Narvey, supra, note 174, at 134, note 38. While the Proclamation purported to reserve these lands under English sovereignty, the fact that civil government was not imposed coincided with First Nations' perceptions that they were to continue to be self-governing with respect to activities of hunting, fishing, etc. on the lands reserved to them.

was attempting to secure territory and jurisdiction through the Proclamation, while First Nations were concerned with preserving their lands and sovereignty. Paradoxically, at the same time the Crown was trying to reassure First Nations that their communities would be undisturbed, many First Nations were inviting colonial assistance to gain military and economic advantages. These competing policies between and within the parties' objectives were not resolved in the wording of the Proclamation because the Crown privileged its understanding of how land would be allocated. The effect of this privileging was to limit First Nations' ability to freely determine their land use, despite Aboriginal non-agreement with such a result, as evidenced by the Treaty of Niagara.

THE TREATY OF NIAGARA

Since the wording of the Proclamation is unclear about the autonomy and jurisdiction of First Nations, and since the Proclamation was drafted under the control and preference of the Colonial power, the spirit and intent of the Royal Proclamation can best be discerned by reference to a treaty with First Nations representatives at Niagara in 1764.[43] At this gathering a Nation to Nation relationship between settler and First Nation peoples was renewed and extended[44], and the Covenant Chain of Friendship[45], a multi-nation alliance in which no

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[43] Donald Braider, The Niagara (New York: Holt, Rinehart and Winston, 1972) at 137.

[44] O'Callaghan, supra note 12 at 648.

[45] See Paul Williams, The Chain (LL.M. Thesis, York University, 1982) [unpublished] for a description of the Covenant Chain of Friendship.

member gave up their sovereignty [46], was affirmed. The Royal Proclamation, as an invitation to treat, became a treaty[47] at Niagara because it was presented by the Colonialists for affirmation, and was accepted by the First Nations. [48] However, when presenting the Proclamation, representations and promises were made through methods other than the written word, such as oral statements and belts of wampum. [49] It is significant to note that Sir William Johnson,

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[46] Francis Jennings, "Iroquois Alliance in American History" in Jennings et al., supra note 35 at 37 & 39.

[47] One can read about the colonial government's reasons for entering into the treaty from the pen of the British leader who represented the Crown. This concern sprang from the need to secure an alliance of friendship because of the power advantage First Nations possessed. Sir William Johnson stated:

...they [the Indians] apprehend that we design to enslave them...if we conquer their prejudices by our generosity they will lay aside their Jealousy's, & we may rest in security. This is much cheaper than any other plan, and more certain of success. Our extensive Frontier renders it necessary if we will provide for their security...[in the last campaign] they saw themselves able to effect what was looked upon by many of our Prejudiced politicians here as utterly impossible...The Indians all know we cannot be a Match for them in the midst of an extended woody Country...

O'Callaghan, supra note 12 at 649.

First Nations expressed a similar fear of war with the English: see Alexander Henry, Travels and Adventures in Canada and the Indian Territories between the years 1760-1776 (Toronto: Morang, 1901) at 157-170.

[48] O'Callaghan, supra note 12 at 648. See infra note 55 for a list of the Nations involved.

[49] For example, one of the remembered promises the British made to First Nations which did not find its way into the Proclamation is stated as follows by Blackbird:

...that was the time the British government made such extraordinary promises to the Ottawa tribe of Indians, at the same time thanking them for their humane action upon those remnants of the massacre. She promised them that her long arms will perpetually extend around them from generation to generation, or as long as there should be rolling sun. They should receive gifts from her sovereign in the shape of goods, provisions, firearms, ammunition, and intoxicating liquors! Her sovereign's beneficent arm should even be extended unto the dogs belonging to the Ottawa tribe of Indians...and when you get up in the morning, look to

Superintendent of Indian Affairs, had earlier agreed to meet with the First Nations and reassert their mutual relationship through requirements prescribed by the Aboriginal peoples,[50] which criteria involved the giving and receiving of wampum belts[51]. Some principles which were implicit in the written version of the Proclamation were made explicit to First Nations in these other communications. For example, First Nation peoples approved terms of the Proclamation which encompassed more than a system of land allotment, including express guarantees of First Nations sovereignty.

In the winter following the issuance of the Royal Proclamation, First Nation leaders throughout the north-east, mid-east, and mid-west were invited to attend a conference to be held the following summer to discuss principles that would govern their relationship with the Crown. The people of the Algonquin and Nippising Nations met with the

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> the east, you will see that the sun, as it will peep through the earth, will be as red as my coat, to remind you why I am likened unto the sun, and my promises will be as perpetual as the rolling sun.

Andrew J. Blackbird, History of the Ottawa And Chippewa Indians of Michigan (Ypsilanti, Michigan: Ypsilanti Job Printing House, 1887) at 8.

[50] General Gage wrote to the Earl of Halifax on April 13 1764 regarding the anticipated treaty of Niagara:

"After concerting with Sir Wm. Johnson the proper measures to be taken in order to conclude a peace with the Indians of that district, I have wrote [sic] to Major Gladwin, that if he finds them sincerely disposed to peace, in the spring, he would give notice to the Chiefs of the several Nations to repair to Niagara by the end of June, where Sir Wm. Johnson would meet them in order to complete the work of peace according to their own forms and ceremonies."

O'Callaghan, supra note 12 at 78.

[51] First Nations had stated to colonial officials:

"know that our words are of no weight unless accompanied by wampum": ibid. vol. 9 at 604.

British Superintendent of Indian Affairs at Oswegatchie and were persuaded to be messengers in inviting other Nations to attend a peace council at Niagara in the summer of 1764.[52] Representatives of these two Nations travelled throughout the winter of 1763-1764 with a printed copy of the Royal Proclamation, and with various strings of wampum, in order to request the various the various First Nations to a council with the British.[53]

William Johnson described the purpose of the intended meeting at Niagara as a "Treaty of Offensive and Defensive Alliance" that would include promises to,

> assure them of a Free Fair & open trade, at the principal Posts, & a free intercourse & passage into our Country, That we will make no Settlements or Encroachments contrary to Treaty, or without their permission. That we will bring to justice any persons who commit Robberys or Murders on them & that we will protect & aid them against their and our Enemys & duly observe our engagements with them.[54]

It is clear that, in conjunction with their issuance of the Proclamation, the British proposed that a treaty be entered into to negotiate and formalize the principles upon with their relationship would be based. The invitation to a treaty, with the accompanying promises that were to govern the parties' relationship, demonstrates the intent of the British to enter into diplomatic negotiations with the First Nations of North America. Johnson further proposed, on behalf of the British, that,

> at this treaty...we should tie them down (in the Peace) according to

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[52] Williams, supra, note 45 at 76.

[53] Public Archives of Canada (PAC), Sulpician Documents, M. 1644, No. 70.

[54] C. Flick, (ed.) The Papers of Sir William Johnson, Vol. 4 (Albany: The University of the State of New York, 1925) at 328.

> their own forms of which they take the most notice, for example, by exchanging a very large belt with some remarkable & intelligible figures thereon. Expressive of the occasion which should always be shown to remind them of their promises.[55]

Thus, the treaty at Niagara was to be recorded in a manner that the First Nations were familiar with. Wampum belts were to be exchanged which would communicate the promises exchanged, and which would form the record of the agreement.

The treaty at Niagara was entered into in July and August, 1764, and was regarded as "the most widely representative gathering of American Indians ever assembled"[56], as approximately two thousand chiefs attended the negotiations.[57] There were at least twenty-four Nations gathered with "representative nations as far east as Nova Scotia, and as far west as the Mississippi, and as far north as Hudson Bay".[58] The Nations gathered included peoples from the western and eastern confederacies. In attendance were the Algonquins, Chippewas, Crees, Fox, Hurons, Pawnees, Menominees, Nippisings, Odawas, Sacs, Toughkamiwons, Potawatomies, Cannesandagas, Caughnawagas, Cayugas, Conoys, Mohicans, Mohawks, Nanticokes, Onondagas, and Senacas.[59] It is also probable that representatives from even further afield participated in the treaty as some records indicate that the Micmac and Lakota (Sioux) Confederacies were also present at this event.[60]

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[55] Ibid. at 329.
[56] Braider, supra note 43 at 137.
[57] William G. Godfrey, Pursuit of Profit and Preferment in Colonial North America: John Bradstreet's Quest (Waterloo: Wilfred Laurier Press, 1982) at 197.
[58] Williams, supra, note 45 at 79.
[59] Flick, supra, note 54, vol. 2 at 278-81, 481, 511-514.
[60] Williams, supra, note 45 at 79.

It is obvious that a substantial number of First Nations people attended the gathering at Niagara. Aboroginal people throughout the Great Lakes and northern, eastern and western colonial regions travelled for weeks and months to attend this meeting.[61]

When everyone was assembled[62], William Johnson, Superintendent of Indian Affairs, presented "the terms of what he hoped would prove a Pax Britannica for North America".[63] Johnson read the terms of the Royal Proclamation to representatives of over 24 nations[64] and a promise of peace was given by Aboriginal representatives and a state of mutual non-interference established.[65] Presents were exchanged to certify the binding nature of the promises being exchanged. The expenditure for the provisions and presents at Niagara were enormous for that day and age, and signify that the assembly was an unique and extraordinary meeting. Johnson's papers lists "Expence [sic] of provisions for Indians only...L25,000 New York Currency Besides the Presents...L38,000 Sterling.[66] Johnson's generous bestowal of presents demonstrates that he followed the principles of First Nations diplomacy in ratifying their agreement. Furthermore, the extravagance and value

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[61] Henry, supra note 47 at 157-174.

[62] In attendance at the treaty, among many others, were "Deputys from almost every nation to the Westward viz Hurons, Ottawaes, Chippawaes, Meynomineys or Folles avoins, Foxes, Sakis, Puans, ettc. with some from the north side of Lake Superior and the neighbourhood of Hudson's Bay". The Delawares and Shawnees were not in attendance at the treaty: O'Callaghan, supra note 12 at 648.

[63] G. Johnson to T. Faye, March 16, 1764, in C. Flick, ed., supra, note 54 at 487.

[64] William Warren, an Ojibway writer, records that "twenty-two different tribes were represented" at the council at Niagara: Warren, supra note 32 at 219.

[65] Braider, supra note 43 at 137.

[66] Williams, supra, note 45 at 82.

of these presents illustrates that he did not want the Indians to soon forget the treaty.

After the exchange of gifts, Johnson then presented the Covenant Chain and Wampum belts and stated:

> Brothers of the Western Nations, Sachems, Chiefs and Warriors; You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now remains for us only to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this belt to all Nations you will fix one end of it to the Chipeweighs at St. Mary's [Michilimackinac] whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.[67]

By this speech, and an exchange of presents and wampum, a treaty of alliance and peace was established between the parties. When Johnson was finished speaking the Western Nations received two different wampum belts to reflect the understandings of the Treaty of Niagara and the words of the Royal Proclamation.[68] One belt was the Gus-Wen-Tah, or two row wampum belt. The other belt was a representation of the statements made by Johnson referred to immediately above, using the imagery of the Crown promising friendship and assistance to First Nations.

The two belts, depicting the Crown's friendship and promise of

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[67] Flick, supra, note 54 at 309-310.

[68] PAC RG 10, v. 391, Head to Glenelg, August 20, 1836 (see reference's to Assikinack's speech). See also J.B. Assikinack, "Memories of the Covenant Chain" PAC RG 10, v. 631 21/10/1851 at 44043.

assistance to First Nations have been described by a later Superintendent, Thomas Anderson, as,

> ...the two memoranda (wampum) which they hold; the one being a pledge of perpetual friendship between the N.A. Indians, and the British Nations, and was delivered to the Tribe as a Council convened for that purpose, by Sir William Johnson, at Niagara in 1764.
>
> On the other wampum belt is marked at one end a hieroglyphic denoting Quebec on this continent, on the other, is a ship with its bow towards Quebec; betwixt those two objects are wove 24 Indians, one holding the cable of the vessel with his right, and so on, until the figure on the extreme left rests his foot on the land at Quebec. Their traditional account of this is, that at the time it was delivered to them (1764) Sir William Johnson promised, in the name of the Government, that those Tribes should continue to receive presents as long as the sun would shine...and if ever the ship came across the Great salt lake without a full cargo, these tribes should pull lustily at the cable until they brought her over full of presents.[69]

This observation, some eighty years after the Treaty of Niagara, establishes that there were two belts exchanged with each First Nation at the meetings in 1764. Aside from the two row wampum belt, another belt was exchanged which depicted the 24 Nations being tied together in friendship with one another, and with the British. It is interesting that as opposed to Johnson's earlier speech, in Anderson's account the belt is not tied to Michilimackinac, but Quebec. It is the author's opinion that each Nation who received such a belt would interpret it as being tied to their own homeland. This would be the consistent with each Nation's understanding that they were tied by the Chain of Friendship in whatever places they lived. The fact that the belt includes Quebec is significant because it confirms that First Nations

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[69] Thomas G. Anderson, Superintendent of Indian Affairs at Manitoulin Island, Indian Department Report, Report of Indian Affairs (1845) at 269.

people from Quebec were part of the Treaty of Niagara, and thus that this territory was also subject to the provisions of the Royal Proclamation.[70]

The other belt, the two row wampum, reflects a diplomatic convention that recognizes the interaction and separation of settler and First Nations societies. This agreement was first struck by the Haudonosaunee upon contact with Europeans, and the principles it represents were renewed by them in 1764, and received for the first time by the Anishnabe in that same year.[71] The symbolism of the two row wampum belt has been commented on by a leading Native legal academic, Robert A. Williams Jr:

> When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their

[70] The issue of whether the Royal Proclamation applies to Quebec, in its provisions relating to First Nations, is currently a contested topic before the Supreme Court of Canada in 1995, leave to appeal granted from R. v. Adams [1993] 3 C.N.L.R 98 and R. v. Cote [1994] 3 C.N.L.R. 98; for commentary see Richard Boivin, "The Cote Decision: Laying to Rest the Royal Proclamation" [1995] 1 C.N.L.R. 1 ; David Schulze, "The Privy Council Decision Concerning George Allsopp's Petition, 1767: An Imperial Precedent on the Application of the Royal Proclamation to the Old Province of Quebec" [1995] 2 C.N.L.R. 1. Of course one cannot predict the outcome of the Court's decision about whether the Proclamation applies to Quebec. However, it may be of the utmost importance that the wampum belts show that the Treaty of Niagara applies in that province. If the Treaty of Niagara applies to Quebec, then it follows that the provisions of the Royal Proclamation accepted at Niagara also apply.

[71] F.W. Major, Manitoulin: Isle of the Ottawas (Gore Bay: Recorder Press, 1974) at 11-15 ("An Indian Council").

> laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.[72]

The two row wampum belt illustrates a First Nation/Crown relationship that is founded on peace, friendship and respect, where each Nation will not interfere with the internal affairs of the other. Thus, on the one hand, the belt contemplates interaction and sharing between First Nations and the Crown, as demonstrated by the three rows of white beads. At the same time the document envisions separation and autonomy among the governments of each power, as represented by the two parallel rows of purple beads. This relationship of separation and integration is a recurring theme of Crown/First Nations relations.

An interpretation of the Proclamation using the Treaty of Niagara discredits the claims of the Crown to exercise sovereignty over First Nations. Such interpretation further allows First Nations to assert that their use of land and resources can not be molested or disturbed without Aboriginal consent. In fact, Sir William Johnson indicated as mucg when he commented on a questionable treaty in 1765:
these people had subscribed to a Treaty with me at Niagara in August

> last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some mistake; for I am well convinced, they never mean or intend anything like it, and that they can not be brought under out laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and it should be fully explained to them, and the nature of subordination punishment ettc [sic], defined, it might produce infinite harm...and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the

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[72] Robert A. Williams Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence" (1986) Wisconsin Law Review 219 at 291.

principal causes of all our troubles...[73]

One can see that Sir William Johnson did not regard the extension of the Royal Proclamation and the Treaty of Niagara as an assertion of sovereignty over First Nations. In fact, he feared any attempt by the British to do it, and stated that in giving the Royal Proclamation at the Treaty of Niagara that he never intended to bring First Nations under subjection or subordination. Records such as the wampum belts, and statements such as Sir William Johnson's, further allow First Nations to assert that their jurisdiction can not be molested or disturbed without Aboriginal consent.

The evidence surrounding the Treaty of Niagara demonstrates that the written text of the Proclamation, while it contains a partial understanding of the agreement at Niagara, does not fully reflect the consensus of the parties.[74] The concepts found in the Proclamation have different meanings when interpreted in accordance with the wampum belt. For example, the belt's denotation of each Nation pursuing its own path while living beside one another in peace and friendship casts new light on the Proclamation's wording "the several Nations...with whom we are connected...should not be molested or disturbed...". These words, read in conjunction with the two row wampum, demonstrate that the connection between the Nations spoken of in the Proclamation is one that mandates Colonial non-interference in the land use and

[73] Williams, supra, note 45 at 83, quoting Sir William Johnson.

[74] The Proclamation contains principles that do not find place in the two row wampum. An example of a principle which finds place in the Proclamation which does not find reference in the two row wampum is "the several...Tribes of Indians...who live under our Protection...": The Royal Proclamation, supra note 37.

governments of First Nations. Therefore, First Nations regarded the agreement, represented by the Proclamation and the two row wampum, as one that affirmed their powers of self-determination in, among other things, allocating land.

READING THE PROCLAMATION AND THE TREATY OF NIAGARA TOGETHER: SUBSEQUENT UNDERSTANDINGS

A final point in determining First Nations' understandings of the Royal Proclamation involves examining subsequent conduct relative to it. Since First Nations were likely to speak and act in accordance with their understandings of the Proclamation, subsequent conduct illustrates First Nation perspectives towards the Proclamation and demonstrates that Native consent was required to any alteration of First Nation land use and governance.[75] Over the years following the treaty of Niagara, including during the War of 1812, many Aboriginal people around the Great Lakes strengthened their alliance with the

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[75] The 1790's contain an example that confirms the parties' subsequent understanding of the Proclamation, despite the continuing double-talk over who had ultimate sovereignty over the land. Guy Carleton, Governor General of Upper and Lower Canada and Commanding Chief of the Crown's North American forces, told the First Nations in 1791:

> The King's rights with respect to your territory were against the nations of Europe; these he resigned to the States. But the King never had any rights against you but to such parts of the country as had been fairly ceded by yourselves with your own free consent by public convention and sale. How then can it be said that he gave away your lands?
>
> So careful was the King of your interests, so fully sensible of your rights, that he would not suffer even his own people to buy your lands, without being sure of your free consent, and of ample justice being done you. ...

Guy Carleton, 1791, Simcoe Papers, Letterbook 17-1791, Ontario Archives, quoted in Clark, supra note 28 at 80.

British in order to fight against the United States.[76] After the War of 1812, many Aboriginal people who resided in the growing American territories of Michigan, Wisconsin and Ohio wanted to move from the United States because American policies endangered First Nations.[77] In this period Britain maintained its alliance and friendship with First Nations by making an annual distribution of presents[78] and by encouraging Native peoples residing on lands under American control to take up residence "under their protection"[79]. In 1828 the British bestowal of presents to First Nations was moved from American controlled Drummond Island to British controlled Penetanguishine on Georgian Bay.[80]

Transcripts of a meeting at Drummond Island in Lake Huron to the west of Manitoulin on July 1818 between Anishnabe peoples and representatives of the British Crown contain articulate references

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[76] Ibid.

[77] Plans were initiated to forcibly remove all Aboriginal peoples to the west of the Mississippi River: see Francis Paul Prucha, American Indian Policy in the Formative Years (Lincoln: University of Nebraska Press, 1970) at 226-229, 242-248.

Aside from the U.S. desire for land for settlement, removal was also threatened because First Nations had fought against the United States. One historian has noted: "The Americans had no love for the Indians of this region, who had supported the British in the recent conflict. They made no secret of their feelings, promising future confiscation of lands held by these tribes": J.R. Wrightman, Forever on the Fringe: Six Studies in the Development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 10. See also "Tenure of Land", Journal of the Legislative Assembly of the Province of Canada 1847, App. T. No. 95.

[78] Robert Surtees, Indian Land Cessions in Ontario, 1763 - 1862: The Evolution of a System (Ph.D. Thesis, Carleton University, 1983) [unpublished] at 87.

[79] Anna Brownell Jameson, Winter Studies and Summer Rambles in Canada (Toronto: McLelland & Stewart, 1965) at 147-154.

[80] Major, supra note 71 at 17-18.

to the Treaty of Niagara. An account of the meeting is as follows:

> The Chiefs did de camp, laying down a broad Wampum Belt, made in 1764; one made in 1786; and one marked Lieutenant M'Dowal, Commanding Michilimackinac, with the pipe of peace marked on it.
>
> Orcarta [Anishnabe] speaker
>
> Father, Your children now seated round you, salute you sincerely, they intend to talk to you a great deal, and beg you will listen to them with patience, for they intend to open their hearts to you. ...
>
> Holding the Belt of 1764 in his hand he said:
>
> Father, This my ancestors received from our Father, Sir W. Johnson. You sent word to all your red children to assemble at the crooked place (Niagara). They heard your voice - obeyed the message - and the next summer met you at the place. You then laid this belt on a mat, and said - "Children, you must all touch this Belt of Peace. I touch it myself, that we may all be brethren united, and hope our friendship will never cease. I will call you my children; will send warmth (presents) to your country; and your families shall never be in want. Look towards the rising sun. My Nation is as brilliant as it is, and its word cannot be violated."
>
> Father, Your words were true - all you promised came to pass. On giving us the Belt of Peace, you said - "If you should ever require my assistance, send this Belt, and my hand will be immediately stretched forth to assist you."
>
> Here the speaker laid down the Belt. ...[81]

This speech is significant because it reveals that some fifty-four years after the treaty of Niagara First Nations of northern Lake Huron maintained their recollection of the promises made there. In particular, the speaker made specific mention of the mutual obligations of peace and friendship, as found in the wampum belt. It is a remarkable insight when viewing these events from a First Nations' perspective

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[81] Cptn. T.G. Anderson, "Report on the Affairs of the Indians of Canada, Section III" Appendix No. 95 in App. T of the Journals of the Legislative Assembly of Canada, Vol. 6.

to understand that these peoples viewed the Royal Proclamation as a treaty of peace and friendship. Furthermore, when one additionally considers that this treaty also contained an obligation for the Crown to sustain the welfare of First Nations, as found in the words "If you should ever require my assistance, send this Belt, and my hand will be immediately stretched forth to assist you", then one can better appreciate and perhaps reinterpret[82] the contemporary justification for the fiduciary relationship between First Nations and the Crown.

In 1836 the distribution of presents was moved to Manitoulin Island to promote it as a place for the settlement of the Crown's Aboriginal allies.[83] Observance of First Nations' perspectives on the treaty of Niagara and the Royal Proclamation is evidenced at the Manitoulin Island gatherings. One very strong endorsement of the Treaty of Niagara is found in the Manitoulin Island treaty of 1836 between the Crown and First Nations of the upper Great Lakes.[84] First Nations present at the negotiations reminded Sir Francis Bond Head, lieutenant-governor of Upper Canada, that their relationship must be defined in terms agreed upon in the two row wampum belt at the treaty

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[82] The reinterpretation of the fiduciary responsibility on the part of the Crown may shift from being based in the exercise of their discretion on First Nations' behalf (Guerin v. The Queen (1984) 55 N.R. 161 (S.C.C.)), to being the result of promises made when the relationship between the parties was established. This is a healthier basis for the relationship because it does not convey a hierarchical confederation of unequal powers but a parallel alliance of mutual support between nations.

[83] PAC RG 10, v. 389, Colborne to Glenelg, January 22, 1836.

[84] For a detailed study of this treaty, see John Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests" (1993) 12 Windsor Yearbook on Access to Justice 179.

of Niagara. Assickinack, an Odawa chief resident at Manitoulin, gave a recitation and interpretation of the two row wampum belt and the agreement at Niagara.[85] When Bond Head replied he noted the principles agreed upon at Niagara by stating:

> Seventy snow seasons have now passed away since we met in council at the crooked place (Niagara) at which time your Great Father, the King and the Indians of North America tied their hands together by the wampum of friendship.[86]

The reminder by First Nations to the Crown of the relationship defined at Niagara, and the reaffirmation of that relationship as being one of solidarity and friendship in a very significant treaty, again suggests that the treaty of Niagara significantly undermines the claims of British sovereignty over First Nations as found in the Proclamation. This understanding should be kept in mind when interpreting the subsequent treaties and the allocation of resources on Manitoulin Island. The agreement at Niagara created specific guarantees to certain rights and, while these guarantees were sometimes made explicit in

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[85] Bond Head said of Assickinack's use of wampum:

> The most solemn form in which the Indian pledges his word is by the delivery of a wampum belt of shells, and when the purport of the symbol is declared, it is remembered and handed down from Father to Son with an accuracy and retention of meaning which is quite extraordinary.
>
> ...[T]he wampum thus given [at Niagara] has thus been preserved, and are now entrusted to the great orator Sigonat, who was present at the Council I attended on Manitoulin Island in Lake Huron, and in every sense these Hieroglyphics are moral affidavits of the bygone transactions to which they relate. On our part, little or nothing documentary exists...

Correspondance Respecting Indians Between the Provincial Secretary of State and the Governors of British North America (London: Queen's Printer, 1837) at 128.

[86] Canada, Indian Treaties and Surrenders, from 1680-1890 (Ottawa: Printer to the Queen's Most Excellent Majesty, 1891-1912 [Toronto: Coles, 1971]) at 112.

subsequent acts, they were certainly implied as they were weaved through the negotiations, often forming the protocol by which decisions were made. The express promises exchanged in establishing a Crown/First Nations relationship at Niagara became the terms and conditions implied in subsequent dealings between these parties.

Aside from preserving the agreement represented by the Royal Proclamation in wampum belts and oral recollections, First Nations also preserved copies of the Proclamation they received in 1764. Copies of the document were often brought forward to colonial officials when they wanted to assert their perspective of what was written in the Proclamation.[87]

First Nation peoples utilization of the Proclamation to convey their understanding of its principles are found in an 1847 colonial report. Indian Commissioners of the colonial government spoke with many First Nation peoples to determine their views on a variety of matters. When views were solicited relative to the Proclamation, the commissioners were referred to the document, and First Nation peoples expressed their understanding of it. The Commissioners wrote the following regarding First Nations' understanding:

> The subsequent proclamation of His Majesty George Third, issued in 1763, furnished them with a fresh guarantee for the possession

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[87] An example of a First Nation person revealing this perspective in the 1840's comes from an Algonquin chief residing south of the Ottawa River:

> Our father, Sir William Johnson, gave our ancestors a writing on parchment, we still hold. This document tells us that we shall never be destroyed on our hunting grounds...that we could not make away with these to strangers.

Chief Greg Sazarin, "220 Years of Broken Promises" in Boyce Richardson, ed., Drumbeat: Anger and Renewal in Indian Country (Toronto: Summerhill Press, 1989) at 182.

> of their hunting grounds and the protection of the crown. This document the Indians look upon as their charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to government.[88]

This statement illustrates that First Nation peoples possessed copies of the Proclamation and presented the document to other governments to convey their perspective of what it contained. In the particular communications that these officials received, First Nation peoples expressed their conviction that the agreement represented by the Proclamation was their Charter.

That the Proclamation represented a Charter for First Nations in the definition of their relationship with the Crown was observed by the Commissioners writing in another place in the report:

> This public instrument [the Royal Proclamation] was formally communicated to the Indians of Canada, by the officer who had a few years before been appointed for their special superintendence; and that they have since regarded it as a solemn pledge of the King's protection of their interests, is proved by the claim of the Algonkians and Nippissing Indians, to be maintained in the possession of their remaining hunting grounds on the Ottawa River, which your excellency has referred to the Committee, and in support of which those tribes exhibited an authentic copy of this Royal Proclamation as promulgated to them in 1763 by the Superintendent General.[89]

These statements further reveal that First Nations continued to hold out the document of the Proclamation and the agreement it represented as an affirmation of their rights some eighty years after it was penned. They expected the Crown to protect their interests, and not allow them to be interfered with, especially with regard to their land use and means of livelihood. This demonstrates the strength with which First

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[88] Cptn. Anderson, supra note 81.
[89] Ibid.

Nations must have expressed their views that they were to be "maintained" and "protected" in their "interests".[90] It further illustrates the fact that First Nations had a perspective of the document that contradicts "claims" to British sovereignty found in the Proclamation.

CONVENTIONAL CANADIAN INTERPRETATION OF THE ROYAL PROCLAMATION

Though some writers have acknowledged First Nations' expectations of the Royal Proclamation[91], most conventional interpretations of the Royal Proclamation in both academic commentary and the common law have not evaluated the Proclamation in the way that it would naturally be understood by Indians. As such, these writings are in perspicuous contrast with the understandings of First Nation peoples.

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[90] One must be careful not to interpret the Proclamation's references as only applying to the protection of hunting grounds and land. While these statements do reflect First Nations' concern for the protection of their subsistence economy on their land, it must be remembered that land and jurisdiction over land were inseparable. The right to hunt necessarily includes the right to self-government. As the Supreme Court of Canada stated in Simon v. The Queen (1985) 24 D.L.R. (4th) 390 (S.C.C.) at 406: "It should be clarified at this point that the right to hunt, to be effective must embody those activities reasonably incidental to the act of hunting itself". When one understands the nature of hunting in an Aboriginal community, one realizes that decision-making and government are "reasonably incidental" and essential to the use and protection of this resource. See Hugh Brody, Maps and Dreams: Indians and the British Columbia Frontier (Vancouver: Douglas and McIntyre, 1981) at 34-71.

[91] The Proclamation was written by the Colonial officials and should be interpreted on the same principles as other treaties. Adopting the words of the United States Supreme Court in reference to another treaty, since it was written by non-Aboriginal people according to the "modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves...the treaty must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians": Jones v. Meehan (1899) 175 U.S. 1 at 10-1, followed in Sioui, supra note 19 at 435.

For example, academic commentary has not recognized that the Royal Proclamation affirms First Nation self-government. One scholar, Thomas Issac, has recently written:

> Many cite the Royal Proclamation of 1763 as evidence of the Aboriginal self-government being recognized. Yet, regardless of the claims of many, nowhere in the Proclamation is such power to be found. While the Proclamation is a solid base for arguing the existence of a number of inherent rights (i.e. fishing and hunting), no such basis exists in the case of self-government, at least inherent self-government.[92]

Elsewhere, Issac has written in a similar vein:

> ...the Royal Proclamation is often referred to as evidence of an existing inherent right of Aboriginal self-government. However, that does not appear to be the case. When read carefully and in its entirety, the Royal Proclamation does affirm Aboriginal rights (without a doubt), but it does not affirm or confer an inherent right of self-government or absolute Aboriginal sovereignty. The Royal Proclamation refers to the nations or tribes of Indians as living "under our protection" and that they should not be molested or disturbed in their "hunting grounds." Clearly, the language of the Proclamation indicates that while the said Indians had and continue to possess rights and claims to the territory in question, those rights did not include an inherent right of self-government in the absolute sense. They lived under Crown "protection" and only "possessed" Crown territory. Sovereignty requires title to the territory. In addition, the possession of the said territory is reserved for them solely for "hunting" purposes. The point made is that the assumption by a number of commentators that the Royal Proclamation confers an Aboriginal right of self-government is not apparent. Indeed, it is difficult to read such a right in any significant manner into the language of the Proclamation.[93]

One can see that the above statement reads the Royal Proclamation in a way that does not go outside of the wording of the document to consider

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[92] Thomas Issac, "Discarding Rose-Coloured Glasses: A Commentary on Asch and Macklem" (1992) 30 Alberta Law Review 708 at 711.

[93] Thomas Issac, "The Storm Over Aboriginal Self-Government: Section 35 of the Constitution Act, 1982 and the Redefinition of the Inherent Right of Aboriginal Self-Government" [1992] 2 C.N.L.R. 6 at 17-18.

First Nation perspectives. For this reason, Issac is unable to conclude that the Proclamation contains evidence of an inherent right of First Nation self-government.[94]

Similarly, the common law has had difficulty in perceiving that the Royal Proclamation affirms First Nation inherent self-government. A starting point in understanding the way that the common law has conventionally viewed the Royal Proclamation is through two early cases of the United States Supreme Court. In particular, the cases of Johnson and Graham's Lessee v. McIntosh[95] and Worcester v. Georgia[96] commented on British Colonial practice relative to First Nations' territories.

In Johnson v. McIntosh Chief Justice Marshall stated:

> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. ...
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance entirely disregarded; but were necessarily, to a considerable extent, impaired...their rights

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[94] Most academic commentary on the Proclamation, despite extensive documentary research, remains largely silent on the question of whether the Proclamation speaks to or protects First Nations self-government. See Jack Stagg, Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763 (Ottawa: Research Branch, Indian and Northern Affairs, 1981); Brian Slattery, The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of the Territories (Saskatoon: Native Law Centre, 1979); Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989); Geoffrey Lester, The Territorial Rights of the Inuit of the Canadian North-West Territories: A Legal Argument (LL.M. Thesis, York University, 1984); Kenneth Narvey, "The Royal Proclamation of 7 October 1763: The Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1974) 38 Saskatchewan Law Review 123; William Pentney, "The Rights of Aboriginal Peoples of Canada and the Constitution Act 1982: Part I, The Interpretive Prism of Section 25" (1988) 22 University of British Columbia Law Review 207. Despite the thoroughness of these authors in uncovering colonial understandings relative to the Proclamation, First Nations' perspectives remain, for the most part, untouched.

[95] (1823) 8 Wheaton 543; 21 U.S. Rep. 240 (U.S.S.C.).

[96] (1832), 6 Peters 515, 31 U.S. Rep. 350 (U.S.S.C.).

> to complete sovereignty, as independent nations, were necessarily diminished...[97]

This judgement blindly assumes that First Nation rights were necessarily impaired and that sovereignty was diminished in the establishment of relations between First Nations and settlers. Again, it does not consider First Nation perspectives on sovereignty. Thus, in one of the first common law statements of the relationship between First Nations and settlers, power was exercised to the detriment of First Nations by not including the Proclamation's guarantee that Native lands and governments were to remain "unmolested and undisturbed".

Nine years later Chief Justice Marshall reinterpreted the effect of "discovery" or contact between settler and First Nation peoples. This time around, Marshall was much more sensitive to First Nation sovereignty and the fact that British policy recognized this. Marshall wrote in the Worcester case:

> The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever which, not having been ceded to, or purchased by, us (the king), as aforesaid are reserved to the said Indians, or any of them.[98]

After citing several similar pronouncements from the period, Marshall wrote the following about the policy of the Proclamation in recognizing First Nation government:

> Such was the policy of Great Britain towards the Indian nations...: she considered them as nations capable of maintaining relations of peace and war; of governing themselves, under her protection[99]; and she made treaties with them, the obligation

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[97] Johnson, supra note 95 at 573-574.

[98] Supra note 96 at 496.

[99] The fact that Marshall viewed First Nations as existing under colonial protection does not mean that he viewed this relationship

of which she acknowledged.[100]

In this statement, Marshall reinterpreted the relationship between Great Britain and First Nations. His focus was not on the curtailment of sovereignty but on the recognition of the wide powers of sovereignty remaining with First Nations. Marshall's emphasis changed from one case to another because he focused on the treaties and policies designed to protect self-government which were recognized in the Royal Proclamation.

When the judiciary applied the Royal Proclamation to Canada they did not consider that First Nations had any significant rights to land and governance other than the misrepresentations about these concepts that the British inserted in the Proclamation. In St. Catherines Milling and Lumber Company v. The Queen, Lord Watson of the Judicial Committee of the Privy Council wrote:

> The capture of Quebec in 1759, and the capitulation in Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property and possession, and all other rights which had at any previous time had been held or acquired by the Crown of France. A royal

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as extinguishing self-government. Marshall wrote ibid. at 500:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that posed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation" so generally applied to them, means "a people distinct from others".

Marshall further added at 501 (emphasis mine):

> ...and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its RIGHT TO SELF GOVERNMENT, by associating with a stronger and taking its protection.

[100] Ibid. at 496.

> proclamation was issued on the 7th of October 1763, shortly after the date of the Treaty of Paris...
>
> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.[101]

Thus, the Canadian judicial construction of the Royal Proclamation started out with a very different emphasis than did the law interpreting it in the United States. Unlike Worcester, St. Catherines contained no discussion about rights to territory and self-government being preserved by the Proclamation. Instead, the court declared that First Nations live, not under their own, but under British sovereignty. The Privy Council assumed that First Nations' land rights existed only at the pleasure of the Crown. They also assumed that First Nations' sovereignty was ceded to Great Britain because they were dependencies held by France and transferred upon capitulation.[102] All these findings were made without any consideration of First Nation perspectives.[103]

Despite its inauspicious introduction in Canadian law, the Royal

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[101] (1888), 14 App. Cas. 46 (P.C.) at 54.

[102] Of course, France did not have sovereignty over First Nations to be able to transfer it: see Chapter 1 notes 8-12 and accompanying text.

[103] The fact that First Nations were not represented or called to testify in a case that purportedly decided their rights shows the depth of exclusion that First Nations experienced in getting their perspectives injected into legal discourse. This is highly regrettable given the wealth of testimony available, since the First Nations people who signed the treaty would still have been available to present their understanding. One can read the sophisticated perspectives First Nations had about the property at issue in this case in Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based (Toronto: Bedfords, Clark, 1880) at 44-76.

Proclamation has received somewhat broader interpretations in subsequent cases. However, these interpretations have never explicitly dealt with the Nation to Nation political relationship between First Nations and the Crown. In Calder v. A.G. of B.C.[104], a case regarding Aboriginal title, there was argument about whether the Royal Proclamation applied to British Columbia. Though the Supreme Court split over the application of the Proclamation to British Columbia,[105] the two main judgments held that the Proclamation was not the exclusive source of Indian title.[106] In his dissenting judgement, Hall J. also strengthened the Proclamation's potential to be a positive instrument in protecting First Nations' rights across Canada by stating:

> The Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne, J. in St. Catharines Milling case at p. 652 as the "Indian Bill of Rights":

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[104] Calder v. A.G. of B.C. (1973), 34 D.L.R. (3d) 145 (S.C.C.).

[105] Judson wrote at 153

> I say at once that I am in complete agreement...that the Proclamation has no bearing upon the problem of Indian title in British Columbia. I base my opinion upon the very terms of the Proclamation and its definition of its geographical limits and upon the history of the discovery, settlement and establishment of what is now British Columbia.

Hall wrote at 203:

> It follows, therefore, that the Colonial Laws Validity Act 1865 (U.K.), c. 63 applied to make the Proclamation the law of British Columbia.

For the current judicial prouncement on the application of the Royal Proclamation to BC, see Delgamuukw v. British Columbia (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) at 287 to 307. See also Delgamuukw v. British Columbia (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) at 521, for the view that "neither the Proclamation nor the policy which gave rise to it apply to Indian lands in British Columbia".

[106] Judson wrote ibid. at 152:

> There can be no doubt that the Privy Council found that the Proclamation of 1763 was the origin of Indian title -...I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title.

Hall wrote at 200:

> The aboriginal title does not depend on treaty, executive order or legislative enactment.

> see also Campbell v. Hall. Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories.[107]

The Proclamation was recognized as containing fundamental principles in the protection of Aboriginal rights by analogizing it to the Magna Carta and Bill of Rights. Furthermore, one judge found that this principle was to be uniformly applied in all places where settlers and First Nations came into contact. Hall's holding in this regard confirmed earlier jurisprudence which held that the Proclamation was prospective in its application:

> A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763...[108]

The Calder case is significant as a point of comparison in the language of perspicuous contrast because it raises the contrasting viewpoints of the Proclamation in Colonial policy and First Nations' understandings.

The next case of consequence to deal with the Royal Proclamation did not reflect First Nation perspectives that the instrument was, among other things, a recognition of inherent self-government. In Guerin v. The Queen[109] Dickson J., as he then was, wrote uncritically about the Proclamation, the doctrine of "discovery" and the nature

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[107] Ibid. at 203.

[108] Ibid. at 204 citing Province of Ontario v. Dominion of Canada (1909), 42 S.C.R. 1 at 103-104. See also R. v. White and Bob (1965), 50 D.L.R. (2d) 613 at 638, affirmed 52 D.L.R. (2d) 481 (S.C.C.).

[109] (1985), 13 D.L.R. (4th) 321 (S.C.C.)

of sovereignty. He stated:

> In Johnson v. M'Intosh, Marshall C.J., although he acknowledged the Royal Proclamation of 1763 as one basis for the recognition of Indian title, was none the less of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished...[110]

This reasoning disregards First Nations' perspectives at the time colonial and Native societies formalized diplomatic relationships between themselves. Dickson J.'s view draws heavily on colonial discourse that regarded First Nations as being over-powered by non-Native settlement.[111] He fails to appreciate that Indians' rights in the land were *not* obviously diminished. There was a conflicting interpretation within the Proclamation (albeit made clearer when considered alongside the Treaty of Niagara) that could have enabled Dickson J. to state that First Nations' land rights were not curtailed by the Proclamation.

Dickson C.J.C.'s reasoning regarding the Proclamation remained the same in R. v. Sparrow.[112] Once again Dickson C.J.C. failed to scrutinize the questionable supposition that the British presence in Canada undermined First Nation land use and sovereignty.[113] Dickson

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[110] Ibid. at 336.

[111] For a detailed discussion of the development of colonial doctrines that worked to disempower and dispossess First Nations, see Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (New York: Oxford University Press, 1990).

[112] (1990), 70 D.L.R. (4th) 385 (S.C.C.)

[113] For an excellent examination and critique of the reasoning in Sparrow, see Michael Asch & Patrick Macklem, "Aboriginal Rights and

C.J.C. wrote:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown.[114]

Dickson C.J.C.'s failure to discern First Nation perspectives on the Royal Proclamation has concealed Native understandings of the relationship reflected in this document. Dickson C.J.C.'s finding here is even more troubling given his admonition within the case that it is "possible, and, indeed, crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake"[115].

R. v. Sioui[116], the latest Supreme Court of Canada case dealing with the Royal Proclamation, again moves First Nations closer to being able to realize their perspective of the Proclamation. This case contains a recognition that First Nations understandings must be consulted in determining the Proclamation's meaning. Lamer, J., as he then was, wrote:

> The very wording of the Royal Proclamation clearly shows that its objective, SO FAR AS THE INDIANS WERE CONCERNED, was to provide a solution to the problems created by the greed which hitherto some of the English had all too often demonstrated in buying up Indian land at low prices. The situation was causing dangerous trouble among the Indians and the Royal Proclamation was meant to remedy this.[117]

By acknowledging that First Nations had an understanding of the

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Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 Alberta Law Review 498.

[114] Supra note 112 at 404.

[115] Ibid. at 411.

[116] Supra note 19 at 457.

[117] Ibid. at 457 (emphasis mine).

Proclamation which addressed their concerns, Lamer, J. moved the language of the courts closer to a point where First Nations' perspectives might form part of the Proclamation's interpretation. His statement, by looking at the "Indians' concern", implies that more than just the British standpoint on the Proclamation will define its meaning. Furthermore, in another passage, Lamer, J. helped to supply meaning to what First Nation concerns were at the time the Proclamation was issued. One of those concerns was the protection of their self-government. Lamer wrote:

> we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.[118]

One way Britain maintained relations with First Nations in a manner "close to those maintained between sovereign nations" was by entering into agreements that reflected this reality. As a First Nations' perspective reveals, one of those Nation to Nation agreements was the Royal Proclamation and its companion treaties, as exemplified by the Treaty of Niagara.

Lamer, J. further strengthened the potential for interpreting the Proclamation as recognizing the pre-existing sovereignty of First Nations when he wrote:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also ALLOWED THEM AUTONOMY IN THEIR INTERNAL AFFAIRS, intervening in this area as little as possible.[119]

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[118] Ibid. at 448.
[119] Ibid. at 450 (emphasis mine).

By recognizing internal sovereignty, the Sioui case has the potential to permit a reinterpretation of the Royal Proclamation in harmony with First Nation's viewpoints. As such, the inherent right of self-government within the current fabric of the common law may be judicially discerned by decision makers who appreciate the Royal Proclamation as containing more than merely what is expressed on the face of the document.

The challenge that interferes with First Nations' perspectives being considered as part of the Proclamation are the conflicting objectives found within the document, and the failure to recognize the Treaty of Niagara as forming First Nations' understanding of the Proclamation. The conflicting aspirations between and within the parties' objectives were not resolved in the wording of the Proclamation because the Crown gave precedence to its preference about how land would be allocated. The effect of this privileging was to conceal the agreement between the Crown and First Nations to not disturb or molest Aboriginal peoples and land use. The Treaty of Niagara reveals what has been hidden in the Proclamation's words because it reasserts the state of mutual non-interference that was intended when principles to guide relationships were formalized between Native and non-Native people in and around Manitoulin Island.

As the Proclamation applies to Manitoulin Island[120], one should recognize that the First Nations of this district agreed to a state of affairs with the British that guaranteed a state of mutual

[120] Supra note 30.

non-interference. The Anishnabe of Manitoulin desired to live apart from the Colonists so that they could pursue their economy and government as they preferred. The opportunity to further confirm this benefit presented itself in 1836 when a representative of the Crown visited Manitoulin Island and offered to secure it for the purposes the First Nations had espoused.

PART II

CHAPTER THREE

THE TREATY OF 1836

It was not until the mid-1830's, when the British encouraged Native settlement on Manitoulin, that the allocation of land between Aboriginal and non-Aboriginal people became a significant issue there. After 1836 the British presence in Canada began to grow and treaties were needed to apply the principles of the Proclamation and Treaty of Niagara and designate land rights between First Nations and the Crown. There are two treaties which deal with the allocation of land on Manitoulin Island. These agreements were signed in 1836 and 1862. The treaties and the circumstances surrounding them will be examined to determine the two parties' rights in land. Both treaties demonstrate that First Nations negotiations in land title settlement established an allocation of land that satisfied some of their objectives while simultaneously compromising other fundamental aspirations. The treaty of 1836 will be examined before turning our attention to the treaty of 1862 in a later chapter.

Negotiations in the treaty of 1836 were undertaken on Manitoulin Island between First Nations and the British Crown.[1] Sir Francis Bond Head, the Lieutenant-Governor of Upper Canada, represented the Crown in concluding the 1836 treaty[2], while the First Nations were represented

[1] Canada, Indian Treaties and Surrenders from 1680 to 1902, reprinted ed. (Toronto: Coles, 1971) at 112-113.

[2] See Ged Martin, "Sir Francis Bond Head: The Private Side of a Lieutenant-Governor" (1981) 73 Ontario History 145, for an overview of significant events in Canada while Bond Head was

by their various chiefs. The aspirations of the settlers in land settlement will be addressed first, after which the goals of the Anishnabe will be explored.

Early in 1836 Bond Head was given instructions by Lord Glenelg, the Colonial Secretary, to report on a way to reduce the costs associated with distributing presents annually to the Indians.[3] Bond Head decided to attend the distribution of presents on Manitoulin in the summer of 1836 to determine how he could fulfil his instructions and report on how presents could be reduced.[4] In considering ways to reduce expenditures on Aboriginal peoples, Bond Head came to the conclusion that the efforts of the Crown to civilize them through an introduction to farming and Christianity were too costly and had failed.[5] Bond Head

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Lieutenant-Governor.

[3] Lord Glenleg forwarded a resolution of a parliamentary committee of the British House of Commons that stated:

> Resolved that the Committee are of opinion from the Evidence Taken and to which they refer that the Indian Department may be greatly reduced, if not altogether abolished, and they, therefore, call the attention of the House to the same, and also to the expense of articles annually distributed to the Indians, and whether any arrangements may not be made to dispense with such distribution in the future, or to commute the presents for money.

PAC RG 10, Vol. 389, Lord Glenleg to Bond Head, January 14, 1836.

[4] He wrote to Glenleg:

> In the beginning of August next, about 7,000 Indians of various tribes are to congregate at the Manitoulin Islands in Lake Huron for the purpose of forming a settlement there as projected by Sir John Colborne. It is my intention if I be then in the Province to attend this most important meeting and...give your Lordship an opinion on...how far it may be practicable with good faith and sound policy to diminish the amount of the presents with a view to the ultimate abrogation of the existing custom, and whether in the mean while they might not be commuted to money payments.

PAC RG 10, Vol. 390, Bond Head to Glenleg, May 5, 1836.

[5] He wrote:

> Whenever and wherever the two races come in contact it is sure to prove fatal to the Red man. However bravely for a short time he may

accordingly stated his conclusions about British policy towards First Nations as follows:

> Whereas I firmly believe every person of sound mind in this country who is disinterested in their conversion, and who is acquainted with the Indian character will agree
> 1st. That the attempt to make farmers of the Red men has been generally speaking, a complete failure.
> 2nd. That congregating them for the purpose of civilization, has implanted many more vices than it has eradicated; and consequently,
> 3rd. The greatest kindness we can perform towards this intelligent, simple minded people, is to remove and fortify them as much as possible from any communication with the Whites.[6]

Since Bond Head considered that British policy towards First Nations had failed, he devised a plan to remove all the Indians in Canada to Manitoulin Island so that they could continue to pursue their traditional activities until they became extinct as a people.[7] Bond Head stated his plans to Lord Glenelg as follows:

...it was evident to me that we would reap a very great benefit if we could persuade these Indians, who are now impeding the progress of civilization in Upper Canada, to resort to a place possessing the double advantage of being admirably adapted to them (inasmuch as it affords fishing, hunting, bird shooting and fruit), and yet in no way adapted to the White population. Many Indians have long been in the habit of living in their canoes amongst these islands [Manitoulin] and from them every inquiry I could make,

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> resist our bayonets and fire arms, sooner or later he is called upon by death to submit to his decree. If we stretch forth the hand of friendship, the liquid fire it offers him to drink, proves still more destructive than our wrath; and lastly if we attempt to Christianize the Indians, and for that sacred object congregate them in villages of substantial log houses, lovely and beautiful as such theory appears, it is an undeniable fact...that as soon as the hunting season commences, the men vanish...in short our philanthropy, like our friendship, has failed in its professions.

PAC RG 10, Vol. 391, Head to Glenleg, November 20, 1836.

[6] Ibid.

[7] Bond Head was of the opinion that the Indians were a doomed race and were "melting like snow before the sun": Robert J. Surtees, Indian Reserve Policy in Upper Canada 1830-1845 (Ottawa: Carleton University, 1966) at 42.

> and from my own observation, I felt convinced that a vast benefit would be conferred both upon the Indians and upon the Province, by prevailing upon them to migrate to that place.[8]

Bond Head initiated his scheme to remove First Nation peoples to Manitoulin in the summer of 1836. He took a five day journey by canoe and arrived at the island to greet 1,500 Native people who had assembled there to receive presents. Bond Head stated that upon meeting them "I accordingly stated my views in private interviews I had with the Chiefs, and then I appointed a grand council, on which they should all assemble and discuss the matter, and deliberate to declare their opinions".[9] Bond Head then proceeded to "address them at some length" and found that "the Indians had previously assembled to deliberate on the subject and appointed one of their greatest orators, [Assickinac or Sigonah], to reply".[10]

Bond Head felt that the chiefs agreed with his proposal because he stated:

> Nothing could be more satisfactory than the calm deliberate manner in which the chief gave in the name of the Ottawa tribes his entire approval of my projects; and as the Chippewas and the Ottawas thus consented to give up twenty three thousand islands...I thought it advisable that a short plain memorial should be drawn up, explanatory of the foregoing arrangements, to be signed by the chiefs while in council, and to be witnessed by the Church of England, Catholic and Methodist Clergymen who were present, as well as several officers of his Majesty's Government.[11]

The "plain memorial" referred to by Bond Head above, which purportedly confirmed his agreement, read partially as follows:

> Seventy snow seasons have now passed since we met council at the crooked

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[8] Supra note 5.
[9] PAC RG 10, Vol. 391, Head to Glenleg, August 20, 1836.
[10] Ibid.
[11] Ibid.

> place (Niagara) at which time and place your Great Father the King and the Indians of North America tied their hands together by the Wampum of friendship.
>
> Since that period various circumstances have occurred to separate from your Great Father many of his red children, and as an unavoidable increase of white population, as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds it has become necessary that new arrangements should be entered into for the purpose of protecting you from the encroachment of the whites.
>
> In all parts of the world farmers seek for uncultivated land as eagerly as you, my red children, hunt in your forest for game. If you would cultivate your land it would then be considered your own property, in the same way as your dogs are considered among yourselves to belong to those who have reared them; but uncultivated land is like wild animals, and Your Great Father, who has hitherto protected you, has now great difficulty in securing it for you from the whites who are hunting to cultivate it.
>
> It appears that these islands upon which we are assembled in Council...Under these circumstances...might be made a most desirable place of residence for many Indians who wish to be civilized as well as be totally separated from the whites, and now I tell you that your Great Father will withdraw his claim to these Islands, and allow them to be applied for that purpose.[12]

Sixteen Anishnabe attached their totems to this document in acceptance of their understanding of the terms of surrender which Bond Head advanced.[13] The foregoing outline demonstrates that Bond Head desired

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[12] Indian Treaties and Surrenders, 1680-1902, supra note 1 at 113.

[13] There appear to be many technical irregularities in the 1836 treaty. Briefly, some of these difficulties are as follows:

1) Bond Head was not completely aware of the terms of the Royal Proclamation which dictated British policy in land surrenders: Indian Commission of Ontario, Consolidated Statement of Facts Claim of the Saugeen and Newash Bands of Ojibwa, Treaty 45 1/2, July 7, 1981, Document 27, Col. Givens to Chief Superintendent D.C. Napier, August 20, 1836.
2) Bond Head did not call a public meeting for the purpose of the surrender as set out in the Royal Proclamation. He did not make this object known beforehand to either the First Nations or Lord Glenleg: ibid.
3) Bond Head stated that consideration in the treaty would be that the Crown would release its interest in the islands, yet it is

a treaty on Manitoulin to reduce Crown expenditures for presents bestowed upon Native peoples, and he also desired their removal from arable land in other parts of Upper Canada.[14]

The Native people who gathered on Manitoulin for the reception of presents from the British in 1836 had at least two identifiable objectives in the allocation of land when a treaty was proposed to them. As the following paragraphs will show, first, they wanted to maintain their traditional exercise of decision-making in construing the treaty and, second, they wanted to irrevocably affirm that Manitoulin Island would be under exclusive Aboriginal jurisdiction. While these two objectives were not dichotomous, the former ambition was compromised because the focus on the latter goal captivated the First Nations' attention.

Traditionally, First Nations did not allocate land use in the exercise of their treaty decision-making powers by conducting their relations with other people in a static way.[15] Relationships were continually renewed and reaffirmed through ceremonial customs.[16] For

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not clear that the Crown had a claim to the islands since the land was analogous to "Indian territory" in the Royal Proclamation, and the land had never been the subject of treaty before: ibid.

[14] In fact, Bond Head secured a surrender of 1.5 million acres of land in south-western Ontario at the same meeting. This treaty is known as Treaty 45 1/2: see Indian Treaties and Surrenders, 1680-1902, supra note 1 at 113. For British criticism of Bond Head's policies at the time of the 1836 treaty see: Sub-committee appointed to make comprehensive inquiry into the state of the Aborigines of British North America, Report on the Indians of Upper Canada 1839 (London: W.Ball, Arnold, 1839; reprinted Toronto: Canadiana House, 1968).

[15] Bruce M. White, "A Skilled Game of Exchange: Ojibway Fur Trade Protocol" (1987) Minnesota History 229.

[16] For a description of the rigorous formalities involved in Ojibway diplomatic relationships, see Peter Jones (Kahkewaquonaby), History

example, as was demonstrated in the last two chapters, First Nations required the exchange of gifts and recurrent deliberations to distribute land. Dynamic and repetitive allocative practices were employed because resource use was "ecologically specific to the scarcity of the particular resource and to the traditional use of the land"[17]. Since ecology and scarcity could combine to change land and resource use, it was important to continually meet to determine where and when sharing and exclusion should occur. Thus, renewal and re-interpretation was practised to bring past agreements into harmony with changing circumstances. First Nations preferred this articulation of treaty-making in the exercise of their powers of self-government because it was consistent with their traditional land use and oral tradition[18]. The idea of the principles of a treaty being "frozen" through terms written on paper was an alien concept to the Anishnabe.

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of the Ojibway Indians with Special Reference to their Conversion to Christianity (London: A.V. Bennett, 1861) at 105-107 & 111-128 and F. W. Major, Manitoulin: The Isle of the Ottawas (Gore Bay: Recorder Press, 1974) at 11-15. For an example of the formalities of treaty making in Haudonoshonee culture, see Francis Jennings et al, eds., The History and Culture of Iroquois Diplomacy (Syracuse, NY: Syracuse University Press, 1985) at 18-21.

[17] William Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England (Toronto: McGraw, Hill, Ryerson, 1983).

[18] The compelling force of oral traditions has been expressed as follows:

> Words did not merely represent meaning. They possessed the power to change reality itself...They [Indians] relied on the ability to use and manipulate language-the fluent and artful use of words-to influence not only other people but also spirits...Although they employed a few mnemonic devices-wampum belts and strings, board plates or bundles of notched sticks-these were no substitute for words...Oral traditions have not been static. Their strength lies in the ability to survive through the power of tribal memory and to renew themselves by incorporating new elements.

Penny Petrone, Native Literature in Canada: From the Oral Tradition to the Present (Toronto: Oxford University Press, 1990) at 10 & 17.

Therefore, to facilitate these recurrent meetings in treaty negotiations, First Nation sovereignty was exercised through the spoken word and Wampum belts, and not through written statements.[19] The reception of presents was also a part of the traditional ceremonial and oral nature of treaties. For example, as has been illustrated the exchange of presents was an important element in formalizing the Treaty of Niagara and the Proclamation. The gathering for presents provided an opportunity to meet in council and exchange words and material goods to reaffirm or modify previous agreements according to changing conditions. The exchange of gifts symbolized the mutual obligations the parties agreed to in their relationship. This explains why First Nation leaders would travel such long distances to receive a few trinkets that were monetarily of trivial value.[20] One has the feeling that many British leaders never fully perceived the Native treaty pattern of ceremonial exchange and renewal that occurred through meeting in council and exchanging presents.[21] For most British officials

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[19] Wampum was the "word" or the "voice" containing messages to be delivered. Wampum played a large role in conveying, accepting, or rejecting messages and proposals at treaties. The presentation of wampum served as a confirmation of the words spoken.
Jennings et al., supra note 16 at 111.

[20] Some chiefs spent six weeks and travelled as far as 500 miles to attend general councils to reaffirm their agreements and receive their distribution of presents: Anna Brownell Jameson, Winter Studies and Summer Rambles in Canada (Toronto: McClelland & Stewart, 1965) at 115.

[21] In fact, a significant First Nations/settler war (Pontiac's war in the early 1760's) was fought because the British did not understand that the giving of presents was "rent" for the land they were using and part of the treaty process: J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989) at 73. See also Richard White, The Middle Ground: Indians, Empires and Republics in the Great Lakes Region,

the exchange of presents did not signify that they were binding themselves to mutual obligations.

Set against Native customs of periodic treaty revisions and the affirmation of mutual obligations through gift giving, Bond Head's proposal to designate Manitoulin forever an insular refuge for Indians negatively struck at the core of traditional Aboriginal concepts of treaties and diplomacy. The implications of Bond Head's proposals were as follows. If First Nations were persuaded to live on Manitoulin Island separately from "white" settlers as he envisioned, then changing land use, recurrent treaties, and gifts to accommodate this purpose would diminish. With First Nations' land use being permanently restricted to Manitoulin, there would be no opportunity for them to use other territories if ecology or scarcity combined to make the Island's lands and resources unproductive and deficient in meeting First Nations' needs. Furthermore, because First Nations could only use the lands and resources of Manitoulin Island, customary practices of seasonal rotation over different lands, such as leaving certain areas fallow each year[22], would become next to impossible. This would subvert First Nations' preference in traditional land use practices because they would no longer assemble in councils to revise and renew the treaty as circumstances surrounding the allocation of land and resources changed.

The reduction of gifts and, from the First Nations' perspective, the reduction of mutual obligations, was also threatened by the treaty

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1650-1815 (Cambridge: Cambridge University Press, 1991) at 223-314.

[22] See Chapter 1 notes 43-44.

the Crown proposed. Bond Head's full intentions to terminate gifts were concealed from the First Nations when he came to Manitoulin to negotiate a treaty because of non-disclosure, and because he linked the proposed treaty with the 1764 Treaty of Niagara. Bond Head hid the fact that the Crown intended to decrease and eventually discontinue the bestowal of gifts, despite this being the principal reason that the British Parliament and Lord Glenelg had commissioned him to investigate the Indian situation.[23] Evidence of the paramountcy to which the British assigned this issue is demonstrated by the fact that the British vigorously pursued their objective to reduce gifts during the next councils on Manitoulin Island in 1837[24] and 1838.[25]

Bond Head's full intentions to terminate gifts were also concealed from the Anishnabe because he linked the proposed treaty with the 1764 Treaty of Niagara. The Treaty of Niagara proposed that First Nations and the Crown would live in peace, friendship and respect in a state of mutual non-interference.[26] The First Nations remembered that in touching the wampum belt at the Niagara treaty council the Crown promised that in return for their friendship, it would send its warmth

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[23] PAC RG 10, Vol. 389, Colborne to Glenleg, January 22, 1836.

[24] Chief Superintendent Jarvis told First Nations assembled at Manitoulin in 1837 that in three years the Crown would no longer bestow presents on people who were living in the United States. Jarvis stated:

> You must come and therefore live under the protection of your Great Father, or lose the advantage which you have for so long enjoyed, of annually receiving valuable presents from him.

Jameson, supra note 20 at 152.

[25] "There was a good deal of lobbying as officials sought to persuade Indians to settle on Manitoulin": John Webster Grant, "Rendezvous at Manitowaning" (1979) 28 The Bulletin 22 at 24

[26] See Chapter 2 note 32.

(presents)[27]. First Nations also recalled that the British promised "if you should ever require my assistance...my hand will immediately be stretched out to assist you".[28] Since the Treaty of Niagara was a treaty that was preserved in wampum and oral tradition[29], Manitoulin First Nations regarded the 1836 treaty, with Bond Head's reference to the gathering at Niagara, as an extension and re-affirmation of a prior treaty, and thus in harmony with their preferred method of treaty diplomacy. As such, it may have been easy for them to assume that assemblies and the bestowal of gifts would continue as before, and that therefore their traditional mode of treaty making would not be compromised. Bond Head connected his proposal with the former treaty by stating as follows:

> Seventy snow seasons have now passed since we met council at the crooked place (Niagara) at which time and place your Great Father the King and the Indians of North America tied their hands together by the Wampum of friendship.[30]

Since Bond Head did not divulge his desire to end the practice of gathering for presents, the Anishnabe must have regarded the 1836 treaty as an affirmation and preservation of their concepts of treaty formation. They must have felt that they were once again getting the opportunity to confirm that a state of mutual non-interference would exist between First Nations and the Crown. This impression would have

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[27] Donald Smith, Sacred Feathers: The Reverand Peter Jones (Kahkewaquonaby) and the Mississauga Indians (Toronto: University of Toronto Press, 1987).

[28] Ibid.

[29] Though the Treaty of Niagara affirmed and incorporated the Royal Proclamation.

[30] Indian Treaties and Surrenders from 1680 to 1902, supra note 1 at 113.

been strengthened because Bond Head linked it to a former treaty and attached wampum to the treaty which would have appeared to give even greater deference to traditional native forms of agreement.[31]

In the treaty of 1836 however, there was another factor, aside from non-disclosure and the form of the treaty, which concealed the Crown's intentions and potentially marginalized the Native desire to exercise their sovereignty according to their aspirations. In particular, the convergence of the parties' substantive goals to affirm a once and for all First Nation title to land on Manitoulin reduced the ability of First Nations to advance their aspirations in other areas, and thus their objective to continue traditional treaty protocol and rotating land use was not explored.

From a First Nations' perspective, the treaty of 1836 was desirable because it allocated land to them, to the exclusion of the settlers.[32] The 1836 agreement purported to create a static state of affairs between the parties because First Nations obtained an assurance that they could possess land on Manitoulin Island to the exclusion of colonizing settlers.[33] This treaty implemented this objective

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[31] PAC RG 10, Vol. 391, Head to Glenleg, August 20, 1836.

[32] Chief E-do-wish-cosh stated his understanding of the 1836 treaty in 1861 as follows:

> The treaty of 1836 which you allude to...was understood by our chiefs then that this Island was to be exclusively for the Indians.

(October 1861) 32 The Christian Guardian no. 46 at 180.

[33] In 1862, Wah-cow-sai, a Potawotomi chief explained his understanding of the 1836 treaty:

> I was present at the treaty of 1836, heard with my own ears its discussion it was said by our Great Father that this island was to be the exclusive property of the Indians and had given up his claim in our favour [sic].

Ibid.

because it created an exclusive sanctuary on Manitoulin for all Aboriginal peoples and did not allocate rights to the use and benefit of the surrendered land to any one particular First Nation. Instead, the treaty gave control of land to any and all Aboriginal peoples who decided they would like to live there. This was also done to prepare the way for migration of other Nations so that there would be no conflict between various First Nations as to who received the advantage of the surrender. Thus, the 1836 treaty was unique from a First Nations' perspective because they were given the power to exclude "white" settlers from Manitoulin and they were given joint title to the land with all other Aboriginal peoples.[34] Future generations of First Nation peoples would take Bond Head's agreement at face value and claim their ownership of land on Manitoulin island to the exclusion of non-Native people.[35]

The allocation of land in the 1836 treaty demonstrates an intertwining of objectives both within and between parties. The intersection of goals relative to land use occurred at a point where the "western" values of certainty of title were aligned[36], while their

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[34] J.R. Wrightman, Forever on the Fringe: Six Studies in the Development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 42 & 48.

[35] In 1862, a chief named Wah-cow-sai represented the feelings of the Indians on Manitoulin island when he stated:

"I remember quite well when the last treaty was made in 1836. I was present; I as at the council at that time, and heard what was then agreed to. We don't wish to give up the Island, and do not want the whites to live upon it."

Canada, Sessional Papers (1863) 26 Victoria, No. 63

[36] The concept of exclusive land use for First Nations, while not unpractised and unknown among them, was nevertheless more consciously imbricated among "western" settler nations than it was amongst First Nations: Cronon, supra note 17 at 55-69.

aspirations in continuing traditional notions of treaty protocol potentially diverged. This inadvertently pushed the parties towards assimilation because the parties' efforts to reach an agreement merged around the focal point of a shared objective. The shared goal of certainty of title partially concealed the Crown's full intention in entering the treaty and marginalized the expression of the Native desire to maintain sovereignty through the establishment of treaties in accord with their traditional culture, though this may not have been apparent to all First Nation participants. As such, the net result of the treaty was that traditional First Nations' concepts of sharing resources through mutual exchange and gift giving was potentially compromised to secure the assurance of exclusive Native jurisdiction over land on Manitoulin Island.[37]

Thus, though First Nations' were not fully cognizant of the potential change to their decision-making process being introduced in the treaty, it was their view that by reserving Manitoulin for all First Nation peoples they were maintaining their sovereignty over land use decisions on the Island.

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[37] The fact that First Nations did not exercise their sovereignty in a traditional manner in entering into the treaty of 1836 should not be taken to mean that thereby their sovereignty was extinguished. First Nations should be permitted to choose the method by which they exercise their sovereignty to realistically allow them to deal with the diverse circumstances they encounter. R. v. Sparrow (1990), 70 D.L.R. (4th) 385 (S.C.C.) at 397 held that "existing aboriginal rights must be interpreted flexibly so as to permit their evolution over time...[A]n approach...which would incorporate frozen rights must be rejected."

CHAPTER FOUR

SETTLEMENT AND RELIGIOUS DIVISION: 1837-1860

By 1860, Manitoulin Island had developed a substantial Native population of 1,350 people.[1] This number represented about one half of the Aboriginal population in the northern Indian superintendency of Upper Canada.[2] Many of these people were settled in villages that were encouraged by the Catholic or the Anglican churches. For example Wikwemikong, which was the largest Catholic settlement on Manitoulin, grew from a population of 12 families in 1837[3] to 700 people by 1860.[4] Similarly Manitowaning[5], which was supported by the Anglicans, grew from 34 people in 1837[6] to 182 people by 1852.[7] The settlements of Catholic Wikwemikong and Anglican Manitowaning saw the Colonists engage in policies designed to change First Nations use of land through a scheme of "acculturation and assimilation".[8] One of the most striking

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[1] J.R. Wrightman, Forever on the Fringe: Six Studies in the Development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 20. For a summary description of the settlements on the island in this period see also William H. Smith, Canadian Gazetteer comprising Statistical and General Information respecting all parts of the Upper Province or Canada West (Toronto: R.H. Rowsell, 1846) at 105-109.

[2] Ibid.

[3] Rev. J. Paquin, S.J. Modern Jesuit Indian Missions in Southern Ontario (undated manuscript) at 119.

[4] Wrightman, supra note 1 at 44.

[5] Manitowaning and Wikwemikong were only eighteen miles apart from each other.

[6] Sophia Rowe (Anderson's daughter), transcript of written memorial to T.G. Anderson.

[7] PAC RG 10 Vol. 621A at 96, George Ironside to Bruce, July 16, 1852.

[8] E. Palmer Patterson, The Canadian Indian: A History Since 1500 (Don Mills: Collier-MacMillan, 1972) at 89.

examples of the differences between First Nation and Crown perspectives of land use is reflected in the religious contest waged over the Indigenous inhabitants of Manitoulin Island between 1836 and 1860. While each religious order had a different emphasis on how "civilization" was to occur, in the end each group sought to persuade the Anishnabe people to use the land in the way that they themselves did. Many First Nation peoples resisted these efforts, though once again there were differing degrees of acceptance within the First Nation communities.

While there was periodic discord among the various religiously sponsored Native communities, Anishnabe people spread out from these two main settlements to occupy and use much of the Island.[9] During this internal migration the Anglicans and Catholics attempted to break Manitoulin into two religious zones, with the Anglicans occupying the western portions and the Catholics occupying the peninsula on the east. These communities each had their own unique character as First Nation peoples chose various degrees of traditional and "western" lifestyles in the villages on each side of the Island.[10] To assess the consequences

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[9] Wrightman, supra note 1 at 20-40, particularly map at 30.

[10] Substantial settlements from 1836 to 1862 were as follows: Catholic: Wikwemikong, Mechecowdenong or West Bay, Waiebijiwang or Little Current; Anglican/traditional: Manitowaning, Sagidawong or South Baymouth, Sheguinandah; Traditional: Sheshigwaning.

The growth and development of these and other First Nations' settlements on Manitoulin has been documented elsewhere and thus their examination is outside the scope of this paper. See generally Ruth Bleasdale, "Manitowaning: An Experiment in Indian Settlement" (1974) 66:3 Ontario History at 147, Douglas Leighton, "The Manitoulin Incident of 1863: An Indian-White Confrontation in the Province of Canada" (1977) 69:2 Ontario History at 113, Wrightman, supra note 1 at 20-56 and F.W. Major, Manitoulin: The Isle of the Ottawas (Gore Bay: Recorder Press, 1974) at 17-42.

of this period of contact on First Nations' conceptions of land use we will examine religious and governmental influence at Manitowaning and Wikwemikong. The Anglican community at Manitowaning will be surveyed before turning our attention to Wikwemikong.

MANITOWANING

The Anglican settlement at Manitowaning was established with the official sanction of the Colonial government. In 1831 an Anglican named Cameron suggested setting aside Manitoulin Island for missionary purposes.[11] This same suggestion was made in 1834 by another Anglican, Reverend Adam Elliot.[12] Both of these proposals did not seem to draw wide support. In the summer of 1835 Thomas Anderson, Superintendent of Western Indians, canvassed First Nation peoples around Lake Huron to see if they would be favourable to Manitoulin Island being set aside for their use. He determined that there was considerable interest in this proposal as many Anishnabe people were planning to locate there in the coming years.[13] With this information in hand, Anderson suggested that Manitoulin be secured for settlement and missionary purposes. This time the proposal for a colonial presence on Manitoulin received the backing of Sir John Colborne the the Lieutenant Governor of Upper Canada[14] and the project was approved for operation. With the support

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[11] Waddilove, The Stewart Missions and Report and Correspondance of the Late Bishop of Quebec's Upper Canadian Travelling Mission Fund, 1844 (Hexham, Edward Pruddah, 1844) at 27.

[12] Ibid. at 54.

[13] Ontario Archives, Strachan Papers, Anderson to Phillpots, 18 July 1835.

[14] Colborne to Lord Glenleg, 22 January 1836, "Return to an Address of ...the House of Commons 17 June 1839" in Hohn Webster Grant, "Rendezvous at Manitowaning" (1979) 28 The Bulletin 22 at 28.

of the government it appeared as though the mission and its attendant goals of "inculcat[ing] in the Indian the values and practices of white civilization"[15] would meet with success. However, we will see that there were various obstacles that the project encountered which led to its demise as a mission.

In May of 1836 the Manitowaning mission was initiated, under Anderson's supervision, as its first buildings were erected and two important figures arrived, Reverend Elliot and a schoolmaster.[16] However, in the summer of 1836 Manitowaning's viability as a religious centre to direct cultural change among the Anishnabe was immediately challenged by Bond Head's vision of the Island. It was on the small clearing at Manitowaning that 2,697 First Nation individuals gathered to receive presents and establish the 1836 Treaty.[17] As will be recalled, Head viewed the Island as an insular refuge where First Nations would gather and be free to continue to practice their pursuits of hunting and fishing, without further corruption by the colonists. Anderson's proposed missionary establishment at the site flew in the face of Head's philosophy that sought to isolate First Nations in their traditional cultural patterns. Head recognized this conflict in objectives and immediately ordered Anderson to discontinue the mission. Anderson followed orders and returned to Coldwater to watch the demise of that experiment in missionary acculturation. Thus in the summer of 1836,

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[15] Bleasdale, supra note 10 at 147.

[16] Society of Converting and Civilizing the Indians, 6th Annual Report (1836) 16-19.

[17] W.H. Smith, Canadian Gazetteer: Statistical and General Information Respecting All Parts of the Upper Province, or Canada West (Toronto: H.W. Roswell, 1846) at 106.

there was every indication that the principles that established mutual non-interference in the Treaty of Niagara and the Treaty of 1836 would be followed, and directed cultural ventures would be thwarted.

However, in 1837 Anderson somehow received sufficient financial support and the requisite permission to again locate a mission at Manitowaning. Yet, upon Anderson's resettlement, it did not appear as though there was anyone living in the village,[18] and this left the mission to start from scratch. It was not until the summer of 1838 that Manitowaning began to take on promising signs of life for Anderson. Bond Head was no longer the Lieutenant Governor and the new Governor, Sir George Arthur, viewed the establishment of a mission at Manitowaning in a much more favourable light.[19] Thus, on the renewed urging of Bishop Strachan, and with the probable encouragement of Sir John Colborne, the government was once again committed to the provision of financial support for a mission at Manitowaning.[20] In October of 1838, a party of thirty four non-Native people took up residence at the establishment to direct the "civilization" of the Aboriginal people there. This party included a surgeon[21], a schoolteacher[22], a clergyman[23], and various artisans and labourers[24].

The establishment of the settlement at Manitowaning violated the agreements at Niagara and of 1836 in two ways. First, T.G. Anderson,

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[18] Wrightman, supra note 1 at 23.
[19] John Webster Grant, "Rendezvous at Manitowaning" (1979) 28 The Bulletin 22 at 29.
[20] Wrightman, supra note 1 at 24.
[21] Smith, supra note 17 at 106.
[22] Wrightman, supra note 1 at 24.
[23] Major, supra note 10 at 17.
[24] Smith, supra note 17 at 106.

his party, and the government had no right or licence to occupy the land they cleared. Their presence was in contravention of the terms of the Treaty of 1836 which stated:

> It appears that these islands upon which we are assembled in Council...Under these circumstances...might be made a most desirable place of residence for many Indians who wish to be civilized as well as be totally separated from the whites, and now I tell you that your Great Father will withdraw his claim to these Islands, and allow them to be applied for that purpose.[25]

Thus Anderson dishonoured the treaty and breached its provisions by living on land that the Crown had withdrawn its claims to. The second point that Anderson violated by the establishment of the mission was through his attempts to interfere with the affairs of the Anishnabe. Anderson's disregard of the agreed-to state of mutual non-interference leads one to question the honour of the Crown in abiding by its own solemn agreements. Here was a situation where the Crown publically espoused one course of action with its First Nation allies and then pursued a course of action in opposition to their promises.

Despite Anderson's egregious defilement of the sacred promises of the Crown, his actions could not continue without eventually some form of cooperation coming from the Anishnabe. Here again one sees the diversity of objectives among First Nation peoples. The cooperation for Anderson's plan occurred through some Anishnabe people accepting the principles that he was trying to establish. While it is arguable whether individual Anishnabe had the formal authority to change the agreements solemnized by their community, the fact nonetheless remains

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[25] Canada, Indian Treaties and Surrenders from 1680-1890, reprinted ed. (Toronto: Coles, 1971) at 113.

that individual First Nation people did accept Anderson's intrusions. In 1838, the first year of the establishment at Manitowaning, four Anishnabe people converted to Anglicanism. We are told by Sophie Anderson, T.G. Anderson's daughter, that:

> Soon the Indians came to us, seeking instruction, and the first two who desired to be baptized were an old man and his squaw [sic]. They were called Adam and Eve and were lawfully married at the same time. Two of their sons, grown men, were also baptized. One of them was called Abel.[26]

It is interesting to observe that Manitowaning must have been regarded as something of a racial and cultural genesis by Anderson and company. Naming the first converts Adam and Eve and one of their sons Abel speaks to their hope of populating the country with Christians. In retrospect, it was the Colonists who were entering into the lone and dreary world as the establishment suffered continual problems, that the conflict in vision and promises foreshadowed, throughout the period of its official existence.

Eventually, more Anishnabe people came to join themselves to the settlement at Manitowaning, though their participation was usually without great commitment to the vision offered by the mission. At the beginning of 1839 over three hundred Anishnabe came to take up residence at Manitowaning.[27] This group included some local Ojibway and a small group of avowed Anglican Potawatomi and Ojibway from the Lake St. Clair area at the south of Lake Huron.[28] These people were quite transient in their participation at Manitowaning as many Potawatomi eventually

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[26] Major, supra note 10 at 19.
[27] Wrightman, supra note 1 at 25.
[28] JLAC, Appendix EEE.

returned to Lake St. Clair[29], while other local Ojibway maintained their seasonal pattern of life. Despite the inconsistency of commitment, there were some who accepted Anderson's vision of a Christian farming community.

In keeping with Anishnabe support, Anderson crudely surveyed a village plot and constructed some housing, a sawmill, and a school. He also cleared some land for future Anishnabe agriculture.[30] It was at this point that Anderson attempted to change Anishnabe concepts of land and resource use by introducing them to a European style of agriculture.[31] As will be recalled, in the past the Anishnabe had farmed but they had undertaken this activity in communal fields. Anderson's methods necessitated individual plots of land being cultivated and used by individuals. The Anishnabe adaption to these concepts was mixed. As one writer has observed:

> One of the most encouraging signs of progress was the Indians' abandonment of their traditional practice of ploughing common fields. However, they continued to operate on the principle of usufruct. As long as an Indian family cultivated a particular plot of land that family was considered to have exclusive rights to that land and its produce. But only land in immediate use could be classified as one's property.[32]

Thus, it is evident that some Anishnabe were willing to adapt their traditional conceptions of land use. However, in their acceptance of these new principles one sees that they undertook this change within their cultural framework by altering the new system to suit their preferences.

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[29] Wrightman, supra note 1 at 26.
[30] Ibid. at 25.
[31] Ibid.
[32] Bleasdale, supra note 10 at 150.

The piecemeal acceptance of Anderson's principles continued to grow and by 1843 there were over 37 Anishnabe homes in use. However, to bring some perspective to the partiality of support that Anderson's teachings were receiving, it is important to observe that while 322 Anishnabe had contact with the establishment of Manitowaning, only 176 had entered the Anglican faith and there had been no baptisms for two years.[33] Furthermore, many Anishnabe people chose to live a more traditional lifestyle and over half of the 176 Anglicans lived in customary seasonal encampments.[34] This was a source of tremendous disappointment to the government and missionary societies that supported the establishment. It was only to be a matter of time before the establishment would abandon its objectives of "civilizing" the Anishnabe. It would be sixteen more years, however, before the project would be officially terminated in 1861.

In 1845 the Manitowaning project underwent a change. Anderson left for Toronto to take up a position as Chief Superintendent for Indian Affairs and George Ironside replaced him as the District Superintendent at Manitoulin. Similarly, George Brough, the original minister, left Manitowaning, and he was replaced by Reverend Frank O'Meara. Manitowaning started to shrink under these new leaders despite the added energy and skill they possessed. The government and religious leaders increasingly lost control as the Anishnabe chose to live with fewer of the items of settler society in other places on the island.

The faltering of colonial control can be demonstrated through

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[33] JLAC, Appendix EEE.
[34] Wrightman, supra note 1 at 27.

two events. First, despite substantial numbers of Anishnabe coming to live on Manitoulin Island, most chose to settle apart from Manitowaning. Second, the Anishnabe often chose to defy the commands of the government leaders when they viewed these requests as not being in their interests. The effect of these two occurrences will now be examined.

First, the distance and non-western character of most Anishnabe communities on Manitoulin made colonial supervision weak. By the mid 1840's significant numbers of Anishnabe were living at places far removed from Manitowaning.[35] The Colonial leaders had little influence over these people because all the Anglican or traditional settlements had no colonial agents of change residing in them, and with the partial exception of Manitowaning, they were usually only visited once a year for a day, if at all, by the Manitowaning missionary.[36] A quote from Reverend O'Meara's writings about his labours on Manitoulin Island serves to illustrate the spacial and cultural distance between the two societies. O'Meara wrote:

> It is impossible for anyone who has not undertaken those missionary journeys to have an adequate idea of what has to be endured in them. It is not the intensity of the cold, or the snow drifts carried in one's face by the northerly winds... it is when they are passed and the Missionary is about to seat himself on the ground by the wigwam fire, that the worst part of the expedition has to be encountered. The filth and vermin by which he sees and feels himself surrounded are quite sufficient to make him long for the morrow's journey, even though it be a repetition of the

[35] For a description of where people lived, see Chapter 4 note 10.

[36] For a detailed first hand account of Anglican missionary activity on the Island in this period, see F. O'Meara, Report of a Mission to the Ottawahs and Ojibwas, on Lake Huron (London: The Society for the Propagation of the Gospel, 1846) and F. O'Meara, Second Report of a Mission to the Ottawahs and Ojibwas, on Lake Huron (London: The Society for the Propagation of the Gospel, 1847).

> biting winds and blinding drifts which he has already experienced. Still happy would he be, and soon would he forget even these inconveniences if, in most cases, he were received as a welcome guest, and his message was listened to with any degree of attention: but the averted eye, the head covered up in the filthy blanket that forms their only covering by day and night, and laid down to sleep, are too often the returns met for the labour endured. ...Besides that, the squalid wretchedness, and starvation that usually surrounds him, are sufficient to make his heart bleed for the poor creatures...[37]

One has to read past O'Meara's racist observations in order to reveal the relationship between the Anishnabe and the Colonists (though racism certainly influenced at least part of the relationship). Upon close examination, one gets the picture that the Anishnabe were not very interested in what the Colonists were promoting. We also see that the Colonists were also not very impressed with traditional Anishnabe life. As a result, the Anishnabe felt no loss whatsoever by locating at a distance from Manitowaning, and the Colonists had no great desire to live the lifestyle of an alien culture and they sought to change it. Therefore, it can be observed that Colonial attempts to direct cultural change on most of the Island was very weak given the distance between the communities and the non-western character of these places.

The second illustration of weak Colonial control is the Anishnabe's disregard of the government's commands or requests. The Anishnabe failed to abide by the settlers' boundaries, set by the church and supported by the government, that attempted to restrict the Catholics to the east side of the Island and the Anglicans to the west. As the Catholic population grew, many Anishnabe spilled out from the Wikwemikong peninsula to live in other places on the Island. This

[37] O'Meara, supra note 36.

exasperated the Anglicans to no end as these actions were undertaken in spite of their protestations. Furthermore, once people were settled throughout the Island, the government could not dictate how they would use the resources. The Anishnabe chose to continue fishing and hunting and living in a seasonal migratory pattern in the face of strenuous persuasion to stay in one place and cultivate their lands. Others wanted to be free to harvest the wood from the land and they frequently disobeyed the Superintendent's instructions about where they were to cut wood and who they were to sell it to.[38]

The feeble effects of government control at Manitowaning and their failure to convince the Anishnabe to take up a sedentary agricultural life led to the dissolution of the experiment at Manitowaning. One commentator on this period has noted:

> By 1857, it [Manitowaning] was only a collection of sometimes unoccupied Indian houses, its lands largely uncultivated, and its school used primarily by the children of white personnel.[39]

Another scholar has similarly noted:

> The 1858 report of the condition of Indians of Canada West revealed the extent of the Ojibway's rejection of government supervised cultural change. The Commissioners reported that many of the inhabitants had emigrated to join the Newash Band, others had settled at Garden River, and a few had moved to Manitowaning. Only twenty-two houses remained standing at Manitowaning, including the houses of the officers of the establishment. No Indian children attended school regularly. The old workshops lacked Indians, tools and mechanics. The fields were completely neglected. Indians did not appear to attend church services.[40]

It is apparent that the Colonial attempt to alter Anishnabe attitudes towards resource use had met with only slight success. While the

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[38] Wrightman, supra note 1 at 35.
[39] Ibid. at 35.
[40] Bleasdale, supra note 10 at 155.

government was able to influence some to nominally receive its instruction and directions, most Anishnabe continued to pursue the traditional activities that they were promised could be practised without interference on Manitoulin Island.

WIKWEMIKONG

Wikwemikong was founded on a different basis than Manitowaning and therefore, unlike Manitowaning, never represented as strong a threat to the principles agreed upon at Niagara and in 1836. There was already a settled group of Odawa people there when colonialists arrived, whereas the leaders of Manitowaning would continually try to lure people to live in its environs. In 1825 a group of Odawa people arrived from Arbre Croche (now Harbour Springs) Michigan and set up a small agricultural community at Wikwemikong.[41] These people came under the leadership of Assickinac and sought to escape removal to west of the Mississippi River under United States policy. The Odawa received a cash settlement from the United States government and chose Manitoulin because it was their former homeland. These Odawa were already Catholic and as such were more active agents in seeking Catholic religious influences and this formed the basis for the establishment

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[41] L'Arbre Croche was the "headquaters for the Ottawa": Helen Hornbeck Tanner, Atlas of Great Lakes Indian History (Norman: University of Oklahoma Press, 1982) at 62. The Ottawa were also dispersed to the south-west in 1820's, dividing them into two with the southern Odawa eventually going to Kansas and Oklahoma. At this point each group developed its own distinct history. For an account of the non-Manitoulin Odawa history of the "Ottawa", see William E. Unrau & H. Craig Miner, Tribal Dispossession and the Ottawa Indian University Fraud (Norman: University of Oklahoma Press, 1985) especially at 51-58 to study the pressures encountered to leave Michigan.

of a Catholic mission.

In 1836 Father Jean-Baptiste Proulx spent the summer as a visitor on Manitoulin and ministered to the Odawa at Wikwemikong.[42] In 1838 Father Proulx was assigned by Bishop Remy Gaulin to take up permanent residence with the 150 people of the settlement. In 1839 more Odawa migrated to Wikwemikong which substantially increased their population and resources. These immigrants brought livestock and agricultural implements and increased the numbers at Wikwemikong to 350 occupants.[43] It was during this migration that one group of fifty refused to settle at the mission village and situated themselves at Sheshigwaning.

The Catholic settlements on the Wikwemikong peninsula continued to grow throughout the 1840's, ironically during the period when the Manitowaning settlement started its decline. In 1843 a government inquiry, the Rawson Report[44], revealed that Wikwemikong had 376 Odawa people living in 73 neat log homes with two hundred acres of land cleared. There was also a log church, a school, and a sawmill. The community was stable in its composition and the school teacher's salary was the only government contribution. The Odawa also possessed 19 horses, 58 cattle, 161 pigs, 8 sheep and 157 chickens. Despite the appearance of a primarily agricultural lifestyle the Commissioners of the Rawson Report noted:

> Their principle support at both villages is now derived from farming **and fishing** [sic] they sometimes kill hares, partridges and even deer and bears. They also manufacture considerable quantities of maple sugar, of an excellent quantity, for which **they find**

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[42] Wrightman, supra note 1 at 24.
[43] Ibid. at 25.
[44] Rawson Report in Major, supra note 10 at 24-25.

> **a market** at Penetanguishine, Goderich, and sometimes in the towns on the American frontier.[45]

Here we find that the Odawa, despite intensifying their agricultural habits, were still very much the fishers and traders of an earlier era. As with the Ojibway, they continued to adapt western forms of property use to their own cultural preference. Thus, their resource use remained strongly rooted in the preferences and practices of the past, the very attraction which led them to choose Manitoulin as a home in the first place.

Even in their farming practices the Odawa, as with the Ojibway, still let their principles of resource and land use dictate their actions. While the Odawa people at Wikwemikong were traditionally a more sedentary people than the Ojibway of Manitowaning[46], most would take decades before they would relinquish their seasonal resource use.[47] Even today, there is still an active minority who persist in traditional seasonal utilization. The continuing traditional Native economy is exemplified in the agriculture they practised in the 1840's. The Rawson Report observed:

> The land in the village is laid out in half acre lots, and a few farms of fifty acres were surveyed and staked out; but the labour and expense were found too great, and each Indian now selects such place as he pleases, and takes possession of it, in most cases without consulting the Superintendent or the Chiefs. As long as he continues to cultivate his piece of land, he enjoys quiet possession of it, but if he happens to leave it for a season, some other Indian will most likely enter upon it... They respect the boundary lines which have been drawn, but blocks of wild land

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[45] Ibid. at 25.

[46] Familiarity with sedentary agriculture perhaps partially explains why the Catholic settlement was outwardly more successful in encouraging an economy resembling the Colonists'.

[47] Wrightman, supra note 1 at 27.

> blocked out by the blazing of trees, or otherwise, by individual Indians, cannot be secured from intrusion.[48]

This quote demonstrates the continuing traditional perceptions of land use among the Odawa even amidst change. While they no longer cultivated land communally, as was observed with the Ojibway earlier, many did not yet embrace concepts of permanent possession of land without use.

The Odawa also had no desire to fully adopt the Colonist's perception of time. They did not want the bustle and commotion that its acceptance sometimes caused. The Odawa view of the world was cyclical, not linear.[49] This probably proceeded from their seasonal, not Julian calendar orientation to events. Their view of time influenced how they attended to their crops and other economic pursuits. It was recorded of their approach to resource development:

> The division of the day is not systematic. They generally rise about day-light and go to rest a little after sunset. They take a hearty meal before going to work, and during the day they work, smoke, rest, perhaps sleep, eat and drink alternatively, as happens to be convenient, without regard to time or place.[50]

Thus, it is evident that the Odawa continued to interpret and react to their world from a traditional framework while settled in the

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[48] Rawson Report in Major, supra note 10 at 25.

[49] Leroy Little Bear has expressed the Aboriginal concept of time as follows:

> In contrast to the western way of relating to the world - namely, a linear and singular conception - the aboriginal philosophy views the world in cyclical terms... Native people think in terms of cyclicity. Time is not a straight line. It is a circle. Every day is not a new day, but the same day repeating itself. There is no need to give each day a different name. Only one name is needed: day.

Leroy Little Bear, "Aboriginal Rights and the Canadian Grundnorm" in Rick Ponting, ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland & Stewart, 1986) 243 at 244-245.

[50] Rawson Report in Major, supra note 10 at 26.

Catholic villages.

In 1842 the Jesuits were again permitted to be active in Canada, and in 1845 two of their priests were assigned to Wikwemikong, bringing it greater vitality. Father Proulx left at this period (the same period when Anderson and Brough left Manitowaning) and Jesuit Father Jean-Pierre Chone and Joseph Hannipeaux were assigned to Wikwemikong. In 1846, two Jesuit brothers joined the village along with other personnel.

In 1846 a farm was created for the support of the Jesuits, and its lay manager began a program of Indian agricultural instruction.[51] Training also began in carpentry, boat-building, masonry and home-economics.[52] As the settlement at Wikwemikong became more developed and the settlement at Manitowaning declined, friction increased between the Catholics and Anglicans.[53] This discord was passed on to the First Nation inhabitants of the villages and once friendly relations between the Ojibway and Odawa sometimes suffered.[54] However, as has been demonstrated, the majority of disputes were between the Anishnabe and the western Colonists and their philosophies. In 1848, the Odawa and Jesuits could no longer contain their burgeoning population on the Wikwemikong peninsula, and at this point a large group moved to the western Anglican side of the Island. This intermingling of religious and cultural groups led to further dissension among the Officials as groups of Odawa and Ojibway started

[51] JLAC, 1858, appendix 24, query 13.
[52] Wrightman, supra note 1 at 29.
[53] Ibid.
[54] Ibid.

to fuse their association throughout the Island.

The decade of the 1850's saw the village of Wikwemikong become larger and increasingly political. At the end of the decade there were over 1,000 Catholic Anishnabe on the Island, 2,000 acres of land under their cultivation, and many Indigenous people instructed in the crafts and trades of the Colonists.[55] In the political realm, the Jesuits fanned the fires of self-government the Anishnabe espoused by assisting them in making declarations and laws that were aligned with the agreements at Niagara and in 1836.[56] Anishnabe Councils were held without the attendance of the Indian agent[57], and steps were taken to publish and preserve their interpretation of the treaty guaranteeing non-interference on their Island homeland.[58] This was the state of affairs at Wikwemikong immediately prior to the treaty of 1862.

CONTINUATION OF TRADITIONAL RESOURCE USE

There is strong evidence, aside from the above noted descriptions, that fishing and hunting remained integral to Manitoulin First Nations in the period 1836 to 1860. The continued pursuit of these traditional activities by most Anishnabe explains the resistance to assimilation and acculturation. Despite limited actions to the contrary, the

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[55] Ibid. at 27.

[56] There was an agreement between many of the Anishnabe that they would lay information against one another for illegal possession and trade in liquor: ibid. at 42.

[57] "A council was called at Wikwemikong that winter, which, to be within the law, should have been attended by the superintendent. He was not invited": ibid.

[58] "The message they [members of the Anishnabe Council] now carried to Anglican and Catholic alike was that, unless the Indians of the Island acted collectively, their lands would be 'stolen' from them for white occupancy": ibid.

Anishnabe continued to strongly prefer their traditional lifestyle of hunting, fishing and communal agriculture to that of individual yeoman-like farming.

The Anishnabe perspective on the allocation of their fisheries resource is evident in many of their actions and much of their correspondence of the period. In 1836 the fisheries around Manitoulin Island were harvested exclusively by the Anishnabe.[59] In the early 1840's, when non-Native fishermen became involved in the fishery around Manitoulin, the Anishnabe petitioned the government to fulfil its obligations to protect Anishnabe property and resources from the interference of the settler society. At a council on February 17, 1848 they instructed their agent to bring their concerns to the Governor General. Their agent noted:

> [The Ottawa and Ojibway fishermen] have long noticed, with feelings of distrust, the gradual encroachments of the whites upon their fishing grounds in the vicinity of their Island. That these places are yearly resorted to by persons under the pretence of mearly [sic] trading with the Indians while their real object is the catching and curing of fish, and, being always well prepared for carrying on the business, large quantities are annually secured and taken away by these intruders, to the great injury of the settlers here.[60]

This statement makes it apparent that the Anishnabe were very concerned that their resources were being intruded upon to their detriment. Their fishery was what they were fundamentally interested in, not the farming the settlers tried to introduce. This interest is confirmed by an observation of Rev. O'Meara, writing on December 1, 1846:

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[59] Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries Around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights" (1990) 6 Native Studies Review 1 at 13.

[60] PAC RG 10, Lytwyn, ibid. vol. 169 at 3029.

> The Indians having now all returned from their fisheries and settled down for the winter...The winter is the only season during which we can reckon on always having the Indians about us, and in regular attendance on the means of grace, for at other seasons there is always something to draw away a portion of them, with their families from the village...[61]

O'Meara further observed on December second:

> Finding the Indians who usually winter in the Ojibwa village have arrived, I spent the visiting portion of the day among them. These Indians generally spend the summer in different encampments on the Lake shore, and when they have made their fall fishery, come to stay at this place where they continue till the sugar season comes.[62]

It is apparent that in the mid 1840's the Anishnabe continued to practice their seasonal resource use. They occupied fixed villages in the winter where they most likely engaged in small scale trapping, snaring and ice fishing, in the early spring they would travel to the maple bushes, and in the late spring they would return to their fisheries. The summer would be spent in small scale communal agriculture while the hunting of big game would occur. Finally, in the fall they would return to their fisheries before setting up their fixed winter camp again.

Traditional Native allocation of land and resources continued throughout the 1850's. The concern for traditional resource use was reflected in the Robinson Huron Treaty.[63] Manitoulin chiefs from West

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[61] O'Meara, supra note 36 at 8.

[62] Ibid. at 8-9.

[63] The Robinson Huron treaty is outside of the scope of examination in this work because the treaty deals mostly with land off Manitoulin Island on the north shore of Lake Huron, and because Manitoulin Chiefs, though present, were scarcely involved in the negotiations. For further information on the Robinson Huron Treaty, see Douglas Leighton, "The Historical Significance of the Robinson Huron Treaties of 1850" (1982) [unpublished] (on file with Treaties and Historical Research in Ottawa under section X-20); Elizabeth M. Willwood, "The Robinson Treaties of 1850" (B.A. Thesis, Wilfrid Laurier University, 1977) (on file with Treaties and Historical Research in Ottawa under section X-66).

Bay, Sheguiandah and Wikwemikong participated in this treaty, in which the parties agreed, among other things,

> ...to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing...[64]

Participation in the Robinson Huron Treaty to reaffirm traditional hunting and fishing demonstrates that Manitoulin Anishnabe continued to protect their customary lifestyle. Their continued hunting and fishing on lands north of the Island also illustrates that they did not exclusively use the land and resources of Manitoulin Island after the Treaty of 1836. The Anishnabe persisted in their traditional seasonal land use off the Island because they required a greater land base than Manitoulin could provide, despite its large size. Agreement and participation in the provisions of the Robinson Huron Treaty illustrates their continued objective in relating to the land in places other than just Manitoulin Island.

The persistence of traditional subsistence activities throughout the 1850's is further evidenced by Anishnabe perseverance in their petitions relative to their fishery. When a non-Native fishermen was given a lease in 1855, this prompted the Indians to petition their agent to write:

> The Chiefs here inform me that all the fishing grounds about the Manitoulin have been secured to the Indians by treaty [1836] and as there are now between two and three hundred American fishermen engaged in the Trade on the Canadian side of this Lake, I would beg to be instructed as to what steps I am to take in the event

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[64] Alexander Morris, ed., The Treaties of Canada with the Indians of Manitoba and the North West Territories including the Negotiations on which they were Based (Toronto: Belford's, Clark and Co., 1880) at 305-309: see affixed signatures for Manitoulin Chiefs.

> of their extending their operations to the Indian fishing grounds on the Island.[65]

This concern resulted in lease arrangements being based on "local negotiations between non-Native fishermen and the Chiefs of the Ottawa and the Ojibwa"[66]. "Although facilitated by agents of the Indian department and ultimately sanctioned by the Governor General, the leases reflected Native control over fishery management and provided a measure of self-determination in the changing economy of the Great Lakes."[67] This continuation of native control existed until the late 1850's, when the government subverted the 1836 treaty by allowing leases of portions of Manitoulin's fishery and requiring the Anishnabe themselves to secure licences.

In 1857 a Fishing Act[68] was passed which, though silent on the Aboriginal fisheries, was interpreted by William Gibbard, the fisheries commissioner of the Upper Great Lakes and the overseer in the implementation of the Act, to mean that Anishnabe fishermen on Manitoulin Island had to apply for leases to fish in their waters. This led the Odawa to proclaim:

> [T]he said Islands with others in the neighbourhood, were set apart for the exclusive use and benefit of the Indians at the same time as the Island on which they now reside.[69]

The Anishnabe continued to stand firm and assert their interpretation of the Treaty of Niagara and the 1836 Treaty, by which they were to remain undisturbed in the possession of their resources, which in this

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[65] PAC RG 10, vol. 573 at 118 in Lytwyn, supra note 59 at 16.
[66] Ibid. at 16.
[67] Ibid.
[68] The Fishing Act (1857), Province of Canada, 20 Victoria, c. 21.
[69] PAC RG 10, vol. 573 in Lytwyn, supra note 59 at 17.

situation included their fishery. The effect of their fisheries being leased without their consent, and their being required to lease their own fisheries, led the Wikwemikong Indians to demand that the leases be torn up[70] and that they be exempted from the provisions for leasing.

In pursuing the objective of not having to lease their own fisheries, the Anishnabe's position was reported as declaring:

> The Indians now assert that this Act trenches on their just rights, as they never surrendered the fisheries when they ceded their land.[71]

Though the writer of this statement disagreed with the continued Anishnabe use of the fishery, this report summarizes their reliance on the earlier treaties for the protection of their resources. They were supported in their view by some government officials[72], one of whom observed:

> With regard to the fisheries, I am at a loss to know upon what grounds it becomes necessary for the Indians to procure licences to cast their nets round an island [Manitoulin] secured to them, if not by the parchment [treaty] usual among ourselves, by a title equally sacred to all right men - the pledged word of Her Majesty's Representatives.[73]

Thus, in 1862, just prior to the treaty signed in that year, the Anishnabe people continued to hold to their view that their property was protected by earlier agreements. This, in their view, gave them

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[70] Ibid.

[71] PAC RG 10, Series 2, vol. 2 at 444-445.

[72] In fact, the Indian Department and the Department of Crown Lands entered into an agreement to exempt Indians from paying for fishery leases to enjoy the privilege of free fishing for their own use, so long as they not transgress the law (RG1, A-I-1 B. 8). This agreement, while alleviating pressure from First Nations in the short term, was unfair to Indians because it made them subject to laws they never consented to.

[73] Globe, 28 March 1862 at 1 in Lytwyn, supra note 59 at 20.

the liberty to pursue their traditional avocations without being forced to adopt the lifestyle of sedentary farmers which the government was attempting to push on them.

CHAPTER FIVE

THE TREATY OF 1862

Despite the relative growth of the Native population on Manitoulin from 1836 to 1860, and the protection the Anishnabe believed the 1836 Treaty gave them, the colonial government initiated discussions to enter into another treaty with First Nations on the island in 1861. Like the treaty of 1836, the treaty of 1862 further demonstrates the extent to which the allocation of land on Manitoulin satisfied some First Nations' objectives while it simultaneously abrogated other primary goals. There were three factors which caused the Crown to request First Nations to surrender their territory and thereby reallocate rights to land on Manitoulin Island. These factors were money, an altered perception of First Nations by the colonial adminstration, and the need for land for colonial settlement.

Financially, by 1861 the British government in England had repudiated its responsibilities for Native affairs.[1] They assumed that Indian land sales would defray the expense of running the Indian department and that the local government would direct these expenditures.[2] Regarding this change in colonial policy, Sir Edmund Head, the Governor General of Canada, observed about the Manitoulin Island First Nations: "I fear that the reduction will bear hardly on

[1] Sessional Papers, Edmund Head to Lord Stanley, August 25, 1860 at 23-27.

[2] David McNabb, "Herman Merivale and the Colonial Office Indian Policy in the Mid-Nineteenth Century" (1981) 1:2 Canadian Journal of Native Studies at 286.

the settlement on Manitoulin, and will greatly affect the condition of the Indians on that island, where they have no revenue of their own arising from land."[3] The absence of money to finance the Indian administration on Manitoulin led some people to conclude that Aboriginal peoples should be persuaded to surrender their lands in order to generate sufficient revenue to support their settlements.[4]

A changing government perception of First Nations also caused the Crown to seek a surrender of land on Manitoulin. During the 1840's and 1850's, the colonial government no longer regarded Indian segregation as the best way to assist First Nations. Bond Head's opinions concerning the separation of Indians from "settlers" lost the backing of the local administration, and legislation was passed that had as its object the assimilation of First Nations.[5] A report by Reverend O'Meara, who had lived on Manitoulin Island for nineteen years attempting to assist the Anishnabe, reflected this shift in the local colonial perspective. O'Meara stated:

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[3] Sessional Papers, August 25, 1860, supra note 1 at 23.

[4] The final draft of the treaty reflected the objective to use the money from the sale of Indian land to pay for expenses. The document stated:

Thirdly, The interest which may accrue from investment of the proceeds of sales of land as aforesaid, shall be payable annually, and shall be apportioned among the Indians now residing westerly of the said sound and gulf...

Canada, Indian Treaties and Surrenders from 1680-1890, reprinted ed. (Toronto: Coles, 1971) at 113.

[5] "An Act for the Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by them from Trespass or Injury", Statutes of Canada 14 Victoria, Ch. 74, 10 Aug. 1850, pp. 1409-13; and, an "Act for the Gradual Civilization of the Indian Tribes in the Canada's" Statutes of Canada 20 Victoria, Ch. 26, 10 June 1857.

> Having during the first years of my connection with the Indians, been strongly in favour of their isolation from white settlements as the best way of securing their advancement in all the particulars named in this query, I take this opportunity of saying that the experience of many years has convinced me that such isolation is not the best mode of securing the desired results....I am decidedly of the opinion that on the whole the balance of advantage to the Indians is on surrounding them with a healthy and well ordered white settlement which tho' of course not without its attendant evils, would on the whole course be of much advantage to their moral, intellectual and social improvement.[6]

Reports such as this had the effect of convincing local colonial administrators that there was no necessity to defend First Nations from colonial encroachments. As such, the local colonial leaders felt that they would be justified in securing a surrender of land from the First Nations of Manitoulin because they believed this would allow for "white" settlement on the island which, as reported, would purportedly benefit the Indians.

A third factor which reinforced the British objective of attaining a surrender of property from Manitoulin First Nations was the influx of settlers into Canada West. These immigrants were mostly farmers who possessed a craving for cultivatable land to provide the means for their support. The Governor General, Sir Edmund Head, recognized the demand for land by agriculturalists. He wanted arrangements that would facilitate the

> ...management of the Indian lands in such a manner as to secure the present possessors and their descendants the full benefit of such lands, without allowing them to be a check and a hinderance to the settlement of the country. The demand for land on the part of the immigrants to this province is so constant and so urgent, as to render it sooner or later difficult, even if it were political, to withstand the pressure, and persist in locking up

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[6] Canada, Sessional Papers, Indian Department Report, 1858, App. 21, Pt. II, Manitoulin Island.

large tracts of some of the most fertile land in the colony.[7]

Edmund Head wanted to open up Native land for settlement because he felt First Nations were not using their land to its full potential. As was shown in the preceding chapter, similar pressure was brought to bear on the government by some settlers who wanted to obtain the fishery resources that surrounded Manitoulin.[8] As was the case with the farmers, the people who were interested in harvesting fish sought to make what they felt would be "better" use of the fisheries than did the Native people. These pressures all caused a government preference to accommodate settlers. Therefore, the need to generate revenues to pay for the Indian department, the changing perceptions of the colonial government, and the immigrants' demand for land, all led the Crown to pursue negotiations for the surrender of land on Manitoulin Island.

First Nations, however, had a different perspective than the government with respect to reallocation of their land. For the most part, the Native people of Manitoulin wanted to retain their exclusive title to land. However, there were some Anishnabe on the island who wanted to have greater interaction with settler society. The Crown's alignment of objectives with this latter (smaller) group of Native people formed the alliance necessary to conclude a treaty in 1862.

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[7] Canada, Sessional Papers Indian Department, Return to an Address of the House of Common, August 20, 1860 at 3-4.

[8] Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries Around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights" (1990) 6 Native Studies Review 1 at 16-20.

The intersection of Native and non-Native goals occurred at a point where representatives of both parties wanted to increase colonial settlement on Manitoulin. This convergence of ambitions marginalized the objectives of the majority of Native people on the island, which was to maintain exclusive title to land. The First Nation objectives in regard to land, and the convergence and separation of different objectives in the process of treaty formation, will now be examined.

In October, 1861, representatives of the Canada West government travelled to Manitoulin to attempt to acquire a surrender of land and to survey the island.[9] The Anishnabe of Manitoulin had detected prior manifestations of the government desire to seek a surrender of land[10], and had prepared to respond to such attempts. It was observed that "for two years past they have been expecting that some proposition would be made to them for this purpose, and during the last winter Councils were held to determine the question in advance."[11] As a result, when the Crown representatives met with the Anishnabe, the Crown's proposals were forcefully rejected by them.[12]

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[9] There were over 130 Indians who attended this council. The Crown representatives were W.R. Bartlett (Newspaper editor) and Chas. Lindsay (Superintendent of the Central Indian Superintendency). Canada, Sessional Papers, (1863), No. 63.

[10] First Nations on Manitoulin would not participate in a census because they feared that it was preparatory to a treaty: PAC RG 10, Vol. 615, Superintendent Ironside to Census Commissioner Richards, June 1861.

[11] Canada, Sessional Papers 1863, No. 63, Return, Bartlett and Lindsay to Vankoughnet (Deputy Superintendent of Indian Affairs), October 12, 1861.

[12] The only evidence of an Aboriginal person who supported the British proposal in 1861 was from J.B. Assickinock, a war chief. He stated:
I speak for myself. I want you to do the same. I shall always be guided

The commissioners responsible for communicating the proposal to the Anishnabe commented on the peoples' preparedness and response to the proposition of a treaty as follows:

> In calling the Council we did not intimate the object for which the chiefs were to be assembled; but the Indians had become possessed of the idea, that it related to the settlement of the island by the white population, and they had resolved almost unanimously to oppose any proposal to that effect. When the statement was given in which the wishes of the government were expressed... [and] read and interpreted the Indians without a word of consultation among themselves, at once declared their refusal to acquiesce to the conditions proposed.[13]

It was obvious to the commissioners that the Anishnabe were not prepared to surrender their land on Manitoulin. The government statement that was read by the commissioners to encourage the Anishnabe to surrender their land declared the government's proposition as follows:

> You are aware that in the year 1836, the Island on which we are now assembled was the subject of conflicting claims...A compromise was come to at a Council held at this place, on the 9th of August, between 1,500 of yourselves and your Father, Sir Francis Bond Head, then Governor of Upper Canada, by which the three contending claimants agreed that this Island should be given up for settlement by all Indians, whom the Government might permit to come here.
>
> At that time there were 9,300 Indians, under the protection of your Great Father, who assembled at an appointed place every year in Upper Canada. It was then thought that this large number would make this Island the place of future settlement. If they had done so, and followed your examples in becoming cultivators of the soil, the intention of the Government in settling this Island with Indians would have been carried out. Unfortunately, however, your people have not availed themselves of the opportunity of collecting, as settlers, upon this Island in a body by whom a large portion of its best soil might be cultivated.

> by the wishes of the Queen's government. If she again required my services as a war chief, I, at the age 91 years, am ready to serve her again.

Sessional Papers, supra note 9.

[13] Canada, Sessional Papers Indian Department Report (1863), Ibid.

> While regretting that this should be the case, your Great Father has sent us here to announce to you his determination to carry out the principle of settlement agreed upon in 1836...
>
> We are instructed to tell you that 25 acres will be secured by a Crown Deed to every head of a family upon this Island; that in addition to this land will be set apart where required for fuel...In default of the Indians neglecting to come here and settle this Island, your Great Father deems it equitable to grant the remainder of the land to his white children, of whom, as well as yourselves, it is his duty to take care.
>
> ...From the White settlers who will become your neighbours, you will learn many useful arts, including that which will enable you to raise by the same labour you now employ, a much greater quantity of produce. The contemplated settlements will bring near to your homes markets at which you can sell the produce you may have to spare, at good prices... [14]

It is easy to appreciate why the Anishnabe rejected this proposal to surrender their land. The proposal was based on an assumption which the Anishnabe never consciously ascribed to. The First Nations did not enter into the earlier treaty with the primary intention of having a certain number of Aboriginal people settle the land to cultivate it. As was seen in examining the treaty of 1836, First Nations entered that agreement because they desired exclusive possession of land on Manitoulin to preserve a place for their people. The commissioners could not avoid the Native expression of this intention, as they wrote "they are possessed of the idea that their title to the Island is perfect and was not impaired by the conditional surrender which they made to Bond Head in 1836".

During the Council called for the surrender, many leaders and

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[14] Ibid.

warriors repeatedly expressed similar sentiments to the treaty commissioners: that their title to the land was perfect and they did not want to give it up. On the first day of negotiations, E-do-wish-cosh, an Odawa chief, stated:

> I have heard what you have said, the words which you have been sent to say to us. I wish now to tell you what my brother Chiefs and Warriors, women and children say. The Great Spirit gave our forefathers land to live upon and our forefathers wished to keep it. The land upon which we are now is our own, and we intend to keep it. The whites should not come and take our land from us; they ought to have stayed on the other side of the salt water to work their land there. The Great Spirit would be angry with us, if we parted with our land, and we don't want to make him angry.[15]

A Potawotomi chief named Wah-cow-sai supported E-do-wish-cosh and stated:

> I will speak for the Podahwahdamies. I remember quite well when the last treaty was made in 1836. I was present; I was at the council at the time, and heard what was then agreed to. We don't wish to give up the Island, and do not wish the whites to live upon it.[16]

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[15] Ibid. This speech was noted with various differences in 32 The Christian Guardian (October 1861) no. 46 at 180:

> You, my English Chiefs, listen to what I say to you this day. I am employed by my superior Chiefs and by my warriors also, to say to you that this land on which we are now, has been the land of our forefathers, on which the great spirit has put them, they kept it till now for us, and it is our duty to keep it for our children and our grandchildren. Would you not think that it would be a great sin to rob our children and grand children of their inheritance?
>
> The treaty of 1836 which you allude to today was not concluded the way you read it now, it was understood by our Chiefs then that this Island was to be exclusively for the Indians.

[16] Ibid., The Christian Guardian recorded this speech as follows:

> I was present at the treaty of 1836, heard with my own ears its discussion it was said by our Great Father then (Sir F.B. Head) that this island was to be exclusively property of the Indians and had given up his claim in our favour. I am very surprised, I am astonished today to hear that the promise of so great a Chief in so high a position was not to be kept. I am only a poor miserable Indian. I would be ashamed to break my words.

After the Anishnabe delivered these and other statements to the commissioners, the negotiations were adjourned for a day. On the following Monday when the talks resumed, E-do-wish-cosh echoed the earlier reaction of the Anishnabe when the commissioners asked them to again consider their proposal. He said:

> I am employed by the other Chiefs and warriors to tell you their decision since we last met. They have been thinking of their past life, of the alliance of the three tribes and also of the future. What would become of themselves by and by? They have smoked the pipe together, as their forefathers had done, thinking over old matters. They are the proprietors of the Island, and intend to keep the land for themselves and their friends all over the country who may come here.[17]

Upon hearing the tenacity with which the Anishnabe clung to their resolve not to cede their land, one of the commissioners proposed that they at least be allowed to survey the Island. E-do-wish-cosh replied again:

> The land is not very good, as I have told you already. We Don't like the Surveyor to go over our Island. He can, if he likes, examine the main land. The Island is very small; in many parts of the Island there are rocks only fit for gulls to lay their eggs on. We have the laws that God established. I wish you would take back

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[17] Ibid. This exchange was recorded in the following way elsewhere:

> You, my English Chiefs. Since Saturday we reflected, we have meditated also on your proposals, we have meditated also of the past as well as on the future, and we always come to this determination, that we cannot deprive our children of their land, so we advise you to go home, and take back your Surveyor, Land measurer, we will not allow him to measure our land
>
> On this Mr. Lindsay, the Commissioner, said that the Government will send troops as necessary to protect his employee. On this the Indian Chief said, that the Government was at liberty to send us as much troops as he wished, and he, the Government, has the power to kill us all if he pleases. Then he can take our land, as for ourselves, we have no guns, no powder, and no balls to defend, even if we had, we do not wish to defend ourselves against our Great Father.

your proposition and your surveyor with you. [18]

After he expressed this wish, he was pressed again by the commissioners to allow a surveyor to stake out the Island. E-do-wish-cosh responded:

> You saw me when I went to consult with all the chiefs here. We don't like it that the Surveyors are here. They should go away...I am empowered by my chiefs to get up the same as I did before. Those chiefs that employ me to speak now have the idea that they are going to be wronged, and that the authority is not from the right source.[19]

Eventually, the commissioners realized that they were not making any progress in the negotiations, and the Council concluded on the following note when a young warrior arose and said:

> Listen to me. I call you friends because the whites and Indians are friends. I wish you would understand what I say - if I understood English I would not employ another man to speak for me. I hope you will not do anything to cause me to be angry against you. This Island of which I speak I consider my body. I don't want one of my legs or arms to be taken from me. I am surprised to hear you say that Island belongs to white men, for I have not seen any white men on the Island before and I am not very young. I know there is an evil spirit of which I am afraid, as well as the Great Spirit above. As I said before, I am surprised to hear you say the Island belongs to you. My father said the English only borrowed St. Joseph's Island to live upon. I don't want to go against the Government and laws, at the same time I wish them to listen to me. You are afraid of your superiors and must do as you were told.[20]

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[18] Ibid.

[19] Ibid.

[20] Ibid. There is some question as to whether the meeting broke up on such a friendly tone. Rev. J. Paquin, S.J. Modern Jesuit Indian Missions in Southern Ontario (undated manuscript) at 212 gave a different perspective. He stated:

> The Indians indignantly turned down the proposition, and protested loudly against the survey of their land. Thereupon the Commissioner declared that the surveyors would come in spite of them, and would be supported by the guns of the soldiers, and at that dramatic moment two canon shots were heard, to impress these supposed simple children of the woods. It was an egregious blunder which spoiled all future negotiations.

With that statement, and a friendly shaking of hands, the meetings ended. The commissioners informed their superiors that they had failed to secure a surrender of land. They recommended that in the future the Indians may be persuaded to give up their land on the island, and "the proposal might have been looked upon in a different light", if the Indians were given more land for reserves, or payment for the land they gave up.[21] They based these observations on private talks which they had with some Native people outside the formalities of the Council.

Given this seemingly unanimous rejection of another treaty by the First Nations on Manitoulin, how is one to explain the fact that exactly one year later a treaty was signed in which the Indians surrendered three quarters of the land on the Island? While on one level this question can be explained by the bad faith which characterized the negotiations by the Crown, on another level the answer lies in exploring the extent to which the fundamental goals of First Nations were compromised by an alignment of aspirations which converged around objectives which some Anishnabe shared with the British. We will now examine how basic objectives of First Nations were marginalized by the particular intersection of objectives which occurred in concluding the treaty of 1862.

During 1862 the First Nations of Manitoulin met in Council at least three times and affirmed their position not to surrender the Island.[22] The chiefs also made it clear that they did not want the

[21] Ibid.

[22] These councils were held in February, June and July: PAC RG 10, Vol. 615, David Layton to Ironside, February 26, 1862 and PAC RG 10,

government interfering with their selection of leaders to influence the resolution of land surrender on the island.[23] However, the government disregarded these Native resolutions not to surrender their land, and by September of 1862 Crown proposals were again formulated to secure title to land on Manitoulin.[24] These proposals resulted in an Order-in-Council being passed which gave William McDougall, the Chief Superintendent of Indian Affairs, the authority to negotiate for the surrender of Manitoulin Island.[25]

As a result, with the authority and resolve to secure a treaty on Manitoulin, McDougall travelled with two other commissioners to meet with a council of Indians on October 4, 1862.[26] McDougall addressed the assembly and was "unpleasantly surprised to find that opposition had not lessened appreciably since a treaty had first been proposed."[27] The commissioners told the First Nation peoples present that settlers would come and over-run their land, and that therefore they should surrender their land so that they could at least receive some

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Vol. 292, Petition from Manitoulin Chiefs to Governor General, June 27 and July 21, 1862.

[23] Ibid.

[24] These proposals included: provisions for the Indians who came to the council, one dollar a head for everyone who agreed to surrender, an acknowledgement that negotiations should proceed on the basis that the Indians had the beneficial interest in the Island, one hundred acres to be reserved for each family, and surrender would only be valid if there was actual settlement by farmers. PAC RG 1, E8 Vol. 78, Chief Superintendent of Indian Affairs William McDougall to Governor General Viscount Monck, September 5, 1862.

[25] PAC RG 10, Vol. 711, September 12, 1862.

[26] McDougall was accompanied by W.P. Spragge and Francis Assiginack.

[27] Douglas Leighton, "The Manitoulin Incident of 1863: An Indian-White Confrontation in the Province of Canada" (1977) 69:2 Ontario History at 118.

compensation and an assurance of reserves for themselves. After expressing these propositions, McDougall dismissed the meeting to allow the Indians to speak amongst themselves.[28] One historian reports McDougall's intention in dismissing the Anishnabe as follows:

> McDougall called for an hours [sic] recess so that his proposal could be given the careful consideration to which he claimed it was entitled. As he must have hoped, spontaneous questions and discussion followed reassembly. The more moderate position, held primarily by Indians residing on the main body of the Island, became apparent, although it was voiced but warily. McDougall also was able to observe for himself the coercive stance of the young, particularly among those from Wikwemikong, by which somewhat shaky unanimity was maintained in opposition to his proposal at the final vote of the day.[29]

After the Natives consulted each other on the government proposal, they reconvened and designated Itawashkesh to speak for them. He stated:

> My brother, we have again considered your offer and we have not changed our mind. You have not provided any land for our children, boys and girls under twenty one years, and all those who are to come. We shall keep our land for our children. It is here that the Great Spirit has placed us to live, and here we shall continue to live. And now we want you to hurry and let us go back to our fields, and gather what we have grown in them.[30]

Upon receiving this answer, McDougall replied:

> My Indian Brothers, I have heard your answer to my proposition; you are losing your time in useless protests. The Great Chief must have your land, and he will have it. Other Indians like you have

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[28] McDougall noted of the discussion among the Indians:

> On re-assembling there was an evident disposition among the bands living westwardly of the place of meeting to listen favourably to the propositions of the government, but the majority were unwilling to treat, and by intimidation and threats of violence prevented any open expression of opinion...

PAC RG Vol. 75, Report on 1862 treaty by William McDougall.

[29] J.R. Wrightman, Forever on the Fringe: Six Studies in the Development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 45.

[30] Paquin, supra note 20 at 214.

> refused to accept this offer but at last they had to give in. I will say nothing more to you as a body, but I will see every Indian personally, and receive from him the land he has to give.[31]

McDougall then dismissed the meeting until the following Monday and then proceeded to speak with individual Native people. Some Chiefs "stayed over Sunday with many others, [and] this day they were worked upon by means of threats and promises"[32] by McDougall.

When the parties reassembled on Monday, McDougall capitalized on the division among the Anishnabe that he had witnessed on the Saturday and which he had investigated and reinforced on Sunday. McDougall suggested that since the Wikwemikong people were unanimous in rejecting the government's proposals, surrender would be sought from First Nations living on the western portion of the Island.[33] With this strategy, McDougall was able to secure signatures for the surrender of Indian land on Manitoulin Island.[34]

There was much dissent to the treaty after it was signed. This dissent reveals the different objectives in regard to land that the Anishnabe possessed. One missionary resident among the people at

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[31] Ibid. at 214-215.

[32] Sessional Papers, (1863), supra note 9.

[33] Ascertaining that the Chief's opposition came from Indians living eastwardly of Heywood Sound, the undersigned determined to modify the propositions of the Government, so as to meet in some degree the objections from that quarter...being apprised of the nature of the proposition the undersigned intended to submit, namely to exclude that part eastwardly...from the proposed agreement, they came to the adjourned meeting in a more friendly mood and expressed their willingness to surrender for sale and settlement all that part of the island westwardly of the Gulf and Sound.

PAC RG 1 Vol. 75, 1862 Treaty Report, William McDougall.

[34] This treaty was approved by an Order-in-Council on November 14, 1862.

Wikwemikong stated the feelings of these people as follows:

> How did they gain over the Indians? The assembly took place on a Saturday. The first answer to the Honble. Mr. McDougall's speech was an unanimous refusal, some Chiefs stayed over Sunday with many others; this day they worked upon by means of the threats which the Honble. speaker expressed in his speech. The assent of the minority was obtained on Monday, and the bargain was considered as concluded. The whole of the Treaty!!! was done with the assent of a certain number of chiefs or pretended chiefs. An immense majority of Indians are opposed to it. Is this to be believed? It is a fact. The Honble. Mr. McDougall being discountenanced by the first response of the Indians told them - since I cannot treat with the majority I will address myself to some of you only.[35]

The fact that McDougall signed the treaty with only a minority of Anishnabe certainly casts a cloud over the validity of the treaty. McDougall appears to have violated legislation passed just two years earlier which gave specific instructions regarding majorities with respect to treaty making.[36] Furthermore, McDougall's actions did not follow the spirit and intent of the terms of the Royal Proclamation and the Treaty of Niagara which set out a public process to allocate land. While McDougall justified his actions on the basis that he had obtained a majority of signatures from those who lived closest to the

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[35] Sessional Papers (1863), supra note 9, F.V. Chone to Grand Vicar C.F. Cazeau, October 14, 1863.

[36] The provision which McDougall appears to have violated is as follows:

> No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions:
> Such release or surrender shall be assented to by the chief, or if more than one chief by a majority of the chiefs of the tribe or band of Indians, assembled at a meeting or council of the tribe or band, summoned for that purpose, according to their rules, entitled under this Act to vote thereat...

An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed By Them from Trespass or Injury (1850) Statutes of Canada, Vic. Ch. 74 s. 4.

land surrendered, this argument does not hold legal or moral validity. As has been repeatedly demonstrated, according to the First Nations' understanding the title to the entire island was vested in them collectively; therefore McDougall was not free to treat with some bands separately.

Another allegation which casts doubt on the validity of the 1862 treaty is that some of the chiefs who signed the treaty were intoxicated. One writer has observed:

> Itawashkesh and Migtakwange had succumbed to the temptation of whiskey, and signed their names while drunk.[37]

This allegation is supported by a Jesuit priest at Wikwemikong who stated to a government representative:

> You are all Government robbers alluding to those who were at Manitowaning when the treaty was made, that if he had been there no treaty would have been made, that those who did sign were bought by whiskey, given to them on Sunday, that they were drunk when they signed...[38]

This would also contravene legislation that had been passed two years earlier to deal with the question of alcohol being used at treaties.[39]

Understanding the injustice of the treaty of 1862, the people of Wikwemikong set about to try and get it annulled. They wrote letters

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[37] Pacquin, supra note 20 at 215.

[38] PAC RG 10, Vol. 288, Gibbard to commissioner of Crown Lands, December 9, 1862.

[39] No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions:

> It shall not be lawful to introduce, at any council or meeting of Indians held for the purpose of discussing, or of assenting to a release or surrender of lands, strong or intoxicating liquors of any kind...

An Act for the Protection of Indians, supra note 36 s. 4 (5).

and sent petitions expressing their disagreement with the treaty. They were able to secure a retraction of support from one of the other bands on the island who had signed the treaty. These people sent a petition which read in part:

> It is because they have been deceived, very gratuitously frightened, that our chiefs have parted with our Island. As for us, we have not agreed with them [the chiefs]. This then we expect of thee, that thou annullest by thy authority as Great Chief, what those bad Englishmen have come to do.
>
> The time when they were to sell was unknown to us. It was only when we entered into council place we heard them accomplishing the sale (of our land). And were not pleased with it, and are not now...There are many things which are not nice (in the transaction) and this is particularly why we are dissatisfied, all of here in Shishigwaning.

The Chief then added his agreement with his people:

> I am very pleased to see now here what the Indians of Sheshigwaning have done. He has said the truth he who said of me, "He is not pleased." Certainly, I have not been pleased. And now I put here my name...So I make it known I agree with the men of Wikwemikong in regard to the decision they have come to, to keep this Island for themselves.[40]

The people of Wikwemikong attempted to secure agreement from other Indians who lived on Manitoulin, proclaiming the treaty was invalid. In January, 1863, a Council was held at Manitowaning which had as its object discussion of the 1862 treaty. A Chief read a speech trying to convince others to retract their support for the treaty. He stated in part:

> My Brother Chiefs - I mean you who live at Manitowaning, we shall tell you what we think; and we want to hear what you think. We do not consider that this Island has yet been ceded to the Government, inasmuch as some of the chiefs and many of the warriors did not agree to the surrender. There are Indians at Sheshegwahning, Maple

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[40] PAC RG 10, Vol. 292, Petition of Sheshigwaning to Governor General, May 28, 1863.

> Point, Metchekewedenong Mindemooya River, and South Bay, who are averse to the surrender. Knowing these things we do not cease to think of this part of the Island, and to make endeavors to retain it for all the Indians as well as the small Islands around it.[41]

Thus, we see the efforts that the people of Wikwemikong made in their attempts to get the treaty annulled. Their objective in maintaining exclusive title to Manitoulin was clear. They disagreed with those native people on the Island who signed the treaty and purportedly surrendered their title to land.

However, there were First Nation peoples on the Island who wanted to obtain the benefits which they felt were available upon surrendering their land. A historian of Manitoulin, W.R. Wrightman, observed: "if the unjustified loser in [the treaty process] is taken to be the Indian...his willingness to embrace the idea of white settlers in his midst was the very factor on which McDougall coldly capitalized".[42] There were Native people on Manitoulin Island who did want to participate more fully in settler society and who were willing to give up their title to land to do so. In 1861, when the Anishnabe on Manitoulin were first approached to give up title to their land, an old Odawa Chief named Assickinock exhibited this motivation. He stated:

> There is one great ruler which warms and vivifies us and all things in the world, which assists the plants to grow, thus giving food for the subsistence of man and animals. What ruler is this? It is the Sun. If we look to the Sun and desire it to diminish the force of its rays even a little, it would not on that account shine the less or give the less warmth. It is so with the words of our Great Mother the Queen, on the other side of the great salt lake; even if you oppose her wishes you cannot succeed...I

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[41] PAC RG 10, Vol. 284, Speech of Chief Wakegijig to Indians Assembled at Manitowaning, January 19, 1863.

[42] Wrightman, supra note 29 at 46.

shall always be guided by the wishes of the Queen's Government.[43]

Assickinock expressed these same wishes a year later when the commissioners came to negotiate a treaty.[44] It is obvious that he had a desire to support the colonial government and as such he sustained the commissioners in their proposals.

Assickinock was not the only Native person on Manitoulin to adopt a position that was in favour of opening the Island to settlement. When the grand council in January of 1863 was held, a group of First Nations on the Island continued to express their support for the treaty of the previous year. In response to a speech asking them to rescind their acceptance of the treaty, their spokesperson replied:

> My friends, we do not think alike. We who live on this side consented to give up the Island to the government, but you refused to do so. You spoke of your children and their future condition. You spoke anxiously about them. We also think of ours, and trust that they may do well, and be treated well by the whites. We have already made a treaty with the Government, and we are not going now to throw it away. The future will tell what Indians will be better off. You who oppose to make a treaty, or we who consented to make it. We have hitherto obeyed the Queen Her officers, we mean to do so still. We place ourselves in the good keeping of the Government. My friends, we are no longer independent, nor could we live as independent people. We cannot live as our forefathers did. We are dependent on the white man for many things which are essential to our welfare...
>
> My friends, this side of the island has been ceded. Why should you any longer meddle with it, or speak about it to our Indians. You have your own reserve, speak about that and take good care of it. My friends, you have said that the Indians who ceded their land will be very poor in time to come. I know how the Indians live in small reserves below. They appear to live comfortably. They do not suffer from being surrounded by whites. They are not troubled or persecuted by them. My friends we cannot resist the tide of emigration. The whites are coming nearer and nearer to

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[43] Sessional Papers (1863), supra note 9, Speech of Chief Assickinock, October 5, 1862.

[44] PAC RG 10, Vol. 75, Report on 1862 Treaty, November 3, 1862.

> us. They will at last surround us, but they will not drive us away before them as they have not driven away to whom I have just referred.[45]

This speech reveals considerable evidence that there were some Aboriginal people on Manitoulin who did desire to have non-Native settlement among them. However misguided this may have been regarded from the viewpoint of the Wikwemikong people, or from our standpoint today given our knowledge of their subsequent circumstances, one cannot neglect the expressed objective of the people to cede their land.

The desire of some of the people on Manitoulin to have non-Native settlement on the Island, and the desire of the British to provide land for these settlers, resulted in an alliance that was essential for the land to be surrendered for that purpose. While intimidation and coercion were definitely factors in provoking an alliance with settlers in which Native people surrendered their land, these factors alone do not explain why a treaty was signed because they were present in 1861 as well. There are many questions about how many Native people actually supported the surrender. There are also doubts as to whether those who did sign to surrender did so under their own free will without being intoxicated or intimidated. Yet despite these problems, the point remains that the treaty was able to be signed and its terms executed because there were Anishnabe who had goals that intersected with those of the British.

Yet, given the intense opposition that the majority of Anishnabe had towards surrendering their land, one can see that while some Native

[45] PAC RG 10, Vol. 284, Speech of Maishequonqai, January 19, 1836.

objectives in regard to land were facilitated through the treaty process, this same process simultaneously frustrated other aspirations which First Nations people strongly held. The essential implication of this analysis is that the prevailing approaches in treaty negotiation in the early-1860's endangered those elements of traditional Native culture which encouraged autonomy from modern settler society through excluding non-Native settlement of land. This hazard occurred because the intersection of Native and non-Native goals occurred at a point of convergence in the values of Native and non-Native society which gave merit to the colonial enterprise.[46] This inadvertently pushed the parties towards assimilation because a fusion of the parties' efforts to reach an agreement merged around the focal point of a shared understanding. In the process, the separate systems of land and resource use were threatened. This compromised the fundamental aspirations of the mass of First Nation peoples in relation to their land.

[46] The validity of this analysis can possibly be strengthened by observing that when there were no Native people who would sign the treaty in 1862, the government was not able to obtain the fulfilment of its objectives. However, once a fraction of the Native population communicated their desire to enter into a treaty, this provided the coalition needed to bring about an agreement.

CHAPTER SIX

A CENTURY OF CULTURAL RESISTENCE AND SURVIVAL: 1863-1980

There was much dissension among Manitoulin Island's Aboriginal population following the treaty of 1862. Wikwemikong asserted that its peninsula was unaffected by the new treaty and that they continued to live under the 1836 regime. As such, they regarded themselves as allies of the Crown but not subject to the laws or administration of the Province of Canada.[1] The Council at Wikwemikong strengthened its position by the use of rules to implement its authority over its land. Two events in particular show the perceptions that the people of Wikwemikong had towards their land.

A) TRADITIONAL ABORIGINAL JUSTICE

First, shortly after the treaty of 1862 was concluded, the people of Wikwemikong banished some prominent people from their community. This action was a traditional method that Anishnabe and Iroquois peoples used to punish people who contravened the community's standards of conduct.[2] The people exiled were Tehkummah, former head chief at Wikwemikong, and Kitche Baptiste, another Anishnabe person. Philemon Proulx, a white resident of the village was also forced to leave.[3] These people were banished because they supported the actions of the

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[1] J.R. Wrightman, Forever on the Fringe: Six Studies in the Development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 47.

[2] Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall Law Journal 605.

[3] The expulsion of Proulx received the attention of the press in the south: Toronto Globe 27 July 1863 in Douglas Leighton, "The Manitoulin Incident of 1863: An Indian-White Confrontation in the Province of Canada" (1977) 69:2 Ontario History at 120.

Colonial government; in fact, Tehkummah and Kitche Baptiste had signed the treaty[4]. These actions reinforce the idea that many people still regarded their traditional practices as being the only legitimate form of law. They also illustrate the extreme disapproval the people had for supporters of the treaty.

The other significant action that the Wikwemikong people took immediately after the treaty which illustrates their increasing resistance to Colonial policy was their heightened attempts to overturn the system of government fishing leases. William Gibbard, who was formerly implicated in interpreting the Fishing Act to the Anishnabe's detriment[5], interceded on Proulx's behalf and issued him a fishing licence for the waters around the Island he had resettled to.[6] The people of Wikwemikong took great exception to this licence being issued, not only because it assisted a person they were trying to reprove, but also because they believed that the government had no authority to issue such a licence. Since Wikwemikong had not signed the treaty, they asserted that the government had no legal interest in their

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[4] F.W. Major, Manitoulin: The Isle of the Ottawas (Gore Bay: Recorder Press, 1974) at 45 ("Wikwemikong Indians Expelled").

[5] The Fishing Act (1857), Province of Canada, 20 Victoria, c. 21.

[6] Gibbard's condescending and arrogant attitude towards the First Nations fishery was that "the Indians would be far better off if they attended to their farms instead of dabbling in fisheries". In a letter to the Daily Globe (March 21, 1862) he further revealed his sentiments about Indian fishers when he referred to a Wikwemikong fishermen as "miserable looking, ill-clothed, drunken, lying stealing vagabonds" whose rights to the fishery were no more than "squatter's rights". See Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries Around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights" (1990) 6 Native Studies Review 1 at 20.

unsurrendered fishing ground.[7] The issuance of the licence to Proulx resulted in a series of unfortunate confrontations that eventually led to Gibbard's death. As one can imagine, the death of a prominent Colonial official created no small stir in the Colonial population throughout the Canadas.[8]

For our purposes, though the death of Gibbard was a serious incident, we will focus on the measures taken by the people of Wikwemikong to demonstrate the intensity with which they pursued their interpretation of their treaty fishing rights. Upon first learning of issuance of the licence to Proulx, twenty-five Wikwemikong people at Lonely Island tried to force both Gibbard and Proulx, at knife-point, to leave what the Anishnabe regarded as their Island. While Gibbard was saved that day by the arrival of reinforcements, the next day over fifty Anishnabe landed on the Island and forcibly removed Proulx to Sheguiandah.[9] Upon learning of Proulx's subsequent removal, Gibbard recruited some special constables from Toronto and Barrie to confront the Anishnabe for their actions.

When Gibbard and his group arrived at Manitoulin on July 24, 1863, a school bell was rung as an alarm, and a crowd of 200-300 Anishnabe assembled along the bluff and surrounded the policemen. Some were wielding knives while others were threatening to shoot the first person who interfered with what the Anishnabe regarded as their internal affair. They were taking very seriously the state of non-interference

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[7] Leighton, supra note 3 at 121.
[8] Ibid. at 123-125.
[9] Ibid. at 121.

agreed to earlier. In fact, the people at Wikwemikong refused to appear before any judicial body for any infractions charged, proposing instead a "government hearing consistent with their position as allies of Her Majesty".[10] When Gibbard tried to arrest one of the people whom he recognized as the leader of a group which had attempted to expel Proulx earlier, he was met by a large number of armed Native people. This group threatened to massacre the police unless Gibbard withdrew. Gibbard realized he was outnumbered, and left the Island for Sault Ste. Marie.

On Gibbard's trip north, he arrested someone whom he recognized as being one of the leaders of the original series of expulsions the previous year.[11] At Sault Ste. Marie, this person was cleared of Gibbard's charges, and on the return voyage to Manitoulin this person rode on the same ship as Gibbard. The next morning it was discovered that Gibbard was missing, and his dead body later turned up with considerable evidence that he had been murdered. It can not be confirmed that Gibbard was murdered by his former prisoner, since other people had a strong motive to kill him because he was carrying $2,000.00 treaty money from Sault Ste. Marie. What is apparent throughout these events, however, is that the people of Wikwemikong were resolute in their adherence to the agreements of Niagara and 1836, even against the considerable risk of confrontation and violence. They demonstrated

[10] SPPC, 1863, no 18.

[11] The Odawa Chief Osawa-nemeke, or Yellow Thunder was arrested. United Chiefs and Councils of Manitoulin (UCCM), UCCM Fish and Wildlife Project: Submission to the Royal Commission on Aboriginal Peoples (West Bay, 1993) at 15.

this resolve by employing one of their strongest acts of justice - banishment, and by using force to resist further erosion of their rights. Their further proposal that any disagreement about the use of force be shielded from review by the courts, and be resolved in a matter consistent with their position as allies of the Crown, reinforces their reliance on past solemn treaty agreements.

B) BLOCKADES: RESISTING SURVEYS

The next acts which demonstrate Wikwemikong's continued resistance to the allocation of land proposed by the treaty of 1862 are evident in relation to the government's survey of the Island. There were numerous attempts to stop the survey of the Island which both sides were aware was important "in fixing the crown claims yet more firmly on the land and making the upset of the treaty more unlikely"[12]. The surveys were originally delayed by the incidents involving Gibbard described above. The surveys were delayed at other times as recorded as follows:

> According to the terms of the Manitoulin treaty, as we have seen, the portion of the Island west of Manitowaning Bay and South Bay was to be sold to white settlers, but when the surveyors arrived to survey the townships, Indians came over from Wikwemikong and ordered the surveyors off the Island. However by using a little diplomacy the Indians were conciliated and the survey went on.[13]

These attempts to discourage surveys at times went beyond intimidating the surveyors, and extended to frightening the first settlers. It is further recorded:

> When the settlers began to arrive the hostility of these Indians was renewed with vigor, and a number of the first settlers were

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[12] Wrightman, supra note 1 at 55.
[13] Major, supra note 4 at 51 ("Antagonism of Ottawas").

frightened away.[14]

These actions to stop the government organization and distribution of their land were undertaken because the Anishnabe of Wikwemikong believed:

> They are independent of the Government and acting upon this assumption have at various times forcibly sent away settlers who had cleared patches of land.[15]

A further effort to stop the surveys occurred on July 14, 1865, when a mass council of the Anishnabe Nation from around the Great Lakes was convened to discuss the means by which "the Manitoulin once again might become an Indian refuge"[16]. These discussions included reference to lost opportunities to create a place apart from settlers. As late as 1850, the Anishnabe claimed the entire Bruce Peninsula and Manitoulin as a homeland, and wanted it all to be free from non-Native settlement. At that time, Chief John Jones spoke to forty eight First Nation chiefs from around Lake Huron and said:

> Fellow chiefs and brothers! I have pondered with deep solicitude our present condition; and the future welfare of our children as well as ourselves. I have studied deeply and anxiously in order to arrive at a true knowledge of the proper course to be pursued in order to secure us and our descendants, and even to others around us, the greatest amount of peace, health, happiness and usefulness...The people of these Nations I am proud to say are my brethren; many of them are bone of my bone; and for them, if needs be, I could willingly yea cheerfully sacrifice my life.
>
> Brothers, you see my heart. Fellow chiefs and warriors! I have looked over your wigwams through Canada, and have arrived at the conclusion, that you are in a warm place: your neighbours, the whites, are kindling fires all around you [slash and burn cuts of the land]. One purpose for which we have been called together, is to devise some plan by which we can live together, and be a

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[14] Ibid.
[15] Ibid.
[16] PAC RG 10, p. 524, Spragge to Dupont, 25 July 1865.

> happy people, so that our fires may not go out (nation become extinct), but may be kindled in one place...
>
> ...ought we not to make our own laws, in order to give character and stability to our chiefs, as well as empower them to treat with the government under which we live, that they may, from time to time, present all our grievances and other matters to it.[17]

This speech illustrates that continued demands for separate lands was a renewal of past aspirations, not a conveniently formulated strategic plan designed to prevent surveys. The idea of a place of refuge corresponds to the reasons the 1836 treaty was signed, and explains why the Anishnabe reacted with hostility to the surveys. In 1865 a second council was held at Wikwemikong to re-emphasize the same purpose as the gathering earlier in the year. The Anishnabe wished "not to be molested or disturbed in the possession"[18] of their land. It is apparent that the Anishnabe of Wikwemikong initially prevented the survey and settlement of the Island because they viewed the 1862 treaty as void. As such, they continued to rely on the treaty of 1836 to guarantee an exclusive right of possession to Manitoulin. They wanted a place apart, where they could exercise their own laws, and be in the protection and support of their own people.

Despite the efforts of the people of Wikwemikong and some others throughout the Island to stop the surveys, the mapping went ahead. There were three waves of surveys which forever changed the way land was allocated on Manitoulin Island. The first group of surveys, which

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[17] George Copway (Kahgegagahbowh), The Traditional History and Characteristic Sketches of the Ojibway Nation (London: Charles Gilpin, 1850) at 149-150.

[18] Royal Proclamation 1763 R.S.C. 1985 App. II, No. 1.

laid out five townships, were completed between 1864 and 1865. The second phase of surveys, which mapped nine townships, occurred between 1867 and 1870. The last set of surveys, which marked out seven townships, took place between 1878 and 1880.

The whole concept of allocating land by drawing lines on a map and imposing these despite the physical characteristics of the Island is in direct contrast to the system of land use we have seen the Anishnabe employ. The Anishnabe, even as late as 1862, chose to use the land for different purposes at varying intervals throughout the year. Furthermore, some lands were not used in particular years, but were left to spontaneously develop with little interference from human labours. This land use allowed for sustainable development because over-burdensome uses were seldom placed on the interconnectedness of animals, plants and soil. In contrast to this system of land use, the "western" survey system apportioned land to individual owners so that there was little opportunity to vary the type and intensity of use put on the land. Since plots were measured for individuals to use, there was little opportunity for these owners to allow their land to "rest". If they did not plant and harvest the land they possessed, they would have insufficient additional resources to support themselves.

The conflict between Anishnabe resource use and allocation and Colonial use, as represented by the surveys, would continue until 1879 when the last Indian reserve west of the Wikwemikong peninsula[19] was

[19] On September 3, 1919, the people of Wikwemikong were still

finally delineated by survey.[20] Under the terms of the 1862 treaty First Nations were given a choice as to where they wanted their reserves, subject to certain conditions of settlement.[21] Since surveys and sales of land to Colonial settlers could not go ahead until the Anishnabe had chosen their lands, delay on their part did slow down the process. Anishnabe indecision on the choice of their reserve sites forced the postponement of the first Manitoulin land sales, since the government did not want to be in a position of selling land that the Anishnabe might subsequently claim. As late as 1866, much of the reserve situation was still in limbo, though it appeared at this point that most Anishnabe wanted to retain their smaller numerous community sites which would enable them to remain in their old and familiar surroundings.[22] While some land came on the market for sale during this uncertain period[23], other sales had to be delayed even longer. It was not until the 1870's that much of the land of Manitoulin was sold.[24]

C) **TRADITIONAL CULTURE PERSISTENCE**

After the survey of land and the confirmation of Anishnabe reserve lands, the advance and settlement of Colonial population on the Island was quite slow. Most of the initial activity in land sales was taken up through speculation over oil reserves and timber licences. In 1871

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resisting the surveying of their peninsula. Their opposition at this date halted such action: A Synopsis of the History of Wikwemikong [unpublished] at 37 (no author or date, on file with author).

[20] Wrightman, supra note 1 at 77.

[21] Ibid. at 74.

[22] Ibid. at 76.

[23] June 18, 1866 saw the first land put up for sale: ibid. at 78.

[24] Ibid. at 82.

there were only 220 Colonists on Manitoulin[25], though this number jumped to 3,500 by 1876[26]. This was the first year that Colonial populations exceeded Indigenous populations on the Island. By 1880 there were 6,000 non-Native people spread out over the Island and by the turn of the century, Manitoulin's Colonial occupation grew to 9,000 people.[27] The total First Nation population of Manitoulin during the period 1862 to 1900 hovered around 2,000 inhabitants.[28]

During this period of increasing Colonial settlement a non-Native mixed economy of farming and small scale timbering developed. The First Nations of Manitoulin Island for the most part did not participate in the centre of this growth. Most of their activities continued to be subsistence based seasonal activities. The continuation of their ancient lifestyle persisted in the midst of a metamorphosis in the world around them. Yet as time went by and Colonial populations increased, some Anishnabe land and resource use was threatened. For example, Indian fisheries fell under increasing Crown control.[29] The people of Wikwemikong strongly attempted to preserve the privileges of their treaty fishing rights but were often disregarded in their attempts to do so. For example, in 1875 the Anishnabe prosecuted

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[25] Ibid. at 88.
[26] Ibid. at 89.
[27] Ibid. 121.
[28] Ibid. at 135.
[29] For example the Fishery Act of 1865 permitted leases to the Anishnabe on certain conditions, but only for food, see An Act to Amend Chapter 62 of the Consolidated Statutes of Canada, and Provide for the Better Regulation and Protection of Fisheries (1865) 29 Victoria, c. 11. This reduced the commercial reliance which had been placed upon fisheries.

transgressors of their fishing grounds by having their local Indian agent act as justice of the peace and lay formal charges. However, the legality of their actions was questioned by the Indian department and the charges were not enforced.[30] Thus, the unfortunate effect of Anishnabe reliance on the terms of the treaty was that certain Native fishing leases were cancelled and awarded to the person the Anishnabe regarded as the transgressor. This was done by the Crown to "teach" the Indians not to "usurp" authority.[31] This had a chilling effect on Anishnabe attempts to enforce their jurisdiction through direct action since they were concerned about losing other licences around the Island. Hence, like so much of Native resistance, people concealed their actions and continued to use their resources despite Colonial laws and regulations which forbade it. The unjust treatment of the Anishnabe fishery was summarized in 1878 by William Plummer, Indian Superintendent for Manitoulin Island:

> ...the fisheries which have been exclusively Indian for the past few years have been taken from them and given to white traders who employ white fishermen...It can not be for the public interest to lease the best fishing grounds to a few white men and to deprive several hundred Indians who reside in adjacent villages of the privileges which they have enjoyed from time immemorial...As to the Indian treaties, it is well known that in the general surrenders, large tracts of land and adjacent islands were reserved and there are no treaties in existence covering any surrender of these tracts of islands and the waters by which they are immediately surrounded. It is also well known that these tracts and islands were released for the express purpose of retaining the privilege of fishing in the adjacent waters, and it is quite natural that they should think they are arbitrarily deprived by the government of rights which they never have surrendered.[32]

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[30] Wrightman, supra note 1 at 101.
[31] Ibid.
[32] UCCM Royal Commission Submission, supra note 11 at 16.

This statement demonstrates the expressions of support for Native fisheries by non-Native people during the period. As previously noted, the Ojibway continued to exercise these rights in the face of legal prohibitions and sanctions.

The continued reliance and exercise of Anishnabe rights to fish, hunt and gather is found in the account of one of the missionaries resident with the Anishnabe of Manitoulin during the 1890's. He observes, as we have seen most writers do about the Anishnabe throughout their history:

> Sometimes great disappointment is caused when, after a long and troublesome journey, the missionary finds the village almost deserted; yet while the Indians are so wandering in their habits and mode of life, this can hardly be prevented.[33]

At another point he states:

> Many of the Indians here were engaged at this time in fishing. ...the Indians of Subing live chiefly by hunting, they possess gardens and grow corn and potatoes, but they are not as yet very successful in their agricultural pursuits.[34]

The Anishnabe were still migrating to their sugar bush camps throughout the late decades of the 1800's.[35] Thus, despite government attempts to ignore or repudiate their treaty rights, and in spite of increasing settlement on their traditional homelands, the Anishnabe for the most part continued to practice their seasonal pursuits[36] and live the circle

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[33] H.N.B., Manitoulin or Five Years of Church Work Among the Ojibway Indians and Lumbermen, Resident Upon that Island or in Its Vicinity (London: Simpkin, Marshall, Hamilton, Kent & Co., 1895) at 128

[34] Ibid. at 96.

[35] "[T]he Indians prepared for their usual camping out in the sugar bush": ibid. at 108.

[36] Wrightman, supra note 1 at 134, 136 & 139.

of existence that they pursued since time immemorial. An excerpt from a petition by the Chiefs of Wikwemikong to the Crown near the close of the century demonstrates the continued reliance that the Anishnabe of Manitoulin placed upon their fisheries:

> We ask you to please forward this our petition to the Department at Ottawa. The Chiefs and Councillors assembled to consider our miseries, how we are prevented to fish; how we are put in prison for our fishing.
>
> We Ottawas, the descendants of the Ottawas, who were always the friends of the Great King of England. Our forefathers were the owners of the land, of the animals, of the fishes, and used them as their food. It was established by Treaty that here where we live only Indians should dwell and that the fisheries should be our fisheries all [illegible] this was agreed to on August 9th 1836 by F.B. Head...
>
> But now although we petition the authorities to be allowed to fish in the surroundings of the unceded portion of Manitoulin Island we get no support. On the contrary we are only more oppressed; our nets are taken from us, and so are our boats, and we are locked up in prison. [illegible]...we are treaty by the Great King whom our forefathers assisted during the War of 1812 - 1815. During those wars there were often 2,000 Indians to 50 English soldiers in the field; if the Indians had not helped the English then, how much of the country would be theirs now.
>
> ...we want to eat we want to feed our children and we want means to clothe them.[37]

Thus, to the end of the century, the Anishnabe of Manitoulin Island continued to practice and assert their rights to land on Manitoulin as agreed upon at Niagara and in 1836. This caused them to continue to exercise their traditional life patterns despite great personal risk to themselves and their resources. They persisted in the exercise of traditional laws such as banishment, they stood in the way of surveys which threatened to carve up their land, and, in the face of confiscation

[37] UCCM Royal Commission Submission, supra note 11 at 9.

and prison, they disregarded laws passed to take away their fishery. Such actions demonstrate the importance the Anishnabe placed on their agreements with the Crown and on their traditional way of life guaranteed by these compacts.

During the 1900's, First Nations' objectives in regard to land and resources continued to be centred around their traditional economy. In 1903 it was recorded that "a good number of families go sugar making on the Island and on the north shore".[38] In 1910 the Anishnabe people of Manitoulin were "shooting deer in the winter when the snow is deep".[39] In 1920 a Grand General Indian Council was held at Wikwemikong and a petition was drafted that asserted the importance First Nations' continued to place in hunting and fishing. The document read:

> We the Grand General Indian Council assembled at Wikwemikong Indian Reserve, June 16th, do hereby petition the Government of Canada to adjust the Treaty rights of Indians in Ontario concerning hunting and fishing privileges as stipulated in various treaties and surrenders.
>
> That when the Indians surrendered their lands to the Crown, the fish and game were not surrendered, and in certain treaties it states that these provisions to hold good so long as the grass grows and water flows, and as long as the British Government is in existence.[40]

The petition for the protection of fisheries was of direct concern to the Anishnabe of Manitoulin Island as witnessed by a motion immediately following in which two Chiefs of Manitoulin appealed to the Council "for assistance in dealing with their grievances in regard

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[38] A Synopsis History of Wikwemikong, supra note 19 at 31.

[39] Through the Years Vol. IX No. 8 (July 1992): 38.

[40] Abstract of Proceedings of the General Indian Council of Ontario, June 16-19, 1920 [unpublished] at 4 (on file with author).

to the fishing question of this reserve".[41]

In 1949 rights to fish and hunt were still of the highest priority to the Anishnabe of Manitoulin. In a meeting of the Union of Ontario Indians at Wikwemikong in 1949 unanimous support was given to a resolution that:

> Adequate water be declared as Indian territorial water surrounding any Island Reserve for the express purpose of preserving fish for the use of Indians, and that no Provincial Game Laws be applied in waters so declared.
>
> And the game in the forest are the heritage of our people and we never gave up those sacred rights to any Nation. We want our Indians to enjoy their privileges. These rights were reserved for the posterity of the rising generation.[42]

A motion was then specifically passed in the same meeting that

> the Wikwemikong Reserve, submit a request that the water frontage for fishing purposes and protection of the Indian Bands be pressed for immediate consideration and measures taken by the Department [of Indian Affairs] to relieve conditions and alleviate any further hardship.[43]

These assertions and practices show that the majority of Anishnabe on Manitoulin demonstrated "a lack of interest in...acculturation and [a] quiet persistence in a more acceptable cultural course" throughout much of the first half of the twentieth century.[44] They "had firmly rejected farming as a way of life in earlier decades" and continued to pursue a "varied pattern of seasonal employment".[45]

The indifference that the Manitoulin Anishnabe had for fixed,

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[41] Ibid. at 5.

[42] Henry Jackson (secretary), Minutes of the Third Annual Provincial Convention of the Union of Ontario Indian Organization, September 15-16 [unpublished] (on file with author).

[43] Ibid.

[44] Wrightman, supra note 1 at 170.

[45] Ibid. at 171 & 172.

non-seasonal land use should not be taken as meaning that they did not engage in farming or other non-native enterprises. People continued to farm but, as was their tradition, agriculture was only one small part of the diverse economy of the Anishnabe. Though it did not possess the same element of principal importance that non-Native people gave it, farming remained a vital link in the food production of Aboriginal communities.[46] You can not listen to the First Nations people of Manitoulin tell about this period of their history without realizing that farming was one aspect of their economy. Anishnabe people raised pigs, goats, cattle, sheep and turkeys, and cultivated vegetables, corn and grains.[47] While farming was not the foundation of Anishnabe land use, it could not have been stopped without seriously overburdening other segments of their economy.

The Anishnabe of Manitoulin did engage in some activities which took them away from their seasonal patterns, but this was usually in response to severe external pressures. For example, during World War One over 50 men from Manitoulin reserves participated in the conflict.[48] One man, Francis Misinishkotewe from Manitoulin, was awarded the Cross of Saint George for his valiant efforts.[49] Anishnabe also pariticipated in financing the war through such actions as the Sucker Creek Band

[46] For a visual history of the place of farming in West Bay Indian Reserve in the early to mid-1900's, see Regina Beaudin, ed., M'Chigeeng II (West Bay: West Bay Band, 1985).

[47] Interview with Al Shawana, member of the Wikwemikong Historical Society, former Chief and Councillor of Wikwemikong, August 20, 1993 (recording in possession of author).

[48] Peter Schmalz, The Ojibwa of Southern Ontario (Toronto: University of Toronto Press, 1991) at 229.

[49] Ibid.

at Little Current on Manitoulin voting $500.00 for the war "purposes" shortly after the war began.[50] This participation by Manitoulin First Nations occurred despite terrible racism and discrimination. They often received inferior treatment and sometimes experienced greater casualties because of biases against them. Even after returning, the Anishnabe soldiers were not accorded the same respect as non-native veterans. In one case Thomas A. Peltier of Wikwemikong, who was disabled in France and had six children, was refused food by the Minister of Pensions because he lived on the reserve.[51] This must have seemed bitterly ironic for First Nations of Manitoulin because in the past when they had fought as allies of the Crown they had been granted presents and other forms of assistance.[52] In this contemporary example, even though many Anishnabe chose to fight as allies, and not subjects[53], they were deemed to be subjects and conversely received nothing for their efforts.

The other point of variation from traditional use and occupation of the land occurred because of residential and industrial schools. A Catholic residential school was built on Manitoulin Island in 1885. When fire destroyed this building another school was rebuilt at Spanish, and this institution served as a temporary home to many young Anishnabe

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[50] Ibid. at 230.
[51] Ibid. at 233.
[52] For a description of Crown treatment of First Nations as allies in the historical period, see Robert S. Allen, His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815 (Toronto: Dundurn Press, 1993).
[53] Ibid. at 229.

people through the early decades of the 1900's.[54] The result was that some people from Manitoulin had their community education interfered with. For these people, residential school amounted to either an interruption or, in the worst cases, a cessation of the rich knowledge that Anishnabe culture had to teach about land and resource use. While the impact of residential schools for some First Nations people of Manitoulin was unquestionably oppressive and alien, one should not over-estimate its influence on land and resource use. Only a small part of the community was ever involved in the school at any particular time. Furthermore, many Manitoulin Anishnabe never attended these schools, and thus did not experience separation from the land. Even those who did attend school often did so sporadically, going to school for a couple of years at a time and then returning home for extended periods. There was even relief for the few who did attend residential school full time, as most came home for the summer and learned the lessons of the land that their grandparents and parents knew. Therefore, while residential school did change the way some Anishnabe related to the land, for the most part the community continued to perform the same seasonal tasks that they had performed for millennia. Thus, commentators on the First Nations' economy of Manitoulin in the latter half of the twentieth century were able to observe, as is now familiar through the evidence this work has marshalled:

> As in the past, a limited number, especially on the Wikwemikong peninsula, gain part of their income from farms, but most still

[54] For a personal account of life and experiences with the Spanish Residential School, see Basil Johnston, Indian School Days (Toronto: McClelland & Stewart, 1988).

> find varied and sometimes seasonal employment in other endeavours both on and off the reserves.[55]

The degree to which First Nations people on Manitoulin Island have managed to hold on to their ancient patterns of life is a testament to the cultural strength their relationship with the land engenders.

I would like to provide one example of the way in which ancient patterns of land use are reproduced in contemporary Manitoulin Anishnabe communities. The uncovering of this phenomenon is vitally important in understanding Anishnabe land interests today. An appreciation of how tradition continues to motivate action is necessary to discern contemporary First Nations positions relative to land claims, as will be explored in the next section. Unless one is aware of the history and force of the cultural practises I have tried to illustrate throughout this work, one could look into these communities and never appreciate the reproduction of their customs in a modern form. Tradition is disguised to many observers who lack this knowledge, and therefore comprehension of First Nations objectives in contemporary land title negotiations remains concealed to the casual onlooker. However, identifying aspects of cultural persistence should place the reader in a better position to evaluate the appropriateness and relevance of modern land allocations to First Nations people.

In recalling ancient patterns of Anishnabe land use, it will be remembered that in the springtime on the streams and waterways of Manitoulin one would have witnessed the reproduction of a pattern of

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[55] Wrightman, supra note 1 at 205.

life that was replicated throughout the area. These streams were all springtime gathering places where, in mid April to May, Anishnabe people would move from their small winter camps to the heads of the rivers and streams and engage in fishing as the streams became full of spawning aquatic life. They would harvest the rivers by using gill nets, spears, hooks and fish weirs. When the fish run died down these people would then make summer camp with other members of their extended family and community. The women would plant small crops and the men would hunt large game and be absent for extended periods of time to accomplish this purpose. The women would share knowledge and experience with one another to meet the challenges which they encountered over the winter. The people lived like this for five to six months until the weather started to become cold again. They would then gather up their goods and head to the woodlands with their immediate family. Through this time the Anishnabe would live in small winter camps with their immediate kin engaged in small scale hunting and gathering activities. In late March or early April they would begin to gather with members of their extended family in slightly larger camps and take sap from the trees in preparation for the approaching spring. At this point there would be a gathering at the fishing sites once again to continue the circle of their lives through another round.

The reflection of this cycle in the contemporary context demonstrates how many Anishnabe still seem to follow this circle of life. Of course some First Nations people of Manitoulin do not fit the pattern I am about to describe to you, and I am anxious not to

generalize or stereotype Indians to fit this mold. There is an increasing diversity within Native culture as people lead as different and varied lives as you would witness in all segments of society. Nevertheless, I am struck by the persistence of the ancient patterns of life that still seem to exist amongst some of these people, though in a modern context. The following observations extend from my knowledge of people of Manitoulin Island, and from my experience with my own community which is the next reserve south of Manitoulin Island.[56]

The men in Anishnabe communities exhibit traditional patterns of life in the following way. In the late winter and early spring many Anishnabe men will spend time on the Island, engaged in small scale gathering. They will do a little fishing and maybe some limited trapping to supplement the means by which their families live. In the late spring, these men will fish more intensively to store food away for the summer. Then, when the good weather starts to arrive, they will leave their communities and work in industrial, construction, or resource based work. This strikes me as very similar to what used to happen when the communities came together for their summer camp. Many men would leave the community for an extended time to procure sustenance for their family. The difference is that in earlier times sustenance was provided by big game, not construction or industry. In the fall, when the cold weather approaches, these men will work less intensely off the reserve. They will go to their Nation's traditional hunting grounds and put

[56] For a brief history of my reserve, the Chippewas of the Nawash, see John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall Law Journal 291.

some deer or other game down to supplement the money saved over the summer. When they come home, the circle starts to repeat itself.

Similarly, Anishnabe women can often be found engaging in activities that echo earlier practices. In the winter, Anishnabe women often work intensely in the community with internally focused projects and developments. Some women work in band or organizational politics. Others work with community centres such as the Ngwaagan Gamig Recovery Centre, Kina G Bezhgomi Child and Family Services, Aids and HIV Centres or in family care. When the spring approaches these women often start to expand their circle of activity and travel to nearby centres such as Sudbury and Sault Ste. Marie to reinforce the work they have developed during the winter months. This is not to suggest that people do not go to these places during the winter, as they occasionally do. I am merely giving my impressions of a general phenomenon which is quite conspicuous once one has an appreciation for the rhythm of Anishnabe communities. Finally, in the summer many Anishnabe women will spend much more time in association with people from other places to build upon their work and gain new ideas for the next circle of internal focus. Conferences, pow-wows, retreats and seminars are all familiar to many Anishnabe women during this season before the winter returns and the traditional cycle of activity starts over once again.

This pattern of life has caused some people looking at Anishnabe, and not understanding them, to stereotype them as unreliable because some do not hold year-round jobs. There are also charges that they are lazy because some think that these people do not work all winter,

or all summer as the case may be. Sometimes people do not look beyond the borders of their lives and realize that some First Nations people are busy at home in this period with their family or community, many being heavily involved with band politics in the winter. There are those who fail to see the racial and cultural context that is evident in these peoples' lives. Therefore, when some non-Native people talk to First Nations people about the allocation of land, assumptions are made such as "you no longer possess a separate culture which justifies a different treatment of the land you claim", or, "you should become like other Canadians in the way in which you designate and use land because you participate in the same economy". These, and other such assumptions, reveal a misunderstanding of Anishnabe culture because they fail to appreciate the hidden aspirations people have towards the land and the uses to which the Anishnabe want to put it.

Now that I have explained the continued existence of Anishnabe cultural practices, we will turn to the last section of this paper which examines the allocation of land in a contemporary context. We will see how negotiations over land title settlement create an intersection of objectives which often marginalizes and conceals the traditional customs and practices of First Nations land use that has persisted through thousands of years.

PART III

CHAPTER SEVEN

This work has demonstrated how historical attempts to settle rights to land on Manitoulin Island have produced and perpetuated a certain pattern of allocation between Native and non-Native peoples. The persistence of ancient Native practices relative to land and resource use, as opposed to the land use and distribution practices of non-Native people, has been a central element of this study. A significant part of this examination focused on the important agreements reached by the parties in attempting to guarantee their preferences in land use. We will now explore more recent discussions about the use of land on Manitoulin Island. This will also reveal a complex web of intersecting objectives in the allocation of land. A remarkable parallel in the process of land title settlement between the early and latter period will be revealed.

In contemporary efforts to allocate land between Native and non-Native people, the groups have mingled their objectives and pursued a variety of strategies to secure their preferred pattern of land and resource use. This chapter will begin by examining the different objectives that Native and non-Native people possess in settling disputes over land. Attention will subsequently be given to the diverse strategies employed in the pursuit of this goal. The parties' relationship to one another in land title settlement will then be explored before, finally, examining the risks and benefits each party faces in this process.

I CONFLICTING OBJECTIVES IN CONTEMPORARY LAND TITLE SETTLEMENT

A) FIRST NATIONS OBJECTIVES

This work has illustrated that throughout the period of post-contact history First Nations people on Manitoulin have demonstrated two discernable aspirations in regard to land. This has led to a paradoxical facilitation and limitation of their objectives. As shown with the 1764, 1836 and 1862 treaties, one goal that some Aboriginal people possessed was the desire to hold land in common amongst themselves, without the interference, and to the exclusion, of "settlers". This objective was pursued to safeguard traditional relationships to the land. A separate goal in relation to land held by other Native people was the desire to be in a location to participate in the benefits of trade with the settlers. These two ambitions, which can be very loosely classified as segregation and acculturation, have structured the articulation of Native objectives in land use until the present day.

These diverse goals are reflected in the different positions of the United Chiefs and Councils of Manitoulin (UCCM) and the Wikwemikong First Nation. The UCCM have directed discussions about the allocation of land on behalf of several Bands to resolve issues left outstanding from the treaties, while the Wikwemikong people have asserted their sovereignty and stated that their land is unceded. The Bands represented by UCCM are on the western side of the Island, and they are the descendants of those people who were unfairly deceived in, or agreed with, the treaty of 1862. The Bands of the UCCM are Sucker Creek,

Sheshegwaning, Sheguiandah, West Bay and Whitefish River. As a general point, the UCCM have attempted to work with the government to create fairer treatment under the treaties. The population represented by the UCCM is approximately 1500 people.[1] On the other hand, the Wikwemikong people have maintained their separation from the Canadian government and have repeatedly refused to participate in the treaty process. These people occupy the eastern portion of the Island and they are the successors of those who originally opposed the treaty of 1862. The 1992 population of the Wikwemikong peninsula was 2311 people.[2] Currently, over 50% of the Anishnabe on Manitoulin, on both the east and west of the Island, speak Ojibway as their first language.

The UCCM objective was to require the Crown to execute some unfulfilled provisions of the 1862 treaty. UCCM claimed that under the terms of the treaty signed at Manitowaning they had not received compensation for approximately 90,000 acres of land that were surrendered and used but unsold. This unsold land consisted primarily of marine bed, shoreline and road allowances, and lake beds. The UCCM felt that they had a right to the unsold surrendered land that was being used by virtue of the treaty because it provided that in further consideration of such sums as may be realized from time

> to time as interest upon the purchase money to be realized of the lands to be sold for their benefit as aforesaid, the parties hereto of the second part have, and hereby do release and surrender and give up to Her Majesty the Queen, all right, title, interest and claim of the parties of the second part...to Her Majesty.[3]

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[1] Ontario Native Affairs Secretariat, Akwesasne to Wunnumin Lake: Profiles of Aboriginal Communities in Ontario (Toronto: ONAS, 1992) at 208-11, 220-21 & 248-49.

[2] Ibid. at 258.

[3] Canada, Indian Treaties and Surrenders, from 1680-1890 reprinted

The UCCM were claiming that they did not receive the money promised for the land that they surrendered, for which the Crown was receiving benefit. The grounds on which they claimed compensation was the treaty's assurance that the Anishnabe would be paid interest upon the monies received from the purchase of their former lands. It can be concluded that the objective pursued by the UCCM was to receive compensation for these lands which were surrendered and not paid for, from which the Crown was receiving benefit.

The Wikwemikong objective regarding land allocation has been to assert that their peninsula remains unceded. These people desire to use their land in accordance with traditional customs. While Wikwemikong land in some regions is put to uses that are indistinguishable from UCCM communities, land use on Wikwemikong also features many differences. For example, the people of Wikwemikong have a larger land base than the other communities on the Island, enabling them to follow traditional practices, such as leaving land fallow. While there is no clearly articulated policy from their government concerning this ancient use, in observing their land one witnesses such practices throughout their peninsula. It is apparent that ancient motivations surrounding land use continue to influence contemporary patterns of allocation on Wikwemikong. The strength and depth of cultural aspirations concerning land use have enabled the Wikwemikong people to resist the pressure from non-Native society to abandon their

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ed. (Toronto: Coles, 1971).

practices.

One should also be aware that the two objectives demonstrated by UCCM and Wikwemikong in the control of land are not always exclusive. The desire to enjoy the benefits of settler culture and the desire to remain apart are sometimes linked together. An example of wanting to pursue both goals simultaneously is found in UCCM's articulation of their objectives in seeking compensation for unsold surrendered lands:

> We are basing our proposals on a mutual desire to consolidate Indian and non-Indian lands on Manitoulin Island. The existing reserves on Manitoulin of the communities involved in the 1862 treaty are too small to accommodate the present and future populations. Our priority is therefore to exchange unsold lands which were surrendered in trust for sale, for lands to be confirmed and added to the reserves. Our goal is consolidation of socially and economically viable tracts of land. Our goal is also to ensure that our neighbours and ourselves do not deal with isolated strips of unsold Indian lands in the future. The unsatisfied Indian interest should cease to be an obstacle to the development and planning on Manitoulin Island.[4]

Evident in the above quote is the fact that the quest for the benefits that settler culture brings (planning and development), and the separation from settler culture for the preservation of First Nations' culture (consolidation and socially viable tracts of land), sometimes exist in an uncomfortable union together. Both the UCCM and Wikwemikong desire something of what non-Native society has to offer and both groups also wish to maintain their traditions. The difference is that each group has ranked their priorities differently in the pursuit of these objectives. Furthermore, there are individuals within both groups who

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[4] UCCM, reply to Ian Scott, July 22, 1988 (on file with author).

more closely identify with the importance assigned to objectives by the other group. These varied objectives create a complex weave of entwined and divergent objectives within and between First Nation communities on Manitoulin.

Thus, there are two goals which the Anishnabe pursue concerning land allocation. These goals are sometimes pursued separately and at other times together. The conflict of these diverse goals make it difficult for Native aspirations to be fully satisfied. Yet, it is this very diversity which also enables the government to enter agreements with the Anishnabe insofar as they create space for negotiation and the establishment of common goals with the provincial government.

B) NON-NATIVE OBJECTIVES CONCERNING LAND

Non-Native objectives in recent land settlement discussions on Manitoulin Island were represented by the Canadian federal and provincial governments. The presence of both levels of government in the title settlement process complicates an already complex state of affairs, for it will be seen that the aspirations of the levels of government do not always coincide. Moreover, each level of government possesses a set of objectives that are, on occasion, internally conflictual.

The federal government's objectives in land allocation are two-fold and potentially contradictory. It has a goal of expending as little money as possible on the settlement of First Nations' claims. It also has an obligation to protect Indians and their land in the

settlement of disputes concerning its allocation.[5] Since the settlement of First Nations' claims may prove expensive to the government, and since the government may also be obliged to protect these same claims, the federal government is placed in a possible conflict of interest.

The divergent objectives of the federal government are illustrated by its policy initiatives for the resolution of issues in land allocation. The government deals with these issues under the policies of comprehensive and specific claims. The comprehensive claims process is to deal with land where First Nations can establish "their traditional and continuing interest in the land".[6] This means that the policy applies to land where Aboriginal title has not been extinguished by treaty. An illustration of the comprehensive claims policy is the Yukon Agreement under which the Champagne and Aishihik First Nations have achieved the power to govern themselves[7] and enact laws on unsurrendered land[8] in exchange for surrendering other lands

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[5] This obligation is derived from the historic Crown dealings with Indians and from The Constitution Act 1867, R.S.C. 1985, App. II, No. 5, s. 91(24).

[6] Indian Affairs and Northern Development, Comprehensive Land Claims Policy (Ottawa: Supply and Services, 1986) at 6.

[7] Champagne and Aishihik First Nations, The Champagne and Aishihik First Nations Self-Government Agreement (Ottawa: Indians and Northern Affairs, 1993).

[8] See, ibid. s. 13.3 at 17, which provides the authority for the Champagne and Aishihik to enact laws on unsurrendered areas (called Settlement Lands). These Nations have powers to enact laws in the following matters:

a) use, management, administration, control and protection of Settlement Land;
b) allocation or disposition of rights and interests in or to Settlement Land, including expropriation by the Champagne and Aishihik First Nations for the Champagne and Aishihik First Nations' purposes;
c) use, management, administration and protection of natural resources under the ownership, control or jurisdiction of the Champagne

to which they claimed title.[9] The specific land claims process refers to "those claims which relate to the administration of land and other Indian assets as to the fulfilment of treaties".[10] This policy generally applies to land where Aboriginal title has been extinguished, subject to a treaty, and dealt with under the Indian Act.[11] Conventionally, the Manitoulin claim would have fallen under the specific claims process. An example of the usual application of the specific claims process is the $3.2 million settlement made with the Big Cove Band in New Brunswick for the sale of 202 acres of reserve land that did not follow the conditions of the Band's surrender of lands.[12] The federal government will generally only receive First Nations claims relating to land through one of these two noted policies.[13]

Canada's budgetary goal in clearing title to land is illustrated by reference to a critique of Comprehensive Claims policy by the Assembly of First Nations. They state:
Canada's present policy is based on the premises of assimilation and

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and Aishihik First Nations;...

[9] Council for Yukon Indians, Umbrella Final Agreement between the Government of Canada, The Council for the Yukon Indian and the Government of the Yukon (Ottawa: Indian Affairs and Northern Development, 1993).

[10] Canada, Outstanding Business: A Native Claims Process (Ottawa: Supply and Services, 1982) at 7.

[11] The issue of specific claims has a different application in British Columbia: see Eric Denhoff, Native Issues: See You in Court (Canadian Bar Association, 1990) at 6.

[12] Canada, Federal Policy for the Settlement of Native Claims (Ottawa: Department of Indian and Northern Affairs, 1993) at 19.

[13] In 1993, after the period of the Manitoulin negotiations, the federal government finally agreed to accept "claims of a third kind" which "fall within the spirit of the comprehensive and specific claims policies, but do not meet the strict acceptance criteria of these two programs": ibid at 29. It remains to be seen how generous the government will be in using this policy.

> extinguishment...
> The policy is designed to achieve two complementary objectives:
> (i) the extinguishment of aboriginal rights, titles, etc;
> (ii) narrowing the scope of aboriginal rights by excluding political matters from the negotiating table...
> Rather than enabling the First Nations to be self sufficient they dictate a level of existence with a hope that peoples of the First Nations will assimilate into mainstream society.
> The present claims policy reflects the government's intentional and deliberate attempt to colonize First Nations in order to dispossess our land and resources and our inherent right to self-government.[14]

While the First Nations on Manitoulin are not involved in a Comprehensive claim,[15] this statement illustrates that the federal government's objective in land title settlement is to subordinate or extinguish Aboriginal title, and by implication reduce any future financial obligations to Native people relative to Indian land and management.[16] The federal government can best extinguish future financial obligations to First Nations by having them surrender their legal rights to land so that there is no continuing federal responsibility for the surrendered land.[17]

Besides trying to establish their objectives of a free and certain title residing in the Crown, one must also recognize that the federal government has a burden to protect Indian land as well. In Guerin v. The Queen,[18] it was confirmed by the Supreme Court of Canada that the federal

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[14] Assembly of First Nations, Submission to task force on Comprehensive Claims Policy, November, 1985 at 9-10.

[15] See infra notes 30-32.

[16] For a review of financial obligations of the federal government relative to reserve lands, see Canada, Lands, Resources and Title Review (Ottawa: Department of Indian and Northern Affairs, 1990).

[17] The federal government relieves itself of these fiduciary obligations upon surrender provided it does not take on other continuing obligations in the settlement of the claim.

[18] (1985) 13 D.L.R. (4th) 321 (S.C.C.).

Crown has a fiduciary obligation to ensure that Indian legal rights in land are not violated. In that case, it was held that the federal government violated its fiduciary obligation when it did not obtain a lease of a Band's reserve land which was in accordance with the terms which the federal government led the Band to believe would be obtained. Chief Justice Dickson, as he then was, wrote that "[a]fter the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms".[19] The result of this decision is that the federal Crown has a duty to exercise the utmost loyalty in administering Native interests.[20]

One example of the federal government espousing First Nations' objectives is found in a document entitled Set of Principles, which was produced by the Department of Indian and Northern Affairs in response to claims put forward by the UCCM regarding unsold surrendered lands. This document contains fifteen points which outline the federal government's position for the negotiation of the Manitoulin land dispute. This document states in part:

3. The department supports the UCCM in its goal of consolidating larger tracts of land by means of land exchanges
5. The department would be prepared to assist UCCM in consideration of possible exchanges of land.[21]

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[19] Ibid. at 344.

[20] The federal fiduciary duty was confirmed in R. v. Sparrow (1990), 70 D.L.R. (4th) 385 (S.C.C.) at 408, where the court stated:

...the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship is trust like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light if this historic relationship.

[21] Set of Principles, January 1984 (on file with author).

A further illustration of the government's support for First Nations is found in a public document of December 1989 that discusses possible changes to the Indian Act.[22] This document describes the federal government's attempts to change the Indian Act[23] through a process of consultation with Native people. As such, the report looks at changes being discussed in areas such as education, land management, land registry, the administration of Indian money, and Indian government. The document states the objectives of the government as follows:

> The most fundamental long-term goal is to recognize Indian aspirations to exercise greater control over the management of their own communities, their own resources, and their own lands.[24]

While one has to be sceptical of federal support for Aboriginal aspirations given the historic subordination of Native objectives to those of the federal government and its conflict of interest, it is important to note that the federal government at least has to justify any infringement of Aboriginal rights if it does not protect First Nations' rights.[25] This may make the federal government more careful in relation to the protection of Aboriginal rights.

A third and final example of Canada's goal in supporting First Nations is taken from their public statement on Comprehensive Land

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[22] Department of Indian and Northern Affairs, Lands, Revenues and Trusts Review: Questions and Answers (Ottawa: Queen's Printer, 1989).

[23] Indian Act R.S.C. 1985 c. I-5.

[24] Lands, Revenues and Trusts Review: Questions and Answers, supra note 22.

[25] Sparrow, supra note 20 at 410.

Claims.[26] This document outlines different considerations encountered in negotiating land claims in areas where treaties have never been signed. The issues which the document addresses are the federal objectives in the settlement process, the scope of negotiations, the involvement of the provincial and territorial governments, and the procedures used in negotiating comprehensive claims settlements. The policy states

> The Government of Canada is committed to the resolution of comprehensive land claims through the negotiation of settlement agreements. Such agreements must be equitable to Aboriginal people.[27]

Again, while scepticism is in order given the poor record of the federal government in honourably dealing with First Nations' land, one can see that at least the federal government has expressed its objective to deal equitably with First Nations. The federal government responded with the affirmation of equitable dealing in reply to First Nations' criticism[28] of the earlier formulation of the policy. While the federal government may not fulfil all First Nations' aspirations, it can be noted that this statement demonstrates that they are at least espousing some First Nations' concerns in land title settlement.[29]

Yet, as noted, one has to be sceptical about such government

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[26] Comprehensive Land Claims Policy, supra note 6.

[27] Ibid. at 5.

[28] See Federal Policy for Settlement of Native Claims, supra note 12.

[29] Though not apparent during the time of the Manitoulin negotiations that are the subject of this chapter, the government subsequently changed its comprehensive claims policy to take account of Native criticism of the comprehensive claims policy. This illustrates even further attempts by the federal governent to take account of First Nations' concerns in land allocation issues: see Federal Policy for the Settlement of Native Claims, ibid.

statements regarding the resolution of land claims because of the conflict of interest that it finds itself in. The federal government is very good at using encouraging rhetoric about land claims, but when one examines the details of its actions they are anything but encouraging. Because the federal government is committed to reducing its expenditures on Native land claims, while at the same time being under an obligation to protect and secure Native rights, these two objectives place the federal government in a potentially conflicting position. The federal government is supposedly trying to advance First Nations' objectives while also attempting to protect and advance their own. These conflicting objectives have led to the design of a claims policy which ensures that the federal government has the final authority in resolving land disputes. In this policy the federal government tries to straddle its competing objectives by acting on both sides of the dispute in order to accommodate its own divergent concerns. As such

> ...governments act not only as defendants with respect to the alleged wrongdoing, they also act as judge and jury, and banker to the claimant, and at least in the case of the federal government, as a fiduciary legally charged with protecting the rights of the claimant. This fundamental conflict is inherent in the existing process and ensures that even where settlements are agreed to by Indian First Nations...unfairness is likely to linger.[30]

The use of a land dispute resolution process that places so much power in the federal government makes it easy to see why a healthy degree of scepticism is neccesary in assessing federal government statements about protecting First Nations' objectives in land title settlement.

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[30] Indian Commission of Ontario, Discussion Paper Regarding First Nation Land Claims (September 24, 1990) at 99.

Until the federal government manages to separate its conflicting objectives, First Nations will be disadvantaged in pursuing their objectives.

One possible solution to the federal policy deadlock regarding First Nations' land would be to have the process of dispute resolution handled by an independent body. Proposals for the creation of an indepedent body to supervise, monitor and facilitate the validation and compensation of land claims have been recommended and much discussed,[31] yet their implementation remains, for the most part,[32] unrealized. Until such time as the federal government's statements feed into a more neutral process of land dispute resolution, cynicism

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[31] See discussion of draft legislation of the Canadian Parliament from December 1965 (Bill C-123) which proposed an independent claims commission to resolve disputes that involved Indian lands in G. LaForest, Report on Administrative Processes for the Resolution of Specific Indian Claims [unpublished] (Ottawa: DIAND, 1979). For other proposals to create an independent body to deal with disputes regarding Indian lands, see Lloyd Barber, "Indian Claims Mechanisms" (1973-1974) 38 Saskatchewan Law Review 11; Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians, A New Proposal for Claims Resolution in Ontario [unpublished] at 3-4 (submission to Minister of Indian and Northern Affairs, April 11, 1981), 19; Canadian Bar Association, Report of the Canadian Bar Association on Aboriginal Rights in canada: An Agenda for Action (Ottawa: Queen's Printer, 1988) at 80-85; Assembly of First Nations, Draft: Alternative Approaches to First Nations Interest, Aboriginal and Treaty Rights in Canada [unpublished] (Ottawa: August, 1990); Six Nations Council, Draft Position Paper No. 1 on Specific Land Claims in Ontario [unpublished] (Oshweken, September 20, 1990).

[32] The British Columbia Treaty Process incorporates a measure of independence in land dispute resolution by creating a treaty commission. The commissioners are appointed by the federal, provincial and First Nation governments to facilitate negotiations. It is also possible for the commission to arbitrate negotiations, but the extent to which it will be able to use this power is unclear. See British Columbia Task Force, The Report of the British Columbia Task Force (Vancouver: Queen's Printer, June 28, 1991).

and suspicion will surround any encouraging language it uses because the government exercises its authority to arbitrate on both sides of the dispute.

The provincial objective in land allocation is more straight-forward and not as conflictual as the federal government's position. It has a monetary and a political objective.

Monetarily, Ontario desires a settlement of all outstanding Indian claims to land because it receives the benefit of the land after the Indian interest is removed. St. Catherines Milling and Lumber Company v. The Queen [33] was a case that litigated the rights of the provincial and federal government in their claims to surrendered lands. Since this dispute made it necessary to consider underlying title in order to determine which government was entitled to receive the benefit of surrender, the issue of the nature of the Indian interest in land was explored. The court held that the "tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign".[34] As a result, it was found that the provincial Crown held the underlying title to Indian lands. The Privy Council stated that when land was surrendered, the Crown in the right of the province took the underlying title to the land without an encumbrance of any trust to the Indians. This result followed a finding that s. 109 of the British North America Act[35] gave the provincial Crown the entire beneficial interest of all the Crown lands in its boundaries, subject to some

[33] (1888), 14 App. Cas. 46 (P.C.).
[34] Ibid. at 54.
[35] Now the Constitution Act, 1867, supra note 5.

exceptions.[36] This conclusion flowed from the section itself that stated "all lands...belonging to the several provinces of Canada...shall belong to several Provinces...in which the same are situate".[37] It was felt that since the subject lands were within Ontario's boundaries, and were not within the exceptions for Dominion lands, that once the Indian legal interest was removed the land belonged to the province. Ontario therefore has an incentive to work with the federal government to settle land disputes with First Nations because the province will obtain the beneficial interest in the surrendered land. This will in turn enable the province to develop land and thus increase potential provincial receipts from its sale and subsequent taxation.

Politically, Ontario also has an objective in settling Indian land disputes insofar as it has a policy objective to show good faith to First Nations by resolving their claims. Bob Rae, Premier of Ontario, has developed this policy objective. He stated:

> And so, as a leader in this province, I tell you that in the time that is given to us, I am determined to do what I can, and our government is determined to do what it can, to see that we come to terms with this history.
>
> Quite specifically I say to you this: We believe that there is an inherent right to self-government, that inherent right stems from powers, and if you will, sovereignty, which existed prior to 1763, certainly existed prior to 1867, and certainly existed prior to 1982...

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[36] "The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117": St. Catherines, supra note 33 at 57-58.

[37] Constitution Act, s. 109, supra note 5.

I think what's at stake is how we negotiate and come to terms with what these powers actually mean, what impact we can have in the process of negotiation, in creating a common understanding...[38]

This statement was later given the status of official government policy as Ontario entered into a statement of the political relationship between itself and First Nations.[39] Ian Scott, former Attorney General of Ontario who was involved in the allocation of land on Manitoulin, also pointedly recognized the political nature of these claims. He stated:

These are political questions. Governments - and I include aboriginal government in these comments - cannot abdicate their political duty to come to grips with these questions. We cannot expect, nor should we desire, answers on these political questions from the courts.[40]

The settlement of Native land disputes, being a political issue, would

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[38] Ontario Premier Bob Rae, Transcript of remarks to Assembly of First Nations Banquet, University of Toronto, October 2, 1990 in Frank Cassidy, ed., Aboriginal Self-Determination (Lantzville: Oolichan Books, 1991) at 152.

[39] The Statement of Political Relationship states in part:

NOW THEREFORE THE FIRST NATIONS AND ONTARIO AGREE AS FOLLOWS:

1. The inherent right to self-government of the First Nations flows from the Creator and from the First Nations original occupation of the land.
2. Ontario recognizes that under the Constitution of Canada the First Nations have an inherent right to self-government with the Canadian constitutional framework and that the relationship between Ontario and the First Nations must be based upon respect for that right.
3. The First Nations and Ontario - involving the Government of Canada where appropriate - are committed to facilitate the further articulation, the exercise and the implementation of the inherent right to self-government within the Canadian constitutional framework, by respecting existing treaty relationships, and by using such means as the treaty making process, constitutional and legislative reform and agreements acceptable to the First Nations and Ontario.

[40] Ian Scott, in David Hawkes, ed. Aboriginal Peoples and Government Responsibility (Ottawa: Carleton University, 1989) at 358.

help the provincial government electorally. While it is obvious that there are many legal dimensions to the settlement of land disputes which dictate political concerns, what Ian Scott was referring to by calling the matter political is that the issue of land allocation can be dealt with in a more holistic manner. Courts can only deal with very narrow and specific issues while the political process of negotiation can cover a wide range of issues, if there is a commitment by the parties to the process. Scott was admonishing the parties, including the Province, to develop the political commitment to settle issues of Native land allocation.

Ontario's political interest at the time of negotiations with UCCM is evident in the province's proposal that the UCCM release it from further claims in return for the settlement of UCCM grievances.

The proposal states in part:

> Fifth, the final settlement will necessarily include release by your clients of all claims in respect of ceded portions of Manitoulin Island other than the existing reserves and the lands which will be transferred to your clients by the settlement of all claims for damages. The object of the negotiations from Ontario's perspective is to reach a mutually acceptable agreement that is just and that resolves the longstanding grievances of your clients arising from the treaty of 1862 and its aftermath.[41]

The province and the UCCM eventually entered into an agreement that reflected similar terms (the provincial/UCCM agreement will be examined in section II). Thus, Ontario has, besides a monetary interest, a political stake in being able to resolve outstanding claims to surrendered unsold land on Manitoulin Island.

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[41] Mark Krasnick, Executive Director, Ontario Native Affairs Directorate (ONAD), September 30, 1988 (on file with author).

In summarizing the objectives examined in relation to contemporary land allocations on Manitoulin Island, First Nations have two objectives which can be loosely described as seeking control over land as either a vehicle for acculturation or segregation. The federal government also has two goals: to reduce its expenditures on lands reserved for Indians, and to protect Indian land to fulfil its fiduciary obligations. Finally, the provincial government's objective is to receive title so that economic development can be facilitated, and also to further its political agenda by being seen to assist First Nations. These multiple objectives create room for negotiation insofar as some of the goals on each side are aligned. However, as will be seen, this alignment also causes other conflicting aspirations to be sacrificed in order to pursue goals that are mutually acceptable.

II THE STRATEGIES FOR SECURING OBJECTIVES IN LAND

The foregoing analysis calls for a more detailed examination of how each party tries to establish its objectives in land allocation. More specifically, the strategies adopted by the parties involved in the land title settlement process illustrate how the various parties are able to align their goals with others. They also reveal how other ambitions are submerged.

A) FIRST NATIONS' STRATEGIES

Manitoulin First Nations have used several strategies in attempting to secure their objectives concerning land. Strategies have varied according to the goal that is advanced. For those wanting to have closer ties with settler society (UCCM), the most prominent tactics

have been litigation and negotiation. For those on Manitoulin who want to achieve a greater separation from settler society (Wikwemikong), their strategy has been to develop self-government and to not enter into discussions with the government.[42]

As will be remembered, the UCCM claimed that the Crown, Ontario and Canada together or alone, had breached the terms of the 1862 treaty by not providing benefit for unsold surrendered land that was being used. The UCCM chose a strategy of litigation to pursue this goal. It was hoped that litigation would establish that First Nations did have a legal interest in the unsurrendered and unsold surrendered lands on Manitoulin. The UCCM selected a case that was meant to represent all the unsold land on the Island.[43] In the particular case chosen, the Bands of the UCCM claimed a breach of the 1862 treaty because in 1940 Ontario commenced operating a ferry service on Manitoulin that required a dock on a shoreline allowance that was unsold. In 1983 Ontario transferred the dock land to the Ontario Northland Transportation Company that was operating the ferry between the Island and the

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[42] Since the people of Wikwemikong are pursuing a policy that does not acknowledge the legitimacy of the Canadian government's claims over their lands and government, there is not as much public information available to assess their strategies. As a result, while I have been successful in uncovering some information about Wikwemikong's strategies, I have been able to find more details about UCCM's claims. This has led to an unfortunate imbalance in the coverage of the two groups' strategies in the following paragraphs as more space is spent dealing with the UCCM. One should not imply from the asymmetry of this coverage that Wikwemikong's strategy in pursuing their preferred allocation of land is any less sophisticated.

[43] The Court Record of the Statement of Claim and Statement of Defence, Abotossaway and Hare and Antoine and Aquonie v. The Queen, Supreme Court of Ontario, File No. 10/85.

mainland. This land was transferred by Ontario for a nominal $1.00, a price extremely below market value. The UCCM pleaded that this transfer was not at arm's length and that their people received no benefit from the sale of these lands. The UCCM argued further that the transfer constituted a violation of the treaty insofar as the treaty provided that the Crown had an obligation to provide a fair benefit as compensation for the surrender. The UCCM claimed that the federal and provincial governments breached their fiduciary obligation to them by not obtaining a fair price for this land. Thus, the case was felt to be a good test case to establish their interest in the unsold lands on the Island. The case was suspended pending the outcome of negotiations between Ontario and the UCCM.

Besides litigation, the UCCM have also pursued negotiation as a technique to secure their objectives. As will be seen, negotiation eventually led Ontario and the UCCM to a successful resolution of the issues surrounding the outstanding unsold surrendered lands. That negotiation is the preferred method of settlement for the Anishnabe of the UCCM is witnessed by the fact that the UCCM suspended their law suit when Ontario presented them with an offer to settle. Negotiation also has its advantages over litigation because it allows First Nations to introduce political arguments they could not present in court. From the perspective of the provincial government, negotiation is the preferred vehicle of dispute resolution because it takes advantage of the political goals that we saw Ontario has in settling outstanding land issues. An example of the political aspect

that negotiations can have is found in the following discussion in a meeting between UCCM and government representatives. Here the UCCM representative stated:

> There is a lot of public interest right now. Our phones never stop ringing. Land owners are getting very concerned. Not only the Indian people, it's also the landowners. Adjacent to road allowances, to shoreline...they've even offered to pay us for those. Is that the route to take? The continuing payment from some land owners who occupy road allowances...A couple of people called me up and said "who shall I make the cheque out to?" This is why I hope today that we can...move...for negotiations in the next couple of weeks.[44]

Statements such as this reveal the political forces the UCCM and Ontario were having to deal with from provincial citizens relative to land on Manitoulin. This helped to spur the provincial government to enter into negotiations. Negotiations led to an offer from the government of Ontario to settle the lawsuit and eventually resulted in an agreement resolving the issue of compensation for unsold surrendered land. In this agreement the UCCM Bands' agreed to deliver a quit claim deed in all lands transferred by Canada to Ontario.[45] The UCCM also agreed to release Ontario from any claim in respect of liabilty or obligation for the non-fulfilment of any terms of the 1862 treaty.[46]

In another strategic move, the UCCM demonstrated that they did not want to alienate local settler populations. They maintained contact with the Manitoulin Municipal Association (MMU) over the entire period

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[44] Albert Peltier, UCCM representative in meeting to settle position in unsold surrendered land claim, September 8, 1989 (on file with author).

[45] See infra note 71 and accompanying text, for a more detailed description of the settlement.

[46] Ibid.

of the settlement talks in order to "let the MMA know what the bands are doing and prevent misunderstandings".[47] As part of this inclusion, the MMA was invited to various tri-partite land negotiation meetings to express their goals and to ask questions. The transcripts from these meetings demonstrate that the MMA was able to become informed and obtain this information.[48] UCCM also demonstrated that they had a desire to "work out an agreement with [their] neighbours" in particular questions of title and land use.[49] For example, the Sucker Creek band wanted to erect a fence around their reserve but they were not sure where their land ended and the neighbouring farms began. The Band wanted to ensure that they designated their land properly without infringing on the valid property claims of non-natives living on the Island. To resolve this problem the Band cooperated with the neighbouring settlers to ensure that relations with them remained satisfactory.[50]

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[47] Paul Williams, Legal Opinion to UCCM, May 1, 1984 (on file with author).

[48] For example, Ken Ferguson, a representative of the MMA, asked and had answered questions such as the following:

I have one concern. I have no knowledge about the South Bay Mouth incident but the difference of opinion that we have over the suit you introduced. Are you going to continue with that suit regarding the road allowance...The reason we ask that, we talk of trades here and we did in fact trade road allowances. There was no exchange of money, although there is money mentioned in your suit...

Paul Williams, legal counsel for the Band answered:

A quick answer is yes, the lawsuits are going to continue...What happened with the road allowance situation is...there was a trade of a piece of Indian land for a piece of non-Indian land for which the Indians got zero. How much money went to the Bands?

Transcript, Tri-partite Lands Negotiation Meeting, June 27, 1985, at 8-9 (on file with author).

[49] Chief Abotossaway, Tri-partite Lands Negotiation Meeting, June 27, 1985.

[50] Ibid.

A final point of strategy the UCCM pursued was the form of compensation sought for the unsold surrendered lands. The UCCM wanted land or money in order to be able to consolidate a sufficiently large tract of land to make it feasible to protect their culture through their own institutions. They were of the view that they would not be successful in this regard without a land base. The following example from the chief negotiator of the UCCM provides a poignant illustration of this principle.

> I don't know if you have ever been to the island where the reserves are. Some of them are rock, mountain, swamp, un-fit for cultivation. The Indian people were pushed into there. They did not choose it.
>
> We considered your offer [20,000 acres of scrub land]. Some of us looked in Dawson Township. We know the Island. We considered the land on the north shore. We did not know what other interests there were in the lands and it would take years to be able to decide on the land. The chiefs decided that they should be able to buy land on the island. Of their choice. We have considered things several months.[51]

This quote demonstrates that the UCCM desired the ability to control land in order to choose what would be in their best interests to obtain. This is revealed in the decision of the chiefs not to accept the land the government chose to give them but instead to obtain money and buy land on the Island that they themselves view as desirable. This strategy reveals an objective similar to the people of Wikwemikong which is to be more independent from the settler government in their land use and to preserve decision-making within their culture. This example demonstrates that even within First Nations that seek greater

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[51] Albert Peltier, chief negotiator for UCCM, minutes of meeting Sept. 29, 1989 (on file with author).

interaction with settler soceity, there are contested issues about how much interaction will take place, and what form these associations will take.

At this point, brief mention ought to be made of the strategy of the Wikwemikong people who want to remain separate from settler culture. The Wikwemikong strategy is one of refusal to enter into a treaty or litigate their claims. The Wikwemikong Band were of the opinion that they should not officially be involved in the settlement of land claims since they regard their land as never having been surrendered. As a result, they did not participate with the UCCM in dealing the federal and provincial governments in negotiations regarding unsold surrendered lands. They have continued to assert the same type of interest and strategy that was evidenced in 1861-62.[52] Their current feelings about their land and the treaty that purported to take away more than half of their island can be recognized in the words they offered four years after the treaty was signed.

> We take occasion to protest again and to represent to thee how displeased we were when the Ottawa (Manitoulin Island) was surrendered and how we grieve yet for it. What took place then the treaty was not right at all. We repeat again that now we want our land. Please to the Great Spirit that we might own it yet. It does not look well to sell our land since it is only by intimidation that our land has been taken from us. Although we have protested, written to thee until now even that thou wouldst destroy and stop the sale of our land.
>
> It was on October the 4th, to use the English calculation, 1862, that one great Chief a Commissioner W. McDougal came to speak and made use of some Indians to ask them their lands. But they all refused, loved their land on that day - It was on October 6th 1862 that some Indians having been spoken to again and when they had been

[52] See Chapter 5.

> intimidated then only they surrendered the land. The Indians were not all pleased. Some few Chiefs only did the thing. But the majority a very great number were not willing at all and are not yet even now. We hope that when thou shalt see how things, the Treaty, took place it will suggest to thee some great determination for indeed we are very sorrowful for the loss of our land and truly we grieve much in our hearts. We shall never forget it, our Land.[53]

In maintaining their rejection of the 1862 treaty, the Wikwemikong people "became a governing body under what really amounted to a national concept" and "this rising regime...was very real to those who lived in its territory and under [Wikwemikong] intimidations".[54] When they later had a dispute with the government in the late 1860's, the Wikwemikong refused to appear before Canadian courts because they did not recognize them as having jurisdiction over them. This tradition of non-recognition of Canadian authority over their lands continues in Wikwemikong today and provides the reason why these people choose to pursue their objectives without recourse to the Canadian political or legal system. Thus, these people would assert that they should not have to bring claims for their lands since they have their own customs and laws that dictate how land should be used.

B) THE STRATEGIES FOR SECURING NON-NATIVE INTEREST IN LAND

The governments of Ontario and Canada have followed different strategies in attempting to secure an allocation of land on Manitoulin Island that would fulfil each of their objectives. The pursuit of these

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[53] PAC RG 10, Vol. 615, at 71-72, Petition of Wikwemikong to Governor General, June 18, 1866.

[54] J.R. Wrightman, Forever on the Fringe: Six Studies in the development of the Manitoulin Island (Toronto: University of Toronto Press, 1982) at 47.

strategies shows the emerging role of the provincial governments, as against the federal government, in dealing with First Nations' claims. Traditionally, the federal government has taken the sole responsibility in working with the Indians. Section 91(24) of the Constitution Act 1867 gave the federal government this responsibility by assigning them jurisdiction over "Indians, and Lands reserved for the Indians".[55] The federal government assumed this responsibility over Indians in several ways. First, it entered into treaties with First Nations for the surrender of their lands. Second, it enacted the Indian Act,[56] which regulated most aspects of Indian life. Third, it set up a department within the government to administer its obligations towards Indians.

However, as the Canadian federal system has evolved the provincial governments have taken increasing responsibility in many areas of political life. The provincial governments' intrusion into First Nation issues has been slower than in most areas because, while benefits can be obtained by resolving First Nation concerns, the obligations that have to be borne are much heavier than in some other areas.

The provincial government's strategy in dealing with the land on Manitoulin has proceeded from a stance that left all the responsibility with the federal government to one that recognizes an interest and consequent responsibility to be involved in dispute resolution. Evidence that the provincial government originally let

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[55] R.S.C. 1985, App. II, No. 5.
[56] R.S.C. 1985 c. I-5.

the federal government deal almost solely with the Indian legal interest is illustrated by the passage of Orders-in-Council in 1914 by the federal and provincial governments to confirm federal patents in land.[57] The confirmation of patents was made necessary by St. Catherines Milling and Lumber Co. v. The Queen,[58] where the Privy Council held that the provincial government received the right to dispose of land after a surrender of land to the Crown by an Indian treaty. However, despite this ruling Canada continued to issue patents under its own authority, even though it supposedly had no power to do so because title to the land involved was held by the Crown in the right of Ontario. However, the Orders-in-Council did allow the federal government to continue to administer the patenting and sale of lands on Manitoulin which assured the perfectability of future patents. Also, besides recognizing the continuing federal administration of Manitoulin lands, the Orders-in-Council also recognized as legally binding any future patents that would be issued. The problem left unresolved by the Orders-in-Council was that they did not cover past land sales. The problem of the legality of previous land patents would be dealt with 10 years later in the Indian Lands Act, which this work will deal with shortly[59].

In taking a closer look at the wording of the Orders-in-Council one can see the way in which the federal government's rights were

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[57] Canadian Order in Council OCPC 3059, of December 10, 1914, and Ontario Order-in-Council of December 23, 1914.

[58] Supra note 33.

[59] See infra notes 60 & 61 and accompanying text.

limited: to present and future (not past) patents, and, to only administering the Indians' legal interest in the Manitoulin group of islands. The Orders-in-Council read, in part:

> The Dominion to retain for the Indians the Great Manitoulin, Barrie Island and Cockburn Island, and the moneys received for the sales of Islands disposed and patented...the Province to ratify right of the Dominion to the Great Manitoulin, Barrie and Cockburn Islands and to confirm grants issued by the Dominion government for Islands sold...
>
> It is distinctly understood that nothing herein contained shall be construed as an admission on the part of the Province of Ontario of the right of the government of Canada on behalf of the Indians or otherwise to sell or dispose of Indian lands...[60]

The Dominion government's rights to deal with lands in only the Manitoulin group reveals the limited geographical focus of the agreement. Furthermore, one can see the Orders-in-Council were not exactly a transfer of rights since the wording of the Dominion government reveals that the government was to "retain" the Manitoulin group. This meant that the federal government had retained the present and future authority to patent land on Manitoulin Island, it did not confirm any authority to administer previous land sales. It is also crucial to understand that there was only one reason why the government was to retain those islands and that was to protect the Indians' legal interest, or in other words, to fulfil the Crown's treaty obligations, undertaken in 1862. Thus, while the province was deferential to the federal government in Aboriginal issues, one sees that their deference was limited to those areas where the federal government was dealing with treaty obligations. Ontario's willingness to let Canada issue

[60] Orders-in-Council, supra note 57.

patents and dispose of land over which it could have exercised greater control illustrates that the provincial government let the federal government take the primary role in dealing with land where there was a residual Indian interest (in this case, interest monies from surrendered lands).

The provincial government was similarly deferential in 1924 when the provincial and federal government entered into an agreement, given force of law by the Indian Lands Act,[61] which also showed the province's acquiescence in letting Canada deal with First Nation issues. This Act confirmed that where any Indian reserve lands were surrendered thereafter, the federal government would have the power to carry out the sales. More importantly, the Act also confirmed the previous federal administration and sale of surrendered Indian lands. This was the authority not granted by the 1914 orders-in-council. Section 9 of the Indian Lands Act stated:

> Every sale, lease or other disposition heretofore made under the Great Seal of Canada or otherwise under the directions of the Government of Canada of lands which were at the time of such sale, lease or other disposition included in any Indian reserve in the Province of Ontario is hereby confirmed...and the consideration received in respect of any such sale, lease or other disposition shall be and continue to be dealt with by the Dominion of Canada...[62]

Whereas it was hoped that the 1914 Orders-in-Council would confirm continued patents in surrendered land, the Indian Lands Act confirmed past sales and allowed the federal government to administer the funds

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[61] An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario respecting Indian Reserve Lands, S.C. 1924, c. 48.

[62] Ibid.

received from the sales of previously surrendered lands. Thus Ontario allowed the Dominion to deal with reserve lands and later confirmed its patents.

Canada continued to deal with lands that had an Indian legal interest in a dominant way until recently. The conventional way that Ontario had dealt with First Nations was incidentally, by having laws of general application apply to them. This authority partially stemmed from section 88 of the Indian Act.[63] While section 88 gave the province much practical authority, it did not allow the provinces to legislate specifically over Indians. However, section 88, inserted in the Indian Act[64] in 1951, did signal a shift in the allocation of power between the federal and provincial governments respecting Indians. Section 88 states:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under the Act.[65]

Case law interpreting section 88 has given the provincial government this added authority over Indian people.

For example, in Dick v. The Queen [66] the Supreme Court of Canada interpreted section 88 and held that provincial laws of general application apply to Indians even when they affect Indianness. This

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[63] R.S.C. 1985 c. I-5, s. 88.
[64] R.S.C. 1951, c. 29, s. 87.
[65] Supra note 63.
[66] (1985), 23 D.L.R. (4th) 33 (S.C.C.).

finding confirmed the widening scope of provincial authority to deal with First Nations. In the Dick case it was held that a provincial law regulating hunting applied even though it regulated an Indian **qua** Indian because there was no intentional conflict with the Indian Act. In the Dick case, a Shushwap man killed a deer in his traditional hunting grounds outside of his reserve while he was on a fishing trip. He was charged under the provincial Wildlife Act,[67] and a central issue was whether section 88 referentially incorporated the Wildlife Act as a law of general application. The court found that "it has not been established that the legislative policy of the Wildlife Act singles out Indians for special treatment, or discriminates against them in any way",[68] and therefore the law was one of general application. Since the Wildlife Act was a law of general application, this provincial law applies to Indian people. The judiciary created a portal through which the province could step into a sphere that was formerly occupied almost exclusively by the federal government.

While not an example of Ontario legislating in a manner which affects First Nations under section 88, another significant illustration of Ontario involvement in Indian affairs in the Manitoulin situation is found in the federal Indian Lands Agreement, 1986.[69] This Act created an opportunity for Ontario to enter into specific agreements with UCCM in the settlement of their claims. In particular, the Act provided:

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[67] R.S.B.C. 1979, c. 433.
[68] Dick, supra note 66 at 59.
[69] S.C. 1988, c. 39.

> Ontario is willing to enter into negotiations with aboriginal communities in the province for the purpose of establishing new arrangements in program, policy or law which enable those communities to achieve a greater measure of control over their affairs.[70]

The Act then goes on to outline a wide range of issues over which the provincial government could negotiate to achieve the above mentioned policy. These include education, health, social services, culture, justice, environment, land use planning, wildlife management, etc. These items, which were to be dealt with through provincial participation, were traditionally left with the federal government in dealing with Indians. It was this Act which provided the basis for negotiation between the UCCM and the provincial government.

The strategies that Ontario has followed in accepting a greater responsibility to deal with Indians are consistent with its earlier recorded objectives. As will be recalled, the province was interested in settling claims on Manitoulin to provide for land development and to increase political favour. While Ontario had the option to go to court to defend against UCCM's lawsuit, an offer to settle from the province and subsequent negotiations and settlement indicates that their strategy was to deal with the entire matter in a holistic way.

Dealing with the matter politically through negotiation accomplished both of Ontario's goals. Negotiation accomplished one of its goals because the settlement provided that the title to unsold surrendered land on the Island would be unencumbered by Indian legal

[70] Ibid.

interests. This was provided for in the final settlement agreement between Ontario and the UCCM First Nations as follows:

> Subject to paragraph 8, the First Nations and the Cockburn Island First Nation will prior to or on December 5, 1990:
> (b) deliver to Ontario a Quit Claim Deed executed by each of the First Nations and the Cockburn Island First Nation, quitting all and any claim to all and any right, title or interest in all lands transferred by Canada to Ontario...
> (c) deliver to Ontario a Release duly executed by each of the First Nations and the Cockburn Island First Nation;
> (i) releasing all and any claim to or in respect of all and any right, title or interest in all and any of the lands transferred by Canada to Ontario...
> (ii) releasing Ontario from all and any claim or claims of liability or obligation in respect of or arising from the 1862 Treaty and non-fulfilment of its terms insofar as such claims relate to Manitoulin Island...[71]

This agreement realizes Ontario's economic goals because it gives the province certainty of title in unsold surrendered land on Manitoulin which allows the province to market land on Manitoulin in a more efficient way. Of course, lands which were not surrendered or sold, such as on the Wikwemikong peninsula, do not form part of this agreement. Therefore, certainty of title is only present on lands that the UCCM's predecessors surrendered on the eastern portion of the Island.[72]

Negotiation also accomplishes the province's political goals because Ontario was able to make a statement that it realized a desirable

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[71] Final Agreement, December 5, 1990 between the UCCM First Nations, Cockburn Island First Nation and Ontario (on file with author).

[72] Even here certainty of title is not absolute because the question of the validity of the treaty of 1862 was not a part of these negotiations. The agreement was without prejudice to that determination. Therefore, while Ontario has partially achieved its goal of being able to deal with the lands with more certainty, they do not have complete assurance that their rights will not be affected if the treaty is found to be invalid, aside from the fact that Ontario is released from any liability or obligation arising from the 1862 treaty.

societal goal. Bud Wildman, Minister Responsible for Native Affairs, was able to tell the legislature when the UCCM and the Province signed an agreement:

> Mr. Speaker, the commitment of the Government of Ontario to deal fairly and justly with the people of the First Nations living in Ontario has never been stronger than it is today.
>
> The Throne Speech stated our goals: our government is determined to take major steps in negotiating aboriginal self-government, resolving historic grievances and in improving quality of life of aboriginal peoples in Ontario...
>
> Mr. Speaker, I am pleased to be able to inform the House today that we have already taken significant steps. Today the Government of Ontario finalized its first land claim settlement.
>
> Earlier, I joined the chiefs of five First Nations from Manitoulin Island to sign an agreement...[73]

This public statement of the fulfilment of Ontario's commitment to First Nations demonstrates that the provincial government thought it had attained some of its political goals in the Manitoulin land settlement. Thus, in both economic and political terms, it has been demonstrated that Ontario's strategy was consistent with its goals in dealing with land on Manitoulin.

The federal government's strategies in dealing with First Nations are more complex. This complexity stems from the conflict of interest in which it finds itself. If on the one hand the federal government's objective is in reducing its expenditures on Indian lands, and on the other hand it is to protect and advance the Indians' interest, then the federal government is in a position where a move in either direction

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[73] C.J. (Bud) Wildman, Statement to the Legislature, Wednesday December 5, 1990 (on file with the author).

would place it in conflict with one of its goals. As a result of this situation, it can be easily seen that the federal government is locked in an impasse until one of its policy goals becomes stronger than the other, or the situation changes so drastically that it could justify taking one position over the other. In such circumstances it should come as no surprise that the federal government's strategy in dealing with land on Manitoulin was to be an observer. This strategy temporarily allowed the federal government to side step its conflicting policies.

In the discussion about the allocation of land on Manitoulin Island over the past twelve years, the federal government did not disclose its status as being a mere observer until a late stage in the negotiations. It had sat at the table for the entire period with every apparent intention, in the view of the UCCM and Ontario, that it would contribute to the settlement of the claim. This appeared to be the case because a federal negotiator had been identified and its position was identified. However, when Ontario and the UCCM were close to settlement in 1988 the federal government withdrew as a participant from the negotiations, much to the dismay of the other two parties.[74]

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[74] The UCCM stated:

> We are stunned that, after so many years, Canada would suddenly decide that a lot-by-lot "indepth" research effort would be required to tell us what we already consider to be well known... ,

UCCM to Hubert Ryan DIAND negotiator, Sept. 11, 1989 (on file with author).

They further wrote to Maurice Foster MP for Algoma:

> Naturally, we are disappointed and offended by Canada's position. If we had been told at the beginning of the negotiations that Canada did not expect to contribute to any settlement, nor to expect to contribute to any settlement, nor to accept any responsibility, we would probably not have wasted out time.

UCCM to Maurice Foster MP for Algoma, Sept. 11, 1989 (on file with

The federal government based its withdrawal on two points: the fact that it could only deal with settlements in Indian lands by either the specific or the comprehensive claim processes, and the fact that it did not receive the money from cabinet to settle the issue.

First, since the federal government would only deal with the allocation of land with First Nations through comprehensive or specific claims, it rejected the federal/provincial enactment of the 1986 Indian Lands Agreement (ILA)[75] as a method to resolve Indian interests in land negotiations. Thus, while from the perspective of the province the issue of land settlement on Manitoulin was settled by the ILA, the federal government would not confirm settlement under this process and abstained from giving an opinion on the deal. The following letter from the federal government to the director of the Ontario Native Affairs Directorate explains the strategy of the federal government to not deal with the Manitoulin dispute through the ILA.

> The present negotiations with the bands of Manitoulin Island, for the removal of provincial interests in the unsold surrendered lands, have brought to light a disparity between the approaches of the federal government and provincial governments.
>
> This discrepancy in positions threatens not only the Manitoulin discussions but all future negotiations under the 1986 ILA, unless we can achieve a common understanding of the intent of the agreement...The federal government maintains that the 1986 agreement is essentially an administrative mechanism which will allow Ontario to return unsold surrendered lands to Indian bands or to remove outstanding Indian interest...the Manitoulin Bands have suggested that the 1986 ILA be used as a vehicle for the resolution of claims against the Crown. It is not, and never has been, the intention of Canada to use this agreement to negotiate and settle land claims against the federal Crown.

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author).

[75] Supra note 69.

> Canada's role would be to facilitate discussions and to confer reserve status...Should the early negotiations under the 1986 ILA fail, the Indian people of Ontario who have so eagerly awaited this legislation, will become discouraged.[76]

Canada was saying it could not settle the Manitoulin claim under the ILA because it did not intend to pursue these issues outside of the specific claim process.[77] The idea that the ILA could not be used to resolve the impasse over land on Manitoulin because the ILA is an "administrative mechanism" is weak. Other land claims settlements, such as the comprehensive and specific claims processes, occur through "administrative mechanisms", and yet they are still accepted and confirmed. Canada clearly made a policy choice not to be pressured, through litigation or political perseverance, into coming to the negotiating table. The government of Canada prefers to have all of its claims resolved through its own internally administered processes.[78] This was one reason the federal government abstained from active participation in negotiations regarding Manitoulin lands. As a result, the above noted prediction by the federal government's negotiator materialized: that the failure to come to common

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[76] Harry Swain (DIAND) to Mark Krasnick (ONAD Director), September 13, 1989 (on file with author).

[77] "Should a band or bands believe that Canada has a legal obligation with regard to any unsold surrendered lands it is free to pursue the matter through the specific claims process, established within the department for that purpose." Ted Morton (DIAND) to Albert Peltier (UCCM), Sept. 7, 1989 (on file with author).

[78] "The only monies they have is for [specific] Claims. The Deputy Minister looked at this issue again at our request, in fact on two occasions now, and it has been decided that there would be no change in that policy. They wouldn't return to Cabinet. It was a claim against Canada - they'd either have to go to courts or lodge a claim with specific claims." Hubert Ryan (DIAND), Transcript Report of Meeting, Sept. 8, 1989, INAC Boardroom Sudbury.

understanding as to the intent of the ILA threatened not only the Manitoulin discussions but all future negotiations under the 1986 ILA. Fortunately, the commitment of the provincial government redeemed the agreement from impasse. Therefore, it is somewhat ironic that the threat to future negotiation under the ILA is the result of federal inflexibility in dealing with First Nations, and not the result of the other two parties' misunderstanding of the intention of the ILA.

The second reason the federal government chose not to participate in the settlement was that it did not allocate money to settle the claim. This is in keeping with their objective of spending as little money as possible on First Nations' lands. They did not want to solve the claim with a process other than specific claims because they feared it would open up the financial floodgates for other claims, and the government would have to spend even more money with little coordinated control of these expenditures. Such intentions are revealed by the federal negotiator in his statement:

> And the other problem, and I guess they [the Department of Justice] are being very, very careful with this, and want to take another look - it isn't only the Manitoulin Bands that are involved here. We're going to be dealing with 16 other bands with lands scattered throughout Ontario, some of these lands are situated in cities, some are rural, there's a lot of money and they wanted to take another look at this position [i.e. solving claims through ILA]...we didn't get the funds to deal with it...Another alternative is you put the claim in, hold the whole process in abeyance until the claim has been addressed. And then we'd enter the picture again with Native claims.[79]

This quote makes it obvious that the federal government was trying

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[79] Hubert Ryan (DIAND) in correspondence with Albert Peltier (UCCM), September 8, 1989 (on file with author).

to steer the other parties into the specific claims process because it did not have the money set aside to settle the Manitoulin claim through the ILA process. Furthermore, there was a fear that even if it did have money set aside, the federal government would have to pay much more out to other Bands, and in quicker fashion, under the ILA.

Thus, the federal government, in trying to straddle its own conflicting goals in land settlements, reached an impasse as their objective in protecting First Nations land conflicted with the cost of that undertaking. The government's conflicting objectives led their internal bureaucracy to an interdepartmental stalemate as one objective restrained the other. The federal refusal to participate in the settlement of the claims on Manitoulin left the province and the UCCM to work out a limited agreement. These two parties were able to reach a final agreement.

III THE RELATIONSHIP OF EACH PARTY TO ONE ANOTHER IN SECURING OBJECTIVES IN THE LAND

An examination of the relationship of each party to one another in attempting to allocate land on Manitoulin will show how each party's objectives and strategies worked together to either achieve or frustrate goals. It will be shown that Ontario and the Manitoulin First Nations participating in the negotiations were able to work together to arrive at an agreement that partially fulfilled their objectives. On the other hand, the federal government's goals and tactics at this period did not lead to an adequate resolution of land control issues. Since litigation by the First Nations was aimed at Ontario and Canada,

one would expect that this would make Canada and Ontario allies in attempting to resolve disputes. However, it appears as though the First Nations and Ontario, while adversaries in some ways, are more aligned than Ontario is with the federal government. This alliance occurred because, in the final analysis, the objectives of the First Nations and Ontario were clearer and less conflictual than were those of Canada.

It will be recalled that Ontario and the UCCM both had a desire to clear the title on unsold surrendered lands. Ontario had this objective for political approval and economic development, and First Nations had this objective so that they could consolidate their land holdings. As the following demonstrates, these two parties came to an agreement which fulfilled each parties' aspirations.

First Nations received money for economic development and lands adjacent to reserves which were to be given reserve status. As described earlier,[80] in the settlement each UCCM Band delivered a quit claim deed releasing Ontario from any obligation or liability surrounding the unsold surrendered lands. In exchange, the Ontario government agreed to provide various forms of compensation to the UCCM. In particular, the finalized agreement explained the benefits to be given to the band, in part, as follows:

Subject to paragraph 8, Ontario will on December 5, 1990:

(a) pay to the credit of the Land Holding Institution the sum of...($4,500,000.00);
(b) subject to subparagraph 6.1 (d), pay to the credit of the Economic Development Institution the sum of...($1,990,000.00);
(c) pay to the credit of the United Chiefs and Councils of Manitoulin the sum of...($275,000.00) in respect of all First Nations legal,

[80] See supra note 71 and accompanying text.

research, court and negotiating costs;
(d) pay to the credit of the Cockburn Island Institution a sum to be agreed upon by [arbitration];
(e) ...
(f) transfer to Her Majesty in right of Canada for the purpose of being set aside as part of an existing Indian reserve, or as a reserve for a specific Band of Indians, the lands described in Schedule A;
(g) grant by letters patent or otherwise, to the Land Holding Institution estates in fee simple, free and clear of all encumbrances...[81]

The lands given in the agreement will allow the UCCM Bands to consolidate their current property holdings, and the money will enable them to purchase additional lands to further increase and consolidate their holdings. As of July 1994, these lands are being selected and purchased and added to the Bands' reserve holdings. While it is not yet clear to what extent this will increase land under UCCM Bands' control on Manitoulin, it seems as though this will increase band holdings by at least 3 times their pre-1990 amount. Thus, a major UCCM objective was fulfilled by the agreement with Ontario.

On the other hand, Ontario's goals were fulfilled by the negotiations and final agreement because they received a clear title to unsold surrendered lands and a release from further obligations in that regard.[82] The fact that First Nations were willing to relinquish their claim against the provincial government in return for the land and money to consolidate their holdings demonstrates that Ontario and the First Nations had an intersection of objectives on issues that each side considered important enough to allow for an agreement.

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[81] Final Agreement, supra note 71 at 6-7.
[82] Ibid.

While the federal government also had a desire to clear title in the land, they were not able to participate in the final agreement because of what they viewed as their duty to protect First Nations' lands and the cost of such duty. This declaration of protection of First Nations is implicit in a letter written by Ted Morton, the federal negotiator, on September 7, 1989. He wrote:

> It has always been the federal position that disposition of these unsold surrendered lands is an administrative matter and should not put the Indian people in a position where they are forced to give up valid claims against the federal Crown. For that reason, Canada will not be demanding that the bands involved in these negotiations provide releases with regard to such claims.[83]

Mr. Morton's mention of the settlement of claims being an administrative matter has reference to the specific claims process. As will be remembered, the federal government did not want to deal with the Manitoulin issue outside of this process. By characterizing the ILA as outside the administrative process, the federal negotiator attempts to delegitimize and trivialize the ILA process and persuade the parties to pursue their negotiations through specific claims. This characterization of the ILA process was done in the name of protecting the Manitoulin First Nations. The profession of protection of First Nations is questionable because the UCCM people themselves wanted to trade their claims in return for more certain rights.[84]

The federal government should give greater attention to the

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[83] Ted Morton (DIAND) to Albert Peltier (UCCM negotiator), September 7, 1989 (on file with author).

[84] Though, if one were to give Canada the benefit of the doubt as to why they did not agree to participate, one might say that they were protecting the marginalized and subordinated voices within Manitoulin First Nations.

expressed aspirations of the Indian people they are given the duty to assist.[85] First Nations voices should not be disregarded because of the notion that "we know what is best for them". This philosophy undermines efforts of First Nations to speak their objectives in the public forum without filtering them through the artificial construct of the Department of Indian and Northern Affairs. Why would Canada take a position that was contrary to the position of the people they were to represent? How could Canada plead they were protecting the Indians' interest when the Indians themselves wanted settlement? One possible reason is that the government does not recognize the contradiction they put themselves in by holding back on what First Nations are trying to secure. A more reasonable explanation, however, is that it is too financially costly for the government to set a precedent that it will begin to settle claims on a case-by-case basis when pushed by litigation and political pressure.

During negotiations over Manitoulin's unsold surrendered land the federal government's position was stated in this way:

> we didn't get the mandate to deal with these claims. Or we didn't get the funds to deal with it, so if there was a claim, even if we wanted to address the claim, the only thing we can do is tap Departmental funds which the department gets for Indian programs and we don't want to do that.[86]

Under the current policies which exist for land claim settlement, the federal government does not have to deal with litigated or negotiated claims and be concerned that they will run ahead of their political

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[85] Sparrow, supra note 20.

[86] Hubert Ryan (DIAND) in correspondence with Albert Peltier (UCCM), September 8, 1989 (on file with author).

will or ability to pay. Both the specific and comprehensive claims processes are so slow that it would take over 500 years to deal with the claims that are currently submitted.[87] This figure does not include the numerous claims which have not been submitted, which could be twice as many because of the recent boycott of the process. Thus, it is evident why the federal government follows a strategy that slows down settlement in dealing with claims. The federal government continues to deal with claims through existing policies because they are concerned about the "floodgates" being opened if they chose to deal with claims when pushed by litigation or political pressure.

Thus, it is apparent that the diverse objectives of the various parties have led to relationships that enable the province and First Nations to agree on certain goals. The alignment of these goals has led these two parties to sign an agreement to settle the dispute between them regarding unsold surrendered lands. The contradictory nature of the objectives of the federal government do not permit an intersection in understanding with the provincial and First Nation governments. As a result, the federal government has been left outside the final agreement to settle the allocation of property on the Island.[88] Federal

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[87] Vic Savino, "The Black Hole in the Specific Claims Process" in Native Land Issues: See You in Court (Canadian Bar Association, 1990) at 19-20.

[88] The Final Agreement stated:

20. CLAIMS AGAINST CANADA

Nothing in this Agreement or resulting from this Agreement shall be construed as affecting in any way any claims or rights that the First Nations or any of them, or the Cockburn Island First Nation, or any other Indians or Band of Indians have had, have or may

concern with the cost of settlement for receiving clear title, as balanced against their duty to protect Indian lands, has led them to a position which encourages delay and non-agreement.

IV RISKS AND BENEFITS IN TITLE SETTLEMENT ON MANITOULIN CLAIM

There are risks and benefits that accrue to all parties by trying to settle their objectives through the strategies and relationships extant. The analysis in this section will serve to illustrate the implications that have arisen in looking at the modern process of allocating land on Manitoulin.

A) RISKS AND BENEFITS FOR FIRST NATIONS

There are at least two risks that attach to the contemporary manifestation of First Nation objectives in land title settlement. These risks are the subordination and extinguishment of traditional culture, and the reduction of federal responsibility and assistance.

The first risk is that the settler governments could attempt to take advantage of the fact that acculturation and self-sufficiency are both desires of First Nations people. This risk is present because it seems easier to class Native peoples as homogenous, and similar to its own "fictionalized homogeneous" population, when dealing with their claims. Such a classification reduces the complexity of the issues and reduces the strength behind First Nations' claims. For example, the question of compensation was weakened because the provincial

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have, pursuant to any treaty or otherwise, against Her Majesty the Queen in right of Canada, nor shall participation in this agreement, by itself, be construed as being any kind of ratification or adherence to or of the 1862 Treaty.
Final Agreement, December 5, 1990 (on file with author).

government negotiated about, and emphasized, First Nations' objectives that emanated from an acculturation perspective. This disregarded the segment of First Nations that also considered tradition to be important. For example, the UCCM first requested seventy-five million dollars for settlement of the issue of unsold surrendered lands. Ontario could not accept this because it focused on the monetarily appraised value of land. This interplay is illustrated in an extract from the negotiations:

> First Nation negotiator: Our first offer was seventy-five million and you laughed at us. Our lands are sacred. They came to us from our ancestors. How do you place a value on them? The 1862 treaty divided us. We have to create something for our children to show something we will have on our own. How do you put a value on that?
>
> Provincial negotiator: We have a mandate to settle for fair market value. We can't justify these figures.[89]

By focusing on settler concepts of market value, one can see that First Nations' goals were weakened. The abstraction of "fair market value" does not comprehend or include some of the ideas that give the land value for First Nations. Fair market value concentrates on the amount of money the land would capture given supply and demand by buyers and sellers bidding for property in a market. This concept does not include notions of the sacred nature of land to First Nations, or the future value that this land would have to their children as an Indigenous community. Thus, by focusing on settler concepts of value, it is evident that traditional First Nations interests were weakened.

Menno Boldt has criticized those who would value Aboriginal land

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[89] Transcript of negotiations for settlement, September 27, 1989.

solely by its market value. Boldt has written:

> Neogotiations of land-claims settlements based on some concept of market values constitute not only a betrayal of the spirit and intent of the chiefs who marked the treaties, but also a sell out of the birth-right of future generations of Indians...[F]uture generations of Indians may well judge today's real estate plus cash claims settlement to be a "give- away" of their ancestral inheritance on a scale of the apocryphal Manhatten Island deal.[90]

Boldt is concerned that a focus on market value not only undermines the introduction of other measurements of value, but also undervalues the ancestral resource First Nations' possess to have security through future generations. He states:

> If contemporary Indian leaders want to honour the spirit and intent of the chiefs who marked the treaties, they must negotiate their land claims settlements with the purpose of securing the survival and well being of future generations of Indians.[91]

The difficulty First Nations have in following Boldt's advice is that the dynamics of negotiation often push the parties to that perspective which places greater significance on market values. The multiplicity of objectives that exist serve to facilitate the satisfaction of some goals while they compromise others. The objectives that are served are those that seek the benefits of settler society, both in the government and amongst First Nations. While I would not advocate the position that First Nations should not seek elements of settler society, the current approach in negotiations raises the question of whether First Nations who want land to maintain traditional use and enjoyment will ever be able to achieve this goal.

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[90] Menno Boldt, Surviving as Indians: The Challenge of Self-Government (Toronto: University of Toronto Press, 1993) at 43.

[91] Ibid. at 44.

This insight is shared in a different context by certain feminist writers as they examine the role of diversity in the experiences of women.[92] The basic conclusion of this literature is that in advancing positions relative to a group, caution must be exercised to recognize the different experiences and needs that exist within a collective. As has been demonstrated, this same notion could be imported into discourse that deals with First Nations' as groups. The varied objectives and experiences of Native peoples demonstrate a need to be cognizant of differences within groups so that oppression is not reproduced by outside influences or by other members of the circle. As the multiplicity of First Nations' societies is more accurately reflected and respected, both internally and externally, perhaps there will not be the same marginalization of certain people's aspirations within Native society.

Marlee Kline argues that people can become more aware of differences by expanding their ideological analysis to encompass an inquiry into conflicts between dominant and subordinate cultures.[93] She states this enlargement needs to occur because a focus on, and acceptance of, dominant ideologies often weakens subordinate claims to legitimacy. An application of Kline's analysis to First Nations suggests that there is room for expanding the range of objectives

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[92] See Marlee Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 Harvard Women's Law Journal 115; Nitya Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity", (1990) 38 Buffalo Law Review 325; Martha Minow, "Pluralisms" (1989) 21 Conn. Law Review 965.

[93] Kline, ibid. at 115.

considered relevant in the current mode of dispute resolution in order to include and support the subordinated traditional perspective. This revised analysis would encourage both First Nations and government to become more aware of the extent to which acculturation can overwhelm tradition. In fact, this has been one purpose of this thesis.

I have sought to demonstrate the multiplicity of objectives that exist and have existed within First Nations communities so that as First Nations people we can become aware of how some of our goals are elevated at the expense of others. I have also tried to describe how the alignment of particular objectives with external communities can compromise our traditional culture. I have done this so that we can be more fully aware of the implications of our internal diversity to enable us to make informed choices in determining our goals.

This analytical shift is essential to the preservation of our traditional culture. Without this broadened analysis, First Nations face a risk in continuing to deal with land through the simultaneous manifestation of their objectives of acculturation and separation. Until this change occurs, traditional ideas will continue to be marginalized in order to reach agreements because First Nations and settler governments will concur in issues where both parties have an intersection of understanding. All parties need to bring this broadened understanding to the negotiation table.

In order for this analytical shift to occur, First Nations' discourse must be given legitimacy in both litigation and negotiations. When one looks at the transcripts of meetings one is struck by how

the language of lawyers structures and dominates the points that are advanced. For example, at a meeting of July 27, 1985, there were 25 people gathered to discuss issues of Manitoulin land title settlement, 15 of whom were First Nations people. Native people only spoke twenty times which probably took up no more than twenty minutes in this two hour meeting. The following abridged extracts from verbatim transcripts serve to illustrate how traditional First Nations' objectives were submerged:

Federal Negotiator: We would agree that it [the final agreement] would be non-precedent setting. In fact we were assuming that whatever agreement we come to on Manitoulin, will eventually become one of specific agreement.

Chair: Chief Hare, are you satisfied with the answers?

Chief Hare: They sound very good when they say those things. The white man always talks this way when he is dealing with Indian people. I don't believe them. This should be talked about specifically...

Chief Abotossaway: Well my comment with Joe's request would be to...think that's another issue.

[at which point the discussion shifted back to particularized talk about legal points involving shoreline allowances]

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Representative of the MMA: But if you are using them already as if you already own them, what is the difference then [of owning the allowances] if you already use them.

Chief Hare: That is the issue. That is Indian land and we never got paid for it and that's what it boils down to. Just like if you have a strip of backyard at home, and we go take a strip of it, you'd probably shoot me if I did that. So it works the other way.

Ernie Debassige (Member of West Bay Band): Since there are a lot of legal minds here, I'd like to clear up one particular question. Supposing, just for the sake of adventure, I go and set up a teepee in front of, on the shore line allowance of Tom Farquarhar, influential family. If he chased me off there "hey, that Indian is an eyesore, that old Indian, get him the hell out of there."

He can't chase me off because although my people surrendered it, in fact my ancestor is one of the ones that signed it, he made an awful mistake, I don't know what brand they gave him to drink to sign that damned piece of paper. But since I haven't been paid yet for this piece of land, even though it's surrendered, can I still set up my teepee there and live all summer?

Chair: I'd like to ask the lawyer representing Canada to respond, please.

Lawyer: Generally once the land's been surrendered for sale, there wouldn't be any rights of occupation. Particularly given the St. Catherines Milling case and Gilbert Smith case, there wouldn't be any right, no.

[Again the discussion reverted to legal discussion about road allowances]

One can appreciate that dead-end discussion like this for those First Nations people who wanted to deal with political and cultural issues would have been frustrating and marginalizing. Political and cultural issues were suppressed by lawyers, politicians, and at times other Indians. Legal language shaped the issues. This language probably did not mean much to some of the Indians present. I doubt that a reference to St. Catherines or Gilbert Smith would have settled the occupation issues raised by one of the Anishnabe.

As is evident, this focus on legality is seemingly natural when the boundaries of negotiation are set by objectives that intersect under the common law legal discourse. This intersection, however, demonstrates the need for an analytical shift which will embrace Native differences because traditional Anishnabe land use is worth protecting. The shift is necessary as well for those who espouse elements of integration with settler society to be respectful of the compromised position they place on those who have a stronger purpose

in the preservation of traditional modes of life. If a shift does not occur to allow for a greater prominence to be accorded to traditional objectives, one can see that First Nations face a real risk in the current settlement process.

First Nations face an additional risk in working more closely with provincial governments in the settlement of their claims. The risk stems from the fact that it is the federal government that has the constitutional responsibility to deal with First Nations. As the provincial government has more dealings with First Nations, a question arises as to the degree of fiduciary responsibility to which this government could be held.[94] The uncertainty that could result in this new relationship contains a degree of risk not present in First Nations relations with the federal government.

The risk to First Nations in the provincial view of its responsibility is summed up by Menno Boldt and J. Anthony Long as follows:

> The provinces have steadfastly resisted accepting greater responsibility for Indians resident within their boundaries. They would have fewer qualms about such transfer of responsibility if Indians came to them as ordinary citizens. They want to deal with bands as they do with municipalities, and with Indian band members as with other citizens; that is, individually and without special status[95].

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[94] While beyond the scope of this paper, an argument can be made that fiduciary obligations apply to the provinces. For descriptions of fiduciary obligations as they apply to Aboriginal peoples, see Michael Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. Law Review 19; Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle" (1992) 2 National Journal of Constitutional Law 163.

[95] Menno Boldt & J. Anthony Long, "Introduction" in Long & Boldt, eds., Governments in Conflict: Provinces and Indian Nations in Canada

With some provinces holding the above views, it is apparent that there are risks to First Nations as a result of conventional provincial orientations. While the governments of Canada, Ontario and British Columbia have agreed to recognize the inherent right to self-government of First Nations since this statement was written, it is still too early to tell whether or not the provinces can change their long held aversion to dealing with First Nations. While the provinces may be eager to assist First Nations, as the quote above suggests there may still be lingering opinions within the province that would want to reduce First Nations' special status. Since this status has its genesis in history and tradition, one could fear that the provincial government may have policies which would be contrary to preservation and separation which would serve to further erode some First Nations' goals.

The benefits that First Nations obtain from closer dealing with the provincial government is that they are able to secure their objectives from a government that seems to share the political will to negotiate and resolve disputes. This political will stems in part from the higher administrative costs the province could be faced with because of a shift in First Nation demographics. Boldt and Long have described the provincial risk, which results in a First Nation benefit, in this way:

> Political posturing aside the provinces realize that it is in their interests to be involved in the administration of Indian affairs. Increasingly they are encountering (and having to pay for) the consequences of the separate system's abysmal failures. Large and serious problems of Indian pathology are surfacing in most

(Toronto: University of Toronto Press, 1988) at 5.

> urban centres...officials fear that unless meaningful pre-emptive action is taken, the urban Indian population will overwhelm their fiscal and institutional capacity to cope with it. In this regard, what happens with Indians is as important to the provinces as to the federal government.[96]

This quote demonstrates that the province has a benefit in settling land interests through negotiation because they can potentially avoid future administrative costs through the provision of services to deal with First Nations. This is of benefit to Indians because it gives the province the political will to deal with its concerns.

B) BENEFITS AND RISKS FOR THE PROVINCE

A risk the provincial government faces as it undertakes to deal with First Nations is that future court decisions may hold them to be fiduciaries to the Indians. This has already been suggested in one Supreme Court of Canada decision.[97] This would be a risk to the provincial government because it could be newly burdened with costly fiscal and difficult political responsibilities. These fiduciary obligations may flow from the vulnerability First Nations may be in relative to the provincial government. This vulnerability would stem from the **sui generis** nature of First Nations' legal interests that the province deals with. It could be argued that the provinces have a duty to First Nations because the provision of services to Indians as Indians makes First Nations dependent on provincial discretion and thus places the province in a fiduciary position.

Vulnerability and discretion have been held as essential elements

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[96] Ibid. at 5.

[97] Mitchell v. Peguis Indian Band (1990), 71 D.L.R. (4th) 193 (S.C.C.) at 209, (in dissent) per Dickson.

in creating a fiduciary relationships. In Lac Minerals v. International Corona Resources Sopinka J. stated that "the one feature, however, which is considered to be indispensable to the existence of the relationship, and which is the most relevant in this case is the issue of dependency or vulnerability."[98] Thus the provincial government may be held to be a fiduciary if it is found that the Indians are dependent on them. However, it is also likely that the courts would require a power being given to the provincial government on behalf of the Indians in order to hold it to be a fiduciary. As was stated by Gautreau, J. in Woodslee Credit Union v. Taylor,[99]

> a fiduciary duty arises where a person undertakes, either expressly or implicitly, in a manner that is defined and understood by them, and is entrusted with power to effect such [vulnerable] interests. The other person relies on or is otherwise dependent on this undertaking and as a result is in a position of vulnerability. The nature and the circumstances giving rise to the undertaking and the resulting vulnerability are such that loyalty and good faith are intrinsic elements of the consequent duty.[100]

The provinces face a risk of being found to have implicitly assumed a fiduciary duty towards First Nations if it is found that they have undertaken the acceptance of the Crown's historic obligations towards Indians as a result of the Indians, or the federal government (eg. s. 88), giving the provinces power to administer many of the Crown's responsibilities.

The benefits that the provinces may receive in negotiating Indian claims, described earlier in this thesis,[101] are two-fold: they can

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[98] (1989), 61 D.L.R. (4th) 14 (S.C.C.) at 63.
[99] [1989] 66 O.R. (2d) 248 (Ont. S.C.) at 254.
[100] Ibid.
[101] See Chapter 2 note 68 and accompanying text.

clear title to land and receive political support. Monetarily, negotiations are of benefit to Ontario because free title allows for settler development and increases the revenues that the province needs to administer its policies. Boldt and Long have observed:

> The provinces are apprehensive about stepping into the federal government's role of treating Indians as a collectivity with special status and rights. However, they would like to increase their jurisdiction over Indian lands, and particularly resource development...[102]

The implication in this statement is that the province could benefit from increased involvement with the Indians by exercising greater control over valuable resources. Further examples of the importance to the provinces of resource development are apparent to anyone who follows the news - numerous forest lands are claimed by First Nations in British Columbua, oil lands are claimed by First Nations in Alberta, mineral rights are claimed by the First Nations of Saskatchewan, and hydro-electric potential from water is claimed by First Nations in northern Manitoba, Ontario and Quebec. These assertions of rights by First Nations all serve as poignant reminders that the provinces have much to gain by settling their relationships with First Nations.

Negotiations are also of benefit to the provinces because they give First Nations greater self-sufficiency which, as already explained,[103] has been and is a popular political goal of the last two governments in Ontario.

C) RISKS AND BENEFITS FOR THE FEDERAL GOVERNMENT

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[102] Boldt & Long, supra note 94 at 5.
[103] See Chapter 2 note 68 and accompanying text.

The risks that the federal government faces by continuing to deal with the provinces and First Nations in the current manner are increased liability costs and political unrest.

The federal government increases its potential monetary liability to First Nations by delaying the settlement of their claims. Liability is increased because as land comes to have more relative monetary value in our society the cost of returning land to First Nations becomes more expensive. An example of the cost of this process can be shown by the taking of land worth $2,500.00 from First Nations in the 1880's to construct streets in the Town of the Pas. The repayment of $2,500.00 with compound interest in 1989 dollars would be in the order of $80,000.00 to $90,000.00.[104] When one considers that there are hundreds of such claims, it is apparent that as time goes on the cost of settlement of land allocation becomes astronomically high. Thus, when the federal government does get around to resolving the claims against it, it will be so expensive that it will compromise its other policy goals.

The federal government also has the risk of increased distrust between itself and First Nations. This distrust could lead to political unpopularity of the government in the general populace and specific political unrest amongst First Nations. The events at Oka in the summer of 1990 are demonstrative of this risk.[105] Increased liability costs and political unrest would be detrimental to the federal government

[104] Vic Savino, "The Black Hole in the Specific Claims Process" in Eric Denhoff, ed., Native Land Issues: See you in Court (Canadian Bar Association, 1990) at 7.

[105] See Geoffrey York & Loreen Pindera, People of the Pines: The Warriors and the Legacy of Oka (Toronto: Little Brown, 1991).

because their ability to deal peacefully with First Nations might be forfeited. A First Nation representative negotiator for UCCM summarized this sentiment in the following way:

> there is an underlying feeling developing...I don't know if its anger or resentment or what it is...but win, lose or draw I don't think relations are going to be good...over and above the legal concerns, over and above political realities, and above moral responsibility, there's the fourth thing, and that is what is the Island going to be like when we get through...Who is going to be mad at who? Is there going to be an uprising, is there going to be more confrontation?...these things are starting to happen...Maybe the Indian people will suffer it alone, maybe Ontario will suffer it, maybe Canada.[106]

Given that this statement was made in 1989, and remembering the events of 1990, it rings hauntingly true. If the federal government does not move forward to deal substantively with First Nations claims, it faces a very large monetary and political risk in continuing its current dealings with First Nations.

The benefits that the federal government could receive from the objectives and strategies it has chosen to follow could be that the costs of solving the problems may become so expensive that it would never be politically feasible to deal with land claims. If too many non-Indians come to occupy and develop the land and the cost of restitution becomes too great, then the political will of Canadians will not tolerate a large amount of money being spent to settle claims.

The federal government also stands to gain from the conflicting objectives that exist within First Nations culture itself. If

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[106] Steven O'Neill, UCCM legal counsel, transcript of a meeting of September 8, 1989 at 6.

acculturation continues to be the basis and common ground on which agreements can be reached, the goal of tradition and separation will be lost forever to the First Nation peoples. When separation and tradition disappear as a First Nation aspiration, this has far reaching implications. For example, the Indians lose some of the persuasiveness behind their claims to receive special treatment due to the fact that many of their claims are based on traditional ways of dealing within their culture and with other cultures.[107] Once tradition has gone as a basis for claims, then people will not be as willing to settle past wrongs with a society that appears to be much like itself.[108]

As a result, one can see that delay can be a benefit to the federal government in solving its problems with Indian land claims because it makes the cost of settlement politically unrealistic, and reduces the traditional basis for native claims.

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[107] However, see Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford Law Review 1311 for a description of First Nations' claims to sovereignty being based on other considerations, such as a concept of distributive justice.

[108] This argument has already been used against First Nations. In 1969 Prime Minister Trudeau proposed an extinguishment of Aboriginal special status. He stated:

> It is inconceivable, I think, that in a given society one section of society have a treaty with the other section of society...But I don't think that we should encourage the Indians to feel that their treaties should last forever within Canada...They should become Canadian as all other Canadians and if they are prosperous and wealthy they will be treated like the prosperous and wealthy...

Pierre Elliot Trudeau, "Remarks on Aboriginal and Treaty Rights" August 8, 1969 in Peter A. Cumming & Neil H. Mickenberg, eds., Native Rights in Canada (Toronto: General Publishing, 1972) at Appendix VI.

CONCLUSION

This work has examined the objectives that First Nations and the provincial and federal governments have had in the allocation of land on Manitoulin Island. In the pursuit of their objectives, the First Nations of Manitoulin have witnessed a reduction of their traditional territory, while the non-Native population has been able to substantially increase its land base. This result has been brought about through treaty negotiations which submerged First Nations' aspirations to continue their traditional relationship to the land, and accentuated the parties' goals to have separate places where they could carry out their preferred activities. However, this work has also shown that, despite the reduction of First Nations' territory and the questionable manner by which this decrease was accomplished, Aboriginal people of Manitoulin Island have continued to exercise their traditional land and resource use.

Our examination began by looking at the historical methods by which land was allocated within and between First Nations on the Island. The complex structure of First Nations' objectives in land were revealed, and the historical patterns of allocation and use of land on Manitoulin Island were identified. The various Aboriginal groups that occupied Manitoulin Island distributed resources and allocated land according to well established patterns of customary use. Resource use was exclusive for some purposes and shared for others, depending upon the scarcity and importance of the object being used. Furthermore, the people used the land in a seasonal cycle, in the process living

in most areas of their territory during the year. This well-developed system of land allocation allowed First Nations on Manitoulin Island to equitably share in its land and resources.

The thesis then revealed how land allocation was conducted upon contact between Native and non-Native society. First Nations' participated in an allocation of land with non-Native people through the Treaty of Niagara in 1764, and the Royal Proclamation. While the Royal Proclamation is unclear about whether First Nations' rights to land and self-government were subordinated in the period of contact between the groups, the written and oral record of these events demonstrates that the groups operated on a Nation to Nation basis. This clarifies the intent of the Royal Proclamation and shows that First Nations and the Crown formed an alliance, and agreed that neither party would interfere in the affairs of the other without the other's consent. These agreements forged upon contact allowed First Nations on Manitoulin to maintain their traditional shared and exclusive, cyclical and comprehensive land and resource use.

The fact that First Nations did not subsume their rights to land and government in the British Crown upon contact demonstrates that, when First Nations entered into treaties in 1836 and 1862, Aboriginal people were dealing with the Crown on a Nation to Nation basis. However, further investigation revealed that the negotiations surrounding the treaties of 1836 and 1862 illustrate that some fundamental objectives of First Nations were sacrificed -because the parties' objectives aligned on "western" values and diverged on traditional Anishnabe

values, and because the Crown engaged in unscrupulous and unlawful practices in treaty negotiations. First, since an alignment of goals on one point obscured other goals immersed in the configuration of First Nations' communities, this inadvertently pushed the parties towards assimilation because a fusion of the parties' efforts in reaching an agreement merged around the focal point of the shared understanding. As noted, the concern of First Nations that was concealed and marginalized under these prevailing approches was the ambition, through holding land to the exclusion of settlers, to maintain their sovereignty and preserve the benefits of their traditional culture. Furthermore, since the Crown misled Manitoulin Anishnabe about the nature of the promises in the treaties, and since the Crown entered into the treaties through sharp dealing and coercion, there is a question about the very validity of the treaties. Yet, despite the centrifical force of these factors, most First Nations people on Manitoulin resisted assimilation, and carried out their traditional practices and continued to use their land as they had prior to contact. These actions were often undertaken in spite of Colonial disapproval and sanctions.

This work also examined the contemporary attempts to deal with the allocation of land rights on Manitoulin Island. It has shown that contemporary negotiations pose a further danger to traditional methods of First Nations' land use and allocation. The First Nations had objectives of separation and integration. The provincial government's goals were to clear title to the land and obtain political approval.

The federal government's objectives were to reduce its expenditures and protect First Nations. These objectives conflict and intersect, disadvantaging more traditional First Nations' land use preferences.

This conflict and intersection of aspirations served as the basis on which strategies were developed to forward particular goals. As such, it has been shown that Manitoulin First Nations and Ontario were able to pursue a pathway of negotiation by focusing on those objectives that were pushing for the benefits of settler society. It was also explained how these objectives led the federal government to a strategy which involved its removal from active participation, since its own internal positions were acutely contradictory.

Finally, we saw that these objectives, and the strategies used to pursue them, have created risks and benefits for each party. The First Nations who were interested in obtaining elements of settler society were able to forward their goals. This, however, came at the risk to those First Nations people who were interested in separation because their position was compromised by the focus on the dominant parties' goals. Such a compromise threatens patterns of land use First Nations have exercised throughout the centuries. We have also seen that the provincial government received a benefit in the achievement of certainty of title and political accomplishment. Lastly, it was shown that the objectives and strategies followed by the federal government have led it to the risk of increased future settlement costs. Alternatively, these costs may eventually become so high that the federal government will benefit by avoiding settlement altogether.

The lesson that can be learned from the objectives explored in this paper is that First Nations people, and those who negotiate with them to resolve outstanding issues in the allocation of land, need to become aware of the multiplicity of aspirations that exist within Native society. This recognition is necessary to preserve traditional land use. It has also been shown how the dynamics of power can be a disadvantage to First Nations in the pursuit of their objectives. This awareness will sensitize each party to the potential trade-offs that will be made within First Nations communities' in arriving at final agreements concerning land. Comprehension and promotion of differences can lead to legitimacy for those who seek to preserve more traditional modes of life. An appreciation of the legal history behind claims shows where future pitfalls may arise. A change in the language of litigation and negotiation will allow traditional people to be heard and the issues of power to be squarely addressed. If this is not done, an important part of our society will be lost. It is hoped that this realization will result in a broadened analysis and better informed choices as to the possible consequences of a specific course of action in land title settlement. When First Nations and others recognize more fully what they are being asked to give up when they align their objectives with others, perhaps the future will bring a broader base of accommodation that can be enjoyed by all elements of Native society.

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EXHIBIT "F"

This is Exhibit ..... F ..... referred to in the
affidavit of ..... Pat Jones .....
sworn before me, this ..... 15th .....
day of ..... August ..... 2013 .....
.....
A COMMISSIONER FOR TAKING AFFIDAVITS

TITLE: Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada

AUTHOR: Mark D. Walters

SOURCE: Queen's Law Journal
CITED: (1998), 23 Queen's L.J. 301

In 1996, the Supreme Court of Canada handed down seven judgments relating to aboriginal fishing rights. These cases developed the doctrine of aboriginal priority, according to which the government is obligated to give precedence to aboriginal communities when allocating rights of access to fisheries. The court has so far rejected the notion of exclusive aboriginal fishing rights, reasoning that a public right to fish in tidal waters has existed since the time of Magna Carta, and was not abolished even by the entrenchment of aboriginal rights in s. 35(1) of the Constitution Act, 1982.

Mark D. Walters explores whether it is possible to argue for an exclusive aboriginal right to certain fisheries outside the unique context of British Columbia and suggests that the Chippewas of Nawash may have an exclusive right to fish the waters in Lake Huron and Georgian Bay in Ontario. Walters examines the treaties signed in August 1836 over the Manitoulin Islands and the Saugeen Peninsula and argues that comments made by Bond Head and several Saugeen chiefs shortly before and after the treaty was signed demonstrate that the intent was to grant exclusive fishing rights to the Saugeen Ojibway.

The English law relating to fisheries and title to lands beneath navigable waters is also explored. Walters proposes that public fishing rights were established by deviating from English common law rules, and from the original intention of the 16th chapter of Magna Carta, in order to be consistent with the demands of the political morality of settlers in colonial Canada. The author analyzes how aboriginal fishing rights have been manifested in the non-aboriginal legal system, with particular reference to New Zealand cases that confirm that aboriginal (Maori) rights have a non-statutory foundation at common law and/or under treaty. Finally, Walters distinguishes the claims made to lands in British Columbia, a jurisdiction in which aboriginal rights are determined under a municipal model (particular customs remain in place for practical reasons), from those in Upper Canada, where aboriginal rights existed under the imperial model (native law was valid unless explicitly abrogated by legislation). He concludes by suggesting that, in light of the unique legal-historical context of mid-nineteenth century Upper Canada, claims to exclusive jurisdiction over the Saugeen Ojibway fisheries - and the Lake Huron and Georgian Bay waters in particular - may have a firm legal foundation under either common law or by prerogative instrument.

* * *

Introduction

I. Saugeen Ojibway Fishing Rights

II. English Law on Fisheries in Navigable Waters and Its Application to Colonial and Post-Colonial Territories
III. English Law on Fisheries and Aboriginal Rights A. An Analytical Framework
(i) Common Law Aboriginal Rights in the Imperial Dimension
(ii) Common Law Aboriginal Rights in the Municipal Dimension
(iii) The Imperial and Municipal Models as Applied to Fishing Rights
IV. Saugeen Fishing Rights Reconsidered

Conclusion

Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada

Introduction

¶ 1 In 1996 the Supreme Court of Canada issued seven judgments in the area of aboriginal fishing rights. [See Note 1 below] These judgments develop the law relating to aboriginal rights in very significant ways, both in relation to the general interpretation of "existing aboriginal and treaty rights" in section 35(1) of the Constitution Act, 1982 [See Note 2 below] and in relation to the particular issue of aboriginal fishing rights. In the words of Lamer C.J., the identification of constitutionally protected aboriginal rights demands reconciling "the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory"; further, this reconciliation must "take into account the aboriginal perspective, yet do so in terms that are cognizable to the non-aboriginal legal system." [See Note 3 below] With respect to fishing rights, the Supreme Court of Canada has (thus far) concluded that this process of reconciliation results in a right of aboriginal priority: if an aboriginal community can establish that it has an existing aboriginal right to fish in certain waters, then the government is under a constitutional obligation when allocating rights of access to that fishery to give precedence to the aboriginal community over non-aboriginal users. An exclusive aboriginal fishing right is precluded, at least in tidal waters, because non-aboriginal users have their own legal entitlement to fisheries with which the aboriginal right must be reconciled. As stated by Lamer C.J., "since the time of Magna Carta" there has been a public right to fish in tidal waters, and this right could not have been abolished when aboriginal rights were entrenched by section 35(1) in 1982. [See Note 4 below] The public right of fishing to which Lamer C.J. refers is often said to be protected by the 16th chapter of Magna Carta, which states: "nullae ripariae defendentur decaetero, nisi illae quae fuerunt in defenso tempore Henrici regis avi nostri" -- "no banks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather . . ." [See Note 5 below]

Note 1: R. v. Nikal, [1996] 1 S.C.R. 1013 [hereinafter Nikal]; R. v. Lewis, [1996] 1 S.C.R. 921 [hereinafter Lewis]; R. v. Van der Peet, [1996] 2 S.C.R. 507 [hereinafter Van der Peet]; R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; R. v. Gladstone, [1996] 2 S.C.R. 723 [hereinafter Gladstone]; R. v. Adams, [1996] 3 S.C.R. 101 [hereinafter Adams]; R. v. Côté, [1996] 3 S.C.R. 139 [hereinafter Côté].

Note 2: Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Constitution].

Note 3: Van der Peet, supra note 1 at 551.

Note 4: Gladstone, supra note 1 at 770-771.

Note 5: See generally S.A. Moore & H.S. Moore, The History and Law of Fisheries (London: Stevens & Haynes, 1903) c. 2.

¶ 2 The purpose of this article is to consider whether, notwithstanding these recent Supreme Court decisions, it may still be argued that certain First Nations have exclusive rights to their traditional fisheries. The cases in which the doctrine of aboriginal priority was developed involved claims to aboriginal rights existing independently of aboriginal title to land beneath water and unrecognized by treaty or other Crown instrument. [See Note 6 below] Although the Court has denied the possibility of exclusive native fisheries pursuant to Crown instrument in non-tidal waters, the cases in which it did so involved the unique legal-historical context existing in British Columbia. [See Note 7 below] It is therefore important to determine whether the nature of a First Nation's fishing right might be different if one or more of these contextual factors is altered. In particular, the recent Supreme Court fishing cases must be considered in light of the Supreme Court's latest decision on aboriginal title in Delgamuukw v. British Columbia. [See Note 8 below] If, as Delgamuukw confirms, aboriginal title is the "exclusive" right to use and occupy land, [See Note 9 below] then it may be argued that fishing rights incidental to aboriginal title must also be exclusive.

Note 6: Gladstone, supra note 1 at 762-774. See also R. v. Sparrow, [1990] 1 S.C.R. 1075; and Jack v. The Queen, [1980] 1 S.C.R. 294 at 313. In Adams, supra note 1 and Côté, supra note 1, the plaintiffs' claims were based upon aboriginal title, treaty and the Royal Proclamation of 1763, but the Court ruled in their favour on the narrower ground of aboriginal rights.

Note 7: Nikal, supra note 1; and Lewis, supra note 1.

Note 8: [1997] S.C.J. No. 108 (QL) [hereinafter Delgamuukw].

Note 9: Ibid., para. 117.

¶ 3 Aboriginal and treaty rights cannot be determined in the abstract and must be established in relation to specific First Nations. [See Note 10 below] This article therefore examines the question of whether an exclusive aboriginal and/or treaty right to fish can exist by reference to a particular claim -- that of the Chippewas of Nawash to their traditional fisheries in Lake Huron and Georgian Bay off the Bruce peninsula in Ontario. This claim is based, in part, upon certain mid-nineteenth century treaties and letters patent; therefore, the following inquiry will focus upon defining the fishing rights of the Chippewa/Ojibway of the Bruce -- or Saugeen -- peninsula as they existed in the legal and constitutional context of colonial Upper Canada when these instruments were made. The interpretative perspective of the analysis will, however, be legal as opposed to historical, with the objective of contributing to the resolution of the modern problem surrounding attempts by successors of the Saugeen Ojibway, like the Chippewas of Nawash, to assert jurisdiction over their traditional fisheries. [See Note 11 below] The importance of examining this question is increased by obiter dicta in two recent cases: in Jones and Nadjiwon it was suggested that exclusive Saugeen fisheries might exist; [See Note 12 below] whereas in Nikal, certain mid-nineteenth century legal opinions denying exclusive Saugeen Ojibway fisheries were cited with approval. [See Note 13 below]

Note 10: Kruger v. R., [1978] 1 S.C.R. 104 at 109.

Note 11: On these claims, see generally R. v. Jones (1993), 14 O.R. (3d) 421 (Prov. Ct.) [hereinafter Jones and Nadjiwon]; P. Blair, "Solemn Promises and Solum Rights: The Saugeen Ojibway Fishing Grounds and R. v. Jones and Nadjiwon" (1996-97) 28 Ottawa L.Rev. 125; Canada, Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol. 2 (Ottawa: Canada Communication Group, 1996) at 652 [hereinafter Royal Commission Report]; and V.P. Lytwyn, "Waterworld: The Aquatic Territory of the Great Lakes First Nations" in D. Standen & D. McNabs, eds., Gin Das Winan: Documenting Aboriginal History in Ontario (Toronto: Champlain Society, 1996) No. 2, 14 at 22-26; V.P. Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nation's Fishing Islands Fishery in Lake Huron" in B.W. Hodgins & J.S. Milloy, eds., Co-Existence?: Studies in Ontario-First Nations Relations (Peterborough: Trent University, 1992) 81.

Note 12: Jones and Nadjiwon, ibid. at 439-440.

Note 13: Nikal, supra note 1 at 1030-1031.

¶ 4 Part I of this article reviews the Crown instruments which support the claim for exclusive Saugeen Ojibway fishing rights. Part II examines the English law relating to fisheries and title to lands beneath navigable waters, and how this law was applied in colonial and post-colonial territories in cases unrelated to aboriginal peoples. Part III analyzes how the common law relating to rights to fisheries applies in relation to aboriginal peoples generally, with specific reference to Maori rights in New Zealand. Finally, Part IV returns to the question of aboriginal fishing rights in Upper Canada, and reconsiders the rights of the Saugeen Ojibway in light of the preceding analysis.

I. Saugeen Ojibway Fishing Rights

¶ 5 Ojibway (Chippewa) -- or Anishnabe -- peoples were fishing in the upper Great Lakes before the arrival of Europeans in the early seventeenth century. [See Note 14 below] Even after contact with the French and British, the Ojibway continued to follow the same seasonal pattern of resource use: after dispersing in small groups for the winter hunt, members of particular bands, or extended family groupings, congregated at traditional village sites near productive fisheries to engage in fishing during the spring and summer months. [See Note 15 below] Each band controlled its own fishery, although the fishery's use by others was sometimes permitted. [See Note 16 below] The Ojibway bands of the Saugeen peninsula controlled and used fisheries in waters adjacent to the peninsula and around so-called "fishing islands" in Lake Huron and Georgian Bay for food and trade purposes. [See Note 17 below]

Note 14: J.J. Borrows, Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island (D.Jur. Thesis, Osgoode Hall Law School, 1994) 22; C. Cleland, "The Inland Shore Fishery of the North Great Lakes: Its Development and Importance in Prehistory" (1982) 47 American Antiquity 761; and Jones and Nadjiwon, supra note 11 at 435.

Note 15: Borrows, ibid. at 24; and N. Ferris, Continuity Within Change: Settlement-Subsistence Strategies and Artifact Patterns of the Southwestern Ontario Ojibwa A.D. 1780-1861 (M.A. Thesis, York University, 1989) at 169-183.

Note 16: Borrows, ibid. at 31.

Note 17: Royal Commission Report, supra note 11 at 462; and Jones and Nadjiwon, supra note 11 at 435.

¶ 6 Due to settler demand for farming land in the province of Upper Canada, the Crown sought the surrender of the Saugeen territory in the mid-1830s. In 1836, Lieutenant Governor Sir Francis Bond Head treated with various Ottawa and Ojibway bands, including those from Saugeen, on Manitoulin Island. [See Note 18 below] Bond Head, in explaining the resulting treaties to the Secretary of State for the Colonies, observed that the Indians had long lived "in their Canoes" among the islands of Lake Huron, in part because "the surrounding Water abounds with Fish." [See Note 19 below] Because of the abundance of fish and other natural resources around the isolated Manitoulin islands, Bond Head concluded that they were "adapted to them" and "in no Way" adapted to non-natives, and that therefore the islands represented a suitable place on which to relocate Indians whose presence on fertile lands elsewhere in the colony was blocking the "Progress of Civilization." [See Note 20 below] He recognized that the islands "belong (under the Crown) to the Chippewa and Ottawa Indians" and it was "necessary to obtain their Permission" before proceeding with this removal plan; but, he reported, he had succeeded in obtaining this permission, as well as the surrender of much of the Saugeen territory, and the treaties were found in the enclosed "short plain Memorandum" which was, he admitted, "not in legal Form." [See Note 21 below] According to the Lieutenant Governor, the new regime would leave the Indians "better

off" because their reserves "will bona fide be fortified against the Encroachments of the Whites . . . ." [See Note 22 below]

Note 18: On the Bond Head treaties, see Borrows, supra note 14 at 94-110.

Note 19: Sir F. Bond Head, Lt. Gov. Upp. Can., to Lord Glenelg, Sec. of State (20 August 1836) Imperial Blue Books, 1839, No. 93 at 122-123 [hereinafter Imperial Blue Books].

Note 20: Ibid.

Note 21: Ibid.

Note 22: Ibid.

¶ 7 Although the two treaties contained in the memorandum relate to different bands and territories, they must be read together because they were made in the same council and the second treaty refers expressly to the first. [See Note 23 below] The Manitoulin treaty begins by stating that "new Arrangements" were necessary to protect Indian lands from "Encroachments" of non-natives. [See Note 24 below] The arrangement proposed involved relocating Indians to one common reserve, Manitoulin Island. This island, states the treaty, is "surrounded by ennumerable Fishing Islands" and would therefore be a suitable residence "for many Indians who wish to be civilized as well as totally separated from the Whites." [See Note 25 below] Sixteen Ottawa and Chippewa chiefs from Manitoulin agreed to allow their island to be used for this purpose and signed the treaty.

Note 23: The treaties, dated 9 August 1836, were in the form of addresses given by Sir F. Bond Head, written and signed by Bond Head and the chiefs. They were enclosed in Sir F. Bond Head to Glenelg, Imperial Blue Books, supra note 19 at 123-124, and are printed as Treaty No. 45 (Ottawas and Chippewas of Manitoulin) and Treaty No. 45 1/2 "To the Saukings" (Saugeen Ojibway) in Canada, Indian Treaties and Surrenders, vol. 1 (Ottawa: Queen's Printer, 1891) at 112-113 [hereinafter Indian Treaties and Surrenders].

Note 24: Treaty No. 45 in Indian Treaties and Surrenders, ibid.

Note 25: Ibid.

¶ 8 In the treaty with the Saugeen Ojibway, Bond Head began by stating: "You have heard the Proposal I have just made to the [Manitoulin] Chippewas and Ottawas . . . ." [See Note 26 below] He then stated:

Note 26: Treaty No. 45 1/2 in Indian Treaties and Surrenders, ibid.

¶ 9 I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this [Manitoulin] Island or to that Part of your Territory which lies in the North of Owen's Sound, upon which proper Houses shall be built for you, and proper Assistance given to enable you to become civilized and to cultivate Land which your Great Father engages for ever to protect for you from the Encroachments of the Whites. [See Note 27 below]

Note 27: Ibid.

Four Saugeen chiefs signed the treaty.

¶ 10 Although the two treaties are short, they are not plain: clarity was sacrificed in favour of brevity. Did either of these treaties recognize exclusive fishing rights? According to the Manitoulin treaty, the "new Arrangements" would make natives "totally separate" from non-natives whose "Encroachments" would be prohibited. An exclusive right to the fisheries surrounding the "Fishing Islands" is, it may be argued, a necessary incident to this new arrangement. If the purpose of the treaty was to create a reserve in which Indians could fish and hunt free from non-native encroachment, that purpose could not have been accomplished if there existed a right of non-native access to relevant fisheries.

¶ 11 The Saugeen treaty is, on its face, less clear. It recognizes that the Saugeen Ojibway retained the Saugeen peninsula north of Owen's Sound as their reserve. If this territory included their fishing islands in the adjacent waters of Lake Huron and Georgian Bay, then perhaps the treaty implicitly recognized the same sort of exclusive fishing rights as the Manitoulin treaty recognized. The question, then, is whether the second treaty secured the same degree of protection for the Saugeen reserve as the first treaty established for the Manitoulin reserve or whether it contemplated some lesser status. Although a literal reading of the texts reveals differences between the two treaties, such an interpretative approach may be inappropriate given that these "short plain" treaties were not intended to be in legal form. Having regard to the surrounding circumstances, it may be argued that it is simply unlikely that the Saugeen Ojibway chiefs, having just heard that the fishing resources in the Manitoulin islands would be protected from non-native encroachment, would have thought that the treaty they were signing secured to them any less protection for their fisheries.

¶ 12 This interpretation of the treaty is supported by statements made by Chief Metigwob, one of the Saugeen Ojibway signatories. At a council held shortly afterwards, Metigwob explained that during the treaty negotiations the Saugeen chiefs had informed

Bond Head that, rather than accept the offer to relocate to Manitoulin, they preferred to remain on the Saugeen peninsula "as there were many fish in that place." [See Note 28 below] Bond Head's response, said Metigwob, was this:

Note 28: "Statement of Metigwob, one of the Sahgeeng Chiefs, made in a General Council held at the River St. Clair on the 13th September 1836 respecting the surrender of the Sahgeeng Territory to the British Government." Six Nations Land Research Office, cat. No. 836-9-13-1. See also Blair, supra note 11 at 129.

> [T]he Sahgeeng Indians owned all the islands in the vicinity of that neck or point of land, he was about to reserve for them, and that he would remove all the white people who were in the habit of fishing on their grounds. [See Note 29 below]

Note 29: Ibid.

¶ 13 Thus, Bond Head's oral statements about the Saugeen reserve were consistent with what he had written in relation to the Manitoulin reserve: native fishing rights were exclusive and non-native encroachment would be prevented. The significance of this promise arises from the larger context within which it was made. In the years preceding the treaty, non-native use of the Saugeen fisheries had increased and some confusion had arisen about the terms under which a non-native commercial fishing company operated from the fishing islands: the company had obtained both a licence of occupation from the Lieutenant Governor in council and a lease from the Saugeen chiefs in 1834 for use of islands. [See Note 30 below] In light of this, treaty recognition of their exclusive rights to the islands and fisheries was important to the Saugeen chiefs. Furthermore, in the 1836 treaty no provision was made for payment for the surrender of the Saugeen territory. It may therefore be argued that the Crown's consideration was, in part, its promise -- conveyed orally by Bond Head -- to protect exclusive Saugeen possession of unsurrendered Ojibway fisheries. [See Note 31 below] In short, very strong reasons exist to conclude that the 1836 treaty recognized exclusive rights of fishing. [See Note 32 below]

Note 30: Upper Canada, Office of the Lieutenant Governor, "Licence of Occupation to the Huron Fishery Company" (3 July 1834) (Lt. Govr. Sir. J. Colborne) NA RG10 vol. 55 at 58368. In 1834, the Huron Fishery Company obtained this licence of occupation for the islands from the Lieutenant Governor of Upper Canada Sir J. Colborne on the condition that the "Indian Tribes are not excluded from the right of fishing which they have always enjoyed" (Wm. Rowan, Sec. to the Lt. Govr., to Dr. Dunlop (22 May 1834) NA RG10, vol. 55 at 58367. Before commencing its operations on the islands the company therefore obtained the "sole use" of the islands from the Saugeen Chippewa, entering into a lease with the "Chiefs of

the 'Chippewa Fisheries,'" Report of the Huron Fishery Company, E. C. Taylor, Secretary, Goderich (18 April 1835) NA RG 5 M vol. 152 at 83421-83426; Lease to the Huron Fishery Company from the Chiefs of the Chippewa Fisheries (2 September 1834) NA RG10, vol. 56 at 58707. However, it was later suggested that this lease was not necessary: see "Opinion of Attorney General in reference to Licence of Occupation &c of the fishing islands, 1834" (NA RG10, vol. 55 at 58370-58371). See also Blair, supra note 11 at 129-130; and Jones and Nadjiwon, supra note 11 at 437.

Note 31: Blair, ibid.

Note 32: Jones and Nadjiwon, supra note 11 at 438. Fairgrieve J. noted at 438: "[T]he historical evidence supports the conclusion that from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area."

¶ 14 Notwithstanding the 1836 treaty, non-native use of Saugeen fisheries increased. A commission of inquiry on Indian affairs in 1844 observed in relation to the Saugeen fisheries that the "fishing is very productive, and has attracted the notice of the white people, who annoy the Indians by encroaching on what they consider their exclusive right . . ." [See Note 33 below] In an effort to protect their territories, the Saugeen Ojibway sought further written confirmation of their rights, [See Note 34 below] and in 1847 the imperial Crown issued a proclamation in the form of letters patent under the great seal of the province of Canada defining the Saugeen territory and confirming Ojibway title to it. This 1847 deed defined the boundaries of the Saugeen territory as:

Note 33: Canada, Legislative Assembly of Canada, Report on the Affairs of the Indians in Canada (22 January 1844) in Journals of the Legislative Assembly of Canada (1845), Appendix EEE, s. 2, II.15 at 43.

Note 34: Letter of Chief Wahbahdick to the Colonial Secretary, (10 June 1843) NA RG1 L3 vol. 538 "W" Bundle 1843-44, 29m-29o.

> all that tract of land lying on the shore of Lake Huron, and which is butted and bounded or otherwise known as follows: commencing at the mouth of the River Saugeen, thence . . . [a southern boundary line along the base of the Saugeen peninsula is described], bounded on the east, north, and west by Lake Huron, including any islands in Lake Huron within seven miles of that part of the main land comprised within the hereinbefore described tract of land. [See Note 35 below]

Note 35: Declaration by Her Majesty in favor of the Ojibway Indians respecting certain lands on Lake Huron (29 June 1847) NAC RG68, vol. LIBER AG. SPECIAL GRANTS 1841-1854, C-4158.

¶ 15 The deed went on to declare that the Saugeen Ojibway "for ever shall possess and enjoy" the tract and its "rents, issues, and profits . . . without any hinderance whatever on our part, or on the part of our heirs and successors, or of our or their servants or officers." [See Note 36 below] It was stated in Jones and Nadjiwon that this instrument "extended treaty protection to the Saugeen Ojibway's use of their traditional fishing grounds surrounding the Peninsula." [See Note 37 below]

Note 36: Ibid.

Note 37: Jones and Nadjiwon, supra note 11 at 438.

¶ 16 Although further ethnohistorical and historical evidence would be necessary to establish the full nature of Saugeen Ojibway fishing rights under aboriginal custom, the brief review given here suggests that the traditional fisheries of the Saugeen Ojibway fell within territory that they controlled, used and occupied, and exclusive Ojibway possession of this territory and its fisheries was guaranteed, implicitly at least, by treaty and letters patent. Although in subsequent years most of the Saugeen reserve was surrendered, smaller reserves on the shores of Lake Huron, as well as the fishing islands, remained unceded. [See Note 38 below] No effort was made by the Crown to obtain the cession of the lake bed under the waters that comprised the Saugeen territory -- yet as Bond Head observed in 1836, the aboriginal nations of Lake Huron lived on the waters of the lake as much as they lived on the lands adjacent to it. [See Note 39 below] Despite the treaty and letters patent, exclusive Saugeen fishing rights were later disregarded: in 1857 the provincial legislature enacted the first statute regulating fishing in the colony, and thereafter officials leased the fishing islands without Ojibway consent. [See Note 40 below] Doubts were expressed about whether the Saugeen had ever had exclusive fishing rights. [See Note 41 below]

Note 38: Treaty No. 72 (13 October 1854) in Indian Treaties and Surrenders, supra note 23 at 195-196.

Note 39: Imperial Blue Books, supra note 19.

Note 40: Fisheries Act, 1857, 20 Vict. c. 21 (Can.). This empowered the Commissioner of Crown lands to lease fishing stations on public lands. See generally Blair, supra note 11 at 134-136; both articles by Lytwyn, supra note 11; and Royal Commission Report, supra note 11 at 498-499.

Note 41: Opinion of James Cockburn, Sol. Gen., (3 April 1866) NA RG10 vol. 323, Part 2 at 216131-216136.

¶ 17 Having briefly reviewed the grounds for exclusive Saugeen Ojibway fishing rights, it is now necessary to consider how these rights could have been manifested in the non-aboriginal legal system. Could Magna Carta, or the common law from the time of Magna Carta, really provide a legal basis for public fishing rights in the Great Lakes of Upper Canada that rendered such exclusive aboriginal and/or treaty fishing rights impossible? To answer this question an understanding of the English law governing title to land covered by water and to fisheries is required.

II. English Law on Fisheries in Navigable Waters and Its Application to Colonial and Post-Colonial Territories

¶ 18 The basic English common law rules regarding waters and fisheries were summarized by Matthew Hale, Lord Chief Justice of England, in his seventeenth century treatise, "De Jure Maris". [See Note 42 below] According to those rules, land covered by water is the same as land not so covered: it is susceptible to private ownership but until granted by the Crown to a subject it constitutes part of the royal demesne. Fisheries are regarded as profits of the soil, and therefore the owner of lands covered by water has, as an incident of that ownership, a separalis piscaria or a "several" fishery -- an exclusive right to fish in those waters. [See Note 43 below] Indeed, the common law presumes that riparian land owners own the land under and the fisheries within adjacent waters usque ad medium filum aquae. [See Note 44 below] Instruments by which land is conveyed (either by the Crown or the subject) that define the granted lands as bordered by a body of water are interpreted consistently with this ad medium filum aquae presumption, and the grantee is therefore presumed to receive title to the solum and an exclusive fishery to the middle of the adjacent waterway. The landowner's right to fish may be severed from the right to land and alienated as a profit à prendre. The recognition of exclusive fishing rights is not legally inconsistent with any public rights of navigation that may exist at common law by user; however, the public navigation right is "paramount" and, as long as it is exercised reasonably, it prevails over private fishing rights when the two come into practical conflict. [See Note 45 below]

Note 42: Lord Chief Justice Hale, "De Jure Maris et Brachiorum Ejusdem" in F. Hargrave, ed., A Collection of Tracts Relative to the Law of England, vol. 1 (London: T. Wright, 1787) c. 1 & 3 [hereinafter "De Jure Maris"]. See also H. Woolrych, A Treatise of the Law of Waters, 2d ed. (London: Benning & Co., 1851) at 75-78; J.B. Phear, A Treatise on Rights of Water, Including Public and Private Rights to the Sea and Sea-Shore (London: Stevens & Norton, 1859) at 63-69; Moore & Moore, supra note 5; S.R. Hobday, ed., Coulson and Forbes on the Law of Waters (London: Sweet & Maxwell Ltd., 1952) at 405-450; and A.S. Wisdom, The Law of Rivers and Watercourses, 4th ed. (London: Shaw & Sons Ltd., 1979) at 254-271.

Note 43: Alderman of London v. Hastings (1657), 2 Sid. 8; Lord Fitzwalter's Case (1674), 1 Mod. 105 [hereinafter Fitzwalter's]; Seymour v. Courtenay (1771), 5 Burr. 2814; and Moore & Moore, supra note 5 at 43-45.

Note 44: Le Case del Royall Piscarie de le Banne (1610), Davis. 55 at 56 [hereinafter Royall Piscarie]; and "De Jure Maris", supra note 42, c. 1. The phrase 'usque ad medium filum aquae' means, in essence, 'just to the centre thread of the water'.

Note 45: Mayor of Lynn v. Turner (1774), 1 Cowp. 86; Anon. (1808), 1 Camp. 517n; Williams v. Wilcox (1838), 8 Ad. & E. 314 at 333-334; Colchester Co. v. Brooke (1845), 7 Q.B. 339 at 374 [hereinafter Colchester]; and Murphy v. Ryan (1868), I.R. 2 C.L. 143 at 152-153 [hereinafter Murphy].

¶ 19 These rules apply to non-tidal waters. In relation to tidal waters -- also known as 'navigable' waters (when used in this de jure sense, 'navigable' excludes non-tidal waters which are de facto navigable) -- the rules are modified in certain respects. [See Note 46 below] First, title in the soil under tidal waters, while capable of being granted to the subject, is presumed to be in the Crown -- the ad medium filum presumption does not apply to land grants bordered by tidal waters. [See Note 47 below] Second, the common law recognizes a prima facie public right to fish in tidal waters. With respect to non-tidal waters, a public right of fishing is impossible at common law. The owner of the soil (whether Crown or subject) has an exclusive right of fishing that may be granted to another and that cannot be abridged in favour of the public; evidence of long public user may create an easement over a non-tidal waterway making it a public highway, but user cannot give rise to a public right of fishing. [See Note 48 below] In relation to tidal waters, however, a different conclusion is reached. According to Hale's "De Jure Maris", "the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof . . . and may not without injury to their right be restrained of it." [See Note 49 below] This "prima facie" public right is only denied where a several fishery has been granted by the Crown or has arisen "by prescription or usage." [See Note 50 below]

Note 46: On the legal definition of "navigable" waters see:

Royall Piscarie, supra note 44; "De Jure Maris", supra note 42, c. 4; Carter v. Murcot (1768), 4 Burr. 2163 at 2164 [hereinafter Carter]; and Murphy, ibid.

Note 47: "De Jure Maris", ibid., c. 4; R. v. Smith (1780), 2 Doug. 441; and Colchester, supra note 45 at 374.

Note 48: A.G. v. Mathias (1858), 4 K. & J. 579 at 591; Murphy, supra note 45; Lord Rivers v. Adams (1878), 3 Ex. D. 361; Goodman v. Saltash Co. (1882), 7 App. Cas. 633 at 648; Reece v. Miller (1882), 8 Q.B.D. 626 at 629-630; Pearce v. Scotcher (1882), 9 Q.B.D. 162 at 167; Pery v. Thornton (1889), 23 L.R. Ir. 402 [hereinafter Pery]; Blount v. Layard [1891] 2 Ch. 681; and Smith v. Andrews, [1891] 2 Ch. 678.

Note 49: "De Jure Maris", supra note 42, c. 4. See also Fitzwalter's, supra note 43, Hale C.J.; and Warren v. Matthews (1703), 1 Salk. 357 [hereinafter Warren].

Note 50: "De Jure Maris", supra note 42, chap. 5. See also Carter, supra note 46.

¶ 20 As Lamer C.J. suggests, the public right of fishing in tidal waters is linked to the terms of Magna Carta. [See Note 51 below] The relationship is not, however, clear. Blackstone stated that exclusive rights of fishing in "public" rivers could not "at present be granted, by the express provision of magna carta, c. 16." [See Note 52 below] As seen above, chapter 16 was anything but express in this respect. [See Note 53 below] The leading judges of the seventeenth and eighteenth centuries acknowledged the power of the Crown to grant several fisheries in tidal waters without mentioning this Magna Carta restriction, [See Note 54 below] and, in "De Jure Maris", Hale observed that the admonition in chapter 16 that "No Banks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather" merely prohibited writs of de defensione ripariae that allowed the King to put rivers in defenso until he had enjoyed his prerogative of hunting and fishing for his own pleasure. [See Note 55 below] It is unlikely, then, that Magna Carta was intended to restrict the Crown's ability to grant (or the subject's ability to prescribe for) exclusive fishing rights. Nevertheless, by the mid-nineteenth century Blackstone's view of chapter 16 had prevailed: the House of Lords held that Magna Carta did indeed prevent Crown grants of several fisheries in tidal waters, and that to establish a lawful exclusive fishery in such waters one had to produce either a Crown grant "not later than the reign of Henry II" or evidence of "long enjoyment" of the fishery from which it might be inferred that such a grant had been made. [See Note 56 below] In short, the common law came to conclude that after the reign of Henry II, the public right of fishing in tidal waters could not be limited or abrogated except by Act of Parliament. [See Note 57 below]

Note 51: Gladstone, supra note 1.

Note 52: W. Blackstone, Commentaries on the Laws of England, vol. 2 (Oxford: Clarendon Press, 1766) at 417. See also Colchester, supra note 45 at 382.

Note 53: See supra note 5 and accompanying text.

Note 54: Fitzwalter's, supra note 43, Hale C.J.; Warren, supra note 49, Holt C.J.; and Carter, supra note 46, Lord Mansfield.

Note 55: "De Jure Maris", supra note 42, chap. 2.

Note 56: Malcolmson v. O'Dea (1863), 10 H.L. Cas. 593 at 618 [hereinafter Malcolmson].

Note 57: In Neill v. Duke of Devonshire (1882), 8 App. Cas. 135 at 177-183 (H.L.), Lord Blackburn discusses the evolving interpretation of Magna Carta, chapter 16, and concludes that Malcolmson, ibid. now reflects the law. See also British Columbia (A.G.) v. Canada (A.G.), [1914] A.C. 153 at 170 (P.C.) [hereinafter British Columbia (A.G.)]; and Moore & Moore, supra note 5, c. 2.

¶ 21 In articulating the law relating to waters and fisheries, the early common law focused upon the sea and its arms on the one hand and non-tidal rivers on the other; no

express mention was made of large fresh water lakes. [See Note 58 below] There are two aspects of the law governing non-tidal rivers that might be seen as inappropriate for such lakes. First, the presumption that riparian land owners own the land under the lake usque ad medium filum aquae would, in many cases, mean that many small landowners actually own great tracts of submerged land. Second, it might seem unfair that the public, who usually has rights of navigation in such lakes, does not have a common law right of fishing and any public use of the fisheries in these lakes exists only by the owner's grace. Nevertheless, English courts have applied the common law strictly: if lakes are non-tidal then the rules governing non-tidal waters govern. Thus, in a case involving fishing rights on Lough Neagh, which is twenty by fifteen miles, non-tidal and a public highway, Lord Macnaghton stated that it was "incontrovertible" that "[n]o right can exist in the public to fish in the waters of an inland non-tidal lake," and "there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea." [See Note 59 below] Although judges did not seem opposed to the idea that the soil and fisheries in such lakes could be privately owned, concerns were expressed about the idea that the law would presume that the riparian owners had these rights usque ad medium filum aquae, [See Note 60 below] and therefore the normal presumptions regarding the rights of riparian owners came to be regarded in relation to such lakes as easily rebutted by reference to the surrounding circumstances. [See Note 61 below] Thus, the Crown could grant title to the solum and/or fisheries of large non-tidal lakes by an instrument expressly conveying these rights, or by the grant of riparian lands if the surrounding circumstances supported the inference that the Crown also intended to convey the solum under and/or fisheries within adjacent lake waters.

Note 58: Small lakes and ponds were treated as were non-tidal rivers: Greyes Case (1594), Owen 20; and Clarke, supra note 44.

Note 59: Johnston v. O'Neill, [1911] A.C. 552 at 577-578, Lord Macnaghton; also Earl Halsbury at 568; and Lord Dunedin at 593; cf. Lord Shaw at 605. See also Bristow v. Cormican (1878), 3 App. Cas. 641, Lord Cairns at 651-653 (H.L.) [hereinafter Bristow] (although he thought the rule might be in need of reconsideration); Bloomfield v. Johnston (1863), I.R. 8 C.L. 68 [hereinafter Bloomfield]; Pery, supra note 48; and Toome Eel Fishery v. Cardwell, [1966] N.I. 1 at 11-12, Lord MacDermott.

Note 60: Bristow, ibid. at 666-667, Lord Blackburn.

Note 61: Bloomfield, supra note 59; and Moore & Moore, supra note 5 at 87.

¶ 22 English law was introduced into British colonies either by legislation or by the silent operation of common law principle (as the so-called "birthright" of settlers). [See Note 62 below] In either case, English common and statute law applied in the colonies (or, after the American revolution, in the United States) only insofar as it was applicable to "local conditions," [See Note 63 below] a qualification that operated even if it was not expressly included in the reception statute. [See Note 64 below] It was left to judges to determine if and how English law applied. Judges were not restricted to taking or leaving

English rules; rather, judges could modify the law so that it suited local conditions. [See Note 65 below] In general, English rules that were designed to address particular social or political problems peculiar to England were not applied. Thus, English statutes that were "wholly political" and relevant only to "local [English] circumstances," [See Note 66 below] or that "record[ed] a compromise between the King of England and his people" relating to some peculiar "insular medieval" legal principle [See Note 67 below] (descriptions that, it may be noted, apply to many of Magna Carta's provisions) were disregarded.

Note 62: Cooper v. Stuart (1889), 14 A.C. 286 at 291 (P.C.) [hereinafter Cooper]. Also R. v. Farrell (1831), 1 Legge 5 at 9-10 [hereinafter Farrell]; MacDonald v. Levy (1833), 1 Legge 39 at 45, 51.

Note 63: Blackstone, supra note 52 at 106-107; Kielley v. Carson (1841), 4 Moo. P.C. 63 (P.C.) at 84-85; Cooper, ibid.; The Lauderdale Peerage (1885), 10 App. Cas. 692 at 744-745 (H.L.); Uniacke v. Dickson (1848), 2 N.S.R. 287 (Ch.); Mercer v. Hewston (1859), 9 U.C.C.P. 349 at 354-355; Boehm v. Engle, 1 Dall. 15 (Penn. S.C., 1767); U.S. v. Worrall, 2 Dall. 384 at 394 (Penn. S.C., 1798); and Pawlett (Town of) v. Clark, 9 Cranch 292 at 333 (U.S.S.C., 1815).

Note 64: Doe d. Anderson v. Todd (1845), 2 U.C.Q.B. 82.

Note 65: Morris's Lessee v. Vanderen, 1 Dall. 64 (Penn. S.C., 1782); and Farrell, supra note 62.

Note 66: A.G. v. Stewart (1817), 2 Merr. 144 (Statute of Mortmain (1736), 9 Geo. II, c. 1 did not apply in Grenada).

Note 67: Alberta (A.G.) v. Huggard Assets, [1919] A.C. 420 (P.C.) (Statute of Tenures (1660), 12 Car. II, c. 24 did not apply in Alberta).

¶ 23 The difficulties inherent in deciding how English law should apply in colonies are clearly reflected by cases on riparian rights and fisheries. In most American states, the English common law rules were followed closely. However, judges in the United States were reluctant to accept that the English rules governing navigable waters should be restricted to tidal waters only; the reasonableness of recognizing private rights to the solum and fisheries in non-tidal waters was questioned, and exceptions were invariably made in relation to large fresh water lakes and rivers that were de facto navigable. [See Note 68 below] For example, in the Pennsylvania case of Carson v. Blazer, [See Note 69 below] in which a "several fishery" was claimed by the owner of lands bounded by the Susquehanna River, the trial judge refused to apply the common law's ad medium filum aquae presumption because, although the river was non-tidal, it was a "mile wide" and was navigable by "large boats" for "several hundred miles through a rich country" and it would be "highly unreasonable" to apply the English rules on non-tidal waters to "our large rivers." [See Note 70 below] Instead, it was held that fisheries in non-tidal but navigable waters in America were "vested in the state, and open to all . . . . " [See Note 71 below] The appellate court agreed, describing the assertion by riparian owners of private

fisheries to the middle of such rivers as a "wild claim" that "the warmest advocates for the right of exclusive fisheries would scarcely contend for." [See Note 72 below]

Note 68: For general summaries of the ways in which various state courts addressed this issue, see J. K. Angell, A Treatise on the Law of Watercourses, 3rd ed. (Boston: Little & Brown, 1840) at 180-205; J. M. Gould, A Treatise on the Law of Waters, including Riparian Rights, and Public and Private Rights in Waters Tidal and Inland (Chicago: Callaghan & Co., 1883) at 117-159.

Note 69: 2 Binn. 475 (Penn. S.C., 1810).

Note 70: Ibid. at 476-478.

Note 71: Ibid. at 476-478.

Note 72: Ibid. at 484.

¶ 24 Judges in other states expressed similar views. The idea that riparian owners on large lakes and rivers in America might own the solum and fisheries usque ad medium filum acquae was variously described as "preposterous," [See Note 73 below] "opposed to our sense of all that is reasonable, right or true," [See Note 74 below] and "an absurdity too monstrous to be thought of." [See Note 75 below] It was not just the physical differences in the respective geographies of England and America that led these judges to regard the strict application of English rules to American waterways as unreasonable. The English law in this respect represented a balance of public and private interests that, while perhaps appropriate to a country possessed by the English for centuries, was considered inappropriate to the needs of English settlers carving a new life out of a hostile wilderness. Some judges thought pioneer morality demanded that public interests prevail over private ones. Thus, Taney C.J. observed in 1842 that the first settlers could not have met the "many hardships" of the "new world" if fisheries under navigable waters were "liable to immediate appropriation by another as private property . . ." [See Note 76 below]

Note 73: Canal Appraisers v. The People, ex rel. Tibbits (No. 1), 5 Wend. 423 at 462 (N.Y.C.A., 1830) [hereinafter ex rel. Tibbits (No. 1)].

Note 74: Canal Appraisers v. The People, ex rel. Tibbits (No. 2), 17 Wend. 571 at 621 (N.Y.C.A., 1836) [hereinafter ex rel. Tibbits (No. 2)].

Note 75: Elder v. Burrus, 6 Humph. 358 at 367 (Tenn. S.C., 1845). See also Cates v. Wadlington, 1 McCord 580 (S.C.S.C., 1821); Bullock v. Wilson, 2 Porter 436 (Alba. Cir. Ct., 1835); Starr v. Child, 20 Wend. 149 (N.Y.S.C., 1838); Browne v. Scofield, 8 Barb. 239 (N.Y.S.C., 1850).

Note 76: Martin v. Lessee of Waddell, 16 Pet. 367 at 414 (U.S.S.C., 1842) [hereinafter Martin].

¶ 25 The approach in Carson v. Blazer was not followed in all states. Indeed, many judges were anxious to ensure that the evolving American common law accorded as central a place to private property interests as did the English common law. For example, in Adams v. Pease [See Note 77 below] it was held that the owners of land adjoining the non-tidal, though navigable, reaches of the Connecticut river did have an exclusive right of fishing opposite their land to the middle of the river while the public had an easement in the river as a highway. With respect to the English common law rules that dictated this result, Swift C.J. observed: "A more perfect system of regulations on this subject could not be devised. It secures common rights, as far as the public interest requires; and furnishes a proper line of demarcation between them and private rights." [See Note 78 below] This approach to public and private interests was adopted in the New York case of Hooker v. Cummings [See Note 79 below] in which a several fishery in the Salmon River, a navigable non-tidal river flowing into Lake Ontario, was recognized. Spence J. said: a river may be "subject to the public servitude, for the passage of boats" but this public right of navigation over waters could not "divest the owners of the adjacent banks of their exclusive rights to the fisheries therein." [See Note 80 below] Indeed, certain judges regarded the common law's compromise between public and private interests as not only suitable but necessary for the orderly settlement of the American frontier. Unless property in fisheries was vested in particular people there might be an "individual scramble" for the resource resulting in "violence and outrage" and other "incalculable mischiefs." [See Note 81 below] As one judge stated, the common law's recognition of private fisheries in navigable waters "promotes the grand ends of civil society" by "assigning to every thing capable of ownership a legal and determinate owner." [See Note 82 below] Thus, many judges applied the English common law without modification. [See Note 83 below]

Note 77: 2 Conn. 481 (Conn. Sup. Ct of Errors, 1818) [hereinafter Pease].

Note 78: Ibid. at 483.

Note 79: 20 Johns. 90 (N.Y.S.C., 1822).

Note 80: Ibid. at 99-100. See also Palmer v. Mulligan, 3 Caines 308 at 318 (N.Y.S.C., 1805); Shaw v. Crawford, 10 Johns. 236 (N.Y.S.C., 1813); Canal Fund (Commissioners of) v. Kempshall, 26 Wend. 404 (N.Y.S.C., 1841) [hereinafter Kempshall]; McCullough v. Wall, 4 Rich. 68 (S.C.S.C., 1850).

Note 81: Rice v. Ruddiman, 10 Mich. 125 (Mich. S.C., 1862) at 142.

Note 82: Pease, supra note 77 at 484-485.

Note 83: Loreman v. Benson, 8 Mich. 18 (Mich. S.C., 1860); Scott v. Willson, 3 N.H. 321 (N.H.S.C., 1825); Commonwealth v. Chapin, 5 Pick. 199 (Mass. S.C., 1827). See cases discussed at Ex parte Jennings, 3 Wend. 518 (N.Y.S.C., 1826) and Gould, supra note 68.

¶ 26 Although American courts were divided upon whether to apply the English common law on non-tidal waters to de facto navigable rivers and lakes, there seemed to be unanimity in relation to particularly large lakes. The approach taken is reflected in the statements of Walworth C. in the 1830s: the beds and islands of "our large fresh water lakes, or inland seas, which are wholly unprovided for by the common law of England," as well as "those lakes and streams which form the national boundaries between us and a foreign nation," are by "our own local law" assigned not to the riparian owners but "to the public." [See Note 84 below] Courts in states bordering the Great Lakes or other large lakes invariably adopted a similar attitude. [See Note 85 below]

Note 84: ex rel. Tibbits (No.1), supra note 73 at 447 and ex rel. Tibbits (No. 2), supra note 74 at 597.

Note 85: The State v. Gilmanton, 9 N.H. 461 (N.H.S.C., 1838); Kempshall, supra note 80; Kingman v. Sparrow, 12 Barb. 201 (N.Y.S.C., 1851); Morgan v. King, 30 Barb 9 (NYSC, 1858); Champlain & St. Lawrence RR v. Valentine, 19 Barb 484 (NYSC, 1853); La Plaisance Bay Harbour Co. v. Munroe (City of), Walk.'s Ch. 155 at 168 (Mich. 1843); Fletcher v. Phelps, 28 Vt. Rep. 257 at 262 (Vt.S.C., 1856); People v. Silberwood, 67 N.W. 1087 (Mich., 1896); State v. Cleveland, 113 N.E. 677 (Ohio S.C., 1916); Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (U.S.S.C., 1892).

¶ 27 In concluding that the lake bed and fisheries in large lakes vested in the "public," or in the state on the public's behalf, American judges were not purporting to determine what powers the Crown would have had in relation to these waters; they were applying English law only insofar as it was relevant to the American condition, and after the American Revolution the question of whether Magna Carta prevented Crown grants of exclusive fisheries in such waters was of little practical importance. [See Note 86 below] Occasionally, however, a claim to an exclusive fishery in tidal waters was traced to a pre-Revolution Crown grant and courts were then forced to consider the legality of that grant. For example, in Roger v. Jones [See Note 87 below] the inhabitants of the Town of Oyster Bay, New York, claimed an exclusive fishery in tidal waters based upon a 1677 grant issued by the colonial governor in the name of Charles II. In response, the defendant argued that Magna Carta made this grant unlawful. Woodworth J., after reviewing Hale's "De Jure Maris" and the English case law of the seventeenth and eighteenth centuries, concluded that the Crown was under no such restriction. Adopting Hale's analysis of Magna Carta's chapter 16, he concluded that the only object of that provision was "to prevent the King from putting any rivers in defenso for his recreation," and therefore the Crown remained "at liberty" to grant an "exclusive right of fishing" in tidal waters. [See Note 88 below] Of course, at the time Roger was decided there was, aside from Blackstone's statements, little academic or judicial support for the Magna Carta restriction in England. But even after the restriction gained favour in English courts later in the nineteenth century, American courts continued to apply the law as stated in Roger. [See Note 89 below] In short, American judges did not conclude that English law prevented Crown grants of exclusive fisheries in such lakes.

Note 86: Gould, supra note 68 at 71-75; Martin, supra note 76 at 410; Brookhaven v. Strong, 60 N.Y. 56 at 66 (N.Y.C.A., 1875) [hereinafter Brookhaven].

Note 87: 1 Wend. 237 (N.Y.S.C., 1828) [hereinafter Rogers].

Note 88: Ibid. at 257-259.

Note 89: People v. Schermerhorn, 19 Barb. 540 (N.Y.S.C., 1855); Brookhaven, supra note 86 at 65-66. See also Martin, supra note 76 at 410.

¶ 28 In Australia and New Zealand, the English common law relating to rights to the solum and fisheries of navigable waters was applied without modification. Non-tidal waters were, even if de facto navigable, subject to the non-tidal rules. However, the ad medium filum presumption was only applied to grants of lands bordering non-tidal waters where "surrounding circumstances" suggested that the Crown intended it to apply. [See Note 90 below] The surrounding circumstances that informed the courts' construction of land grants were the "facts known to both parties at the time of the grant," [See Note 91 below] and included, for example, the Crown "policy" of encouraging settlement in an "infant colony," [See Note 92 below] the need for public navigation during times of war, [See Note 93 below] "physical circumstances" such as the size of the body of water adjacent to the granted land, [See Note 94 below] and any "other special facts" that indicated that the grantor intended to retain the river bed. [See Note 95 below]

Note 90: Lord v. The Commissioners for Sydney (1859), 12 Moo. P.C. 473 at 497-498 (P.C.) [hereinafter Commissioners for Sydney].

Note 91: R. v. Joyce (1904), 25 N.Z.L.R. 78 at 99 (C.A.) [hereinafter Joyce].

Note 92: Commissioners for Sydney, supra note 90 at 497-498.

Note 93: Mueller v. Taupiri Coal-Mines Ltd. (1900), 20 N.Z.L.R. 89 (C.A.) at 109-110 [hereinafter Mueller].

Note 94: Joyce, supra note 91 at 114.

Note 95: Ibid. at 96, 99-100.

¶ 29 In colonial Canada, the English common law rules were faithfully applied, at least in relation to tidal waters and small non-tidal rivers and ponds. [See Note 96 below] When it came to the question of large non-tidal rivers and lakes that were de facto navigable, however, Canadian judges -- like their American counterparts -- deviated from

a strict application of English rules. Early judgments were informed by a colonizing spirit according to which the public interest of the settler community prevailed. In The Queen v. Meyers it was stated that, with the introduction of law and the "first occupancy" of land by settlers, the "great lakes and some rivers" of Upper Canada became "common to the whole province" -- like "air and light," waters that were de facto navigable, were by "nature" subject to public rights with which the Crown by its prerogative could not interfere. [See Note 97 below] Although Meyers only addressed rights of navigation, and public rights of navigation can coexist with private rights of fishing at common law, the judgments in the case reflect a judicial preoccupation with the public rights of settlers that underlies the cases on waters and fisheries generally.

Note 96: Caldwell v. McLaren (1884), 9 App. Cas. 392 (P.C.) at 404-405; North Shore Ry. Co. v. Pion (1889), 14 App. Cas. 612 (P.C.) at 621; Maclaren v. Quebec (A.G.), [1914] A.C. 258 at 273-274; British Columbia (A.G.), supra note 57 at 166-173; Canada (A.G.) v. Quebec (A.G.), [1921] 1 A.C. 413 at 421-422 (P.C.) [hereinafter Canada (A.G.)].

Note 97: (1853), 3 U.C.C.P. 305 at 350-352, Macaulay C.J. and at 357-358, McLean J. [hereinafter Meyers].

¶ 30 This attitude is clearly manifested in the Upper Canadian response to the question of rights to the solum under and fisheries within the waters of the Great Lakes. Many Crown land grants to settlers defined one of the Great Lakes as a boundary, and according to a strict application of English law these grants should have conveyed the solum and fisheries usque ad medium filum aquae. However, colonial judges asserted that this rule was "unsuitable" to "our great lakes," and that grants to settlers of land bordering these lakes were not subjected to the ad medium filum presumption. [See Note 98 below] In Parker v. Elliot Sullivan J. observed that this conclusion could be reached either by construing Crown land grants as stopping at the water's edge -- that is, by applying the usual English non-tidal rules but holding the ad medium filum presumption to be rebutted -- or by not applying the English non-tidal rules to the Great Lakes at all -- that is, by holding that the Great Lakes were subject instead to the English rules on tidal waters. [See Note 99 below] Opinions of Crown law officers and obiter dicta of judges confirm that the latter justification was accepted. Thus, it was suggested that, as in tidal waters in England, there was a "public right" of fishing in the Great Lakes of Upper Canada and that Crown grants of exclusive fishing rights in these waters to individual settlers would be "void." [See Note 100 below] As Wilkes Co. J. stated in Daragh v. Dunn , the effect of "King John's Great Charter" was to render it "questionable" whether at common law "by any lease or licence . . . a right of fishing in any of the public waters of Upper Canada, can be conveyed to any one or more of Her Majesty's subjects to the exclusion of others." [See Note 101 below] Unlike American judges, Canadian colonial judges did not attempt to consider the original meaning of the 16th chapter of Magna Carta; nor did they consider why this ancient provision barring writs of de defensione ripariae applied in the colony of Upper Canada to restrict the Crown's ability to create

exclusive fishing rights in the Great Lakes. Although chapter 16 may originally have been the result of a political compromise between King and barons addressing a peculiar medieval grievance unrelated to the local conditions of colonial Canada, its reinterpretation as the foundation of public fishing rights made it consistent with the demands of the settler political morality that informed the emerging common law of colonial Canada. In its new form, then, Magna Carta was applicable to local conditions as perceived by colonial judges.

Note 98: Parker v. Elliott (1852), 1 U.C.C.P. 470 at 489 [hereinafter Parker]. See also Doe dem. McDonald v. The Cobourg Harbor Co. (1844), Mich. Term, digested in R.A. Harrison & J.L. Robinson, A Digest of Reports of all Cases Determined in the Queen's Bench and Practice Courts for Upper Canada, From 1823 to 1851 Inclusive (Toronto: Henry Rowsell, 1852) at 148 [hereinafter A Digest of Reports]; Throop v. Cobourg & Peterboro' Ry. Co. (1856), 5 U.C.C.P. 509; and Ross v. Village of Portsmouth (1866), 17 U.C.C.P. 195.

Note 99: Parker, ibid. at 489-490.

Note 100: Robert Jamieson, Att. Gen. Upp. Can., to Lt. Col. Rowan, Sec. to the Lt. Gov. (11 May 1835) NA RG1 E3 vol. 16 at 124-125; Minutes of Governor in Council (23 October 1845) NA RG1 State Books vol. D at 628; Gage v. Bates (1858), 7 U.C.C.P. 116 at 121-122 (citing Moffatt v. Roddy (1839), an unreported decision of the Upper Canada Queen's Bench; and A Digest of Reports, supra note 98 at 215). Supported by later caselaw: Dixson v. Snetsinger (1873), 23 U.C.C.P. 235; and R. v. Robertson, (1882), 6 S.C.R. 52 at 136.

Note 101: Daragh v. Dunn (1861), 7 U.C.L.J. 273 at 274 (Div. Ct.).

III. English Law on Fisheries and Aboriginal Rights

¶ 31 Having summarized the English common law on waters and fisheries and its application to large lakes in colonial territories, it is now possible to return to the question of aboriginal fishing rights and to determine how these rights were manifested in the non-aboriginal legal system. Assuming that the Saugeen Ojibway did assert and exercise against other aboriginal nations in the Great Lakes region an exclusive right over their fisheries in Georgian Bay and Lake Huron, what was the fate of this right upon the arrival of British settlers and the introduction of English law? Was the Saugeen fishing right recognized by and incorporated within the common law, either as an incident to title to the solum or as an independent right? If so, did this right remain an exclusive right or was it somehow, in the course of being translated into terms acceptable to the common law, reduced to a mere right of priority? If it is determined either that the Saugeen Ojibway fishing right was not originally exclusive or that it was originally exclusive but was reduced by the common law to a right of priority, did the Crown in colonial Canada have the authority to grant the Saugeen Ojibway an exclusive right either by the 1836 treaty or by the 1847 letters patent?

¶ 32 For the Saugeen Ojibway and any other aboriginal nation in the Great Lakes region wishing to claim an exclusive aboriginal and/or treaty right of fishing in the Great Lakes, the analysis in Part II presents some obvious problems. On the one hand, basic English legal principles are helpful: if Ojibway title to the bed of Lake Huron can be established, a several fishery in these non-tidal waters is (arguably) established as an incident to that title. This title might be common law aboriginal title, as confirmed by the Royal Proclamation of 1763 [See Note 102 below] and the 1836 treaty, or it might derive from Crown grant under the 1847 letters patent. If either the treaty or patent definition of Saugeen territory is used, the ad medium filum aquae presumption might be said to ensure that the boundary was not the lake edge but included the adjacent lake bed; "surrounding circumstances" might be argued to demonstrate that, unlike the typical settler grant, the Crown intended to convey the solum under the adjacent Great Lake waters in order to protect native fisheries from non-native "encroachment" of reserve territories. Alternatively, it may be argued that if title to the lake bed did not exist, an exclusive fishing right was severed from the Crown's title and granted as a profit à prendre by the treaty.

Note 102: See Part IV below.

¶ 33 These arguments are, of course, premised upon a strict application of the English common law on non-tidal waters. However, if the Great Lakes are governed by the common law rules on tidal waters, then the following three arguments can be made: (a) the common law recognized a public right of fishing in the Great Lakes and, therefore, could not have recognized exclusive aboriginal rights of fishing; (b) the common law included the so-called Magna Carta restriction and therefore denied the Crown's authority to recognize exclusive aboriginal fisheries by prerogative instrument, whether treaty or letters patent; and (c) in addition to these limits on the Crown's powers, any instrument defining Indian reserves as bounded by a lake cannot be interpreted according to the ad medium filum rule of construction. If these arguments have merit then it may be said, as one recent commentator has done, that aboriginal fishing rights in Upper Canada were really determined by the signing of Magna Carta on Runnymede meadow in 1215. [See Note 103 below]

Note 103: R. Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada" (1994) 86 Ontario History 337.

¶ 34 Is this latter approach sound? One method that advocates of exclusive aboriginal fisheries could use to challenge it is simply to assert that colonial judges were wrong. Thus, it might be argued that according to English common law as properly applied in

colonial Canada, the Great Lakes were not in all respects like tidal waters but rather were (like Lough Neagh [See Note 104 below]) subject to non-tidal rules with the minor caveat that the ad medium filum presumption was easily rebutted. This interpretation of the local common law is preferable, it may be argued, because it is closer to the "true" common law rule on large inland lakes as it developed in the United Kingdom in the late nineteenth and early twentieth centuries. Furthermore, it may be argued that this English interpretation is not inconsistent with local conditions; although the Crown would be free to grant the lake bed and fisheries to private individuals, most Crown grants of riparian lots on the Great Lakes would be interpreted as excluding the lake bed and fisheries. Though there would be no public right of fishing protected from the royal prerogative, there would be a public right of navigation (established by user) and settlers would have been at complete liberty to fish unless and until the Crown considered it to be in the public interest to limit public access to fisheries by some prerogative instrument (or, as was done, by statute).

Note 104: See supra note 59 and accompanying text.

¶ 35 Alternatively, one could concede that colonial judges were correct in applying the tidal rules to the Great Lakes, but argue that the English/Canadian interpretation of the Magna Carta restriction was wrong, and that the American interpretation was right -- that chapter 16, properly interpreted, did not prevent Crown grants of exclusive fisheries in tidal waters (or, therefore, in the Great Lakes). Under this approach then, the public would have a common law right to fish in the Great Lakes but it would have been susceptible to abrogation or limitation not only by statute but also by instruments made under the royal prerogative granting exclusive fishing rights to some person or persons.

¶ 36 These two alternative options for reinterpreting local common law, if accepted, would effectively counter arguments that appear to preclude recognition of exclusive aboriginal common law and/or treaty rights of fishing in the Great Lakes. In terms of abstract legal principle the two options are sound -- indeed, the first even has some support in later case law. [See Note 105 below] However, it must be conceded that both options run counter to a large body of cases on waters and fisheries that developed without reference to aboriginal rights, and that they are inconsistent with a judicial attitude favouring public rights in all navigable waters in Canada that, in light of the Supreme Court of Canada's decisions in Nikal and Lewis, [See Note 106 below] must be considered as strong today as it was in the mid-nineteenth century. Although there are grounds to argue that the Great Lakes are not subject to the rules that developed in English common law in relation to tidal waters, and are not subject to a public right of fishing, for the purposes of the following analysis it will be assumed that they are.

Note 105: In Keewatin Power Co. v. Town of Kenora (1908), 16 O.L.R. 184 at 198-200 (Ont. C.A.), it was suggested that judicial statements classifying the Great Lakes as subject to tidal rules were in obiter and that there was no reason to modify the common law in relation to them. The Privy Council in British Columbia (A.G), supra note 57 and Canada (A.G.), supra note 96 at 421, assumed that the basic English common law rules applied in Canada to tidal and non-tidal waters without modification. See also Blair, supra note 11 at 140.

Note 106: Nikal, supra note 1 at 1046-1047; and Lewis, supra note 1 at 950-951.

¶ 37 To accept that local conditions necessitated this colonial interpretation of the common law is not, however, to accept that there could be no exclusive aboriginal fisheries in the Great Lakes at common law or under treaty. The analysis in Part II demonstrates that it was with settler interests that the courts were concerned when adjusting the common law to fit North American conditions. It is simply unreasonable to assume that the common law rules that were carefully refashioned to define the property rights of newly-arrived individual settlers consistent with their interests and objectives could be blindly extended and applied to the determination of the territorial rights of indigenous nations without any regard for the obvious differences between the two sets of peoples. Underlying the concept of aboriginal rights is the notion that settlers and aboriginal peoples were not always subject to the same rules. The common law accommodated political and cultural pluralism by recognizing varying degrees of legal pluralism: aboriginal title, for example, has consistently been held to be a sui generis legal interest in lands and resources that cannot be defined by the same common law rules that define non-native property interests. [See Note 107 below] So even if the case law summarized in Part II is accepted as defining settler rights, it is far from clear that it also served to define aboriginal rights. The difficulty is, of course, that while two sets of rules may have existed for the two sets of people, a particular fishery could not be subject to both an exclusive aboriginal right and a public settler right at the same time. It is important to consider in more precise terms how exclusive aboriginal fishing rights might have been accommodated within a common law context that (arguably) included a public right of fishing.

Note 107: Delgamuukw, supra note 8, paras. 111-115; St. Mary's Indian Band v. Cranbrook (City) (1997), 147 D.L.R. (4th) 385 (S.C.C.) at 391; Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344 at 358; C.P. v. Paul, [1988] 2 S.C.R. 654 at 677-678; and Guerin v. The Queen, [1984] 2 S.C.R. 335 at 376-382.

¶ 38 Consideration of this question is all the more important in light of two implications of the recent Supreme Court of Canada judgments on aboriginal fishing rights. First, in Gladstone it was held that, because the common law context within which the aboriginal right of fishing exists includes a public right of fishing protected since Magna Carta from the royal prerogative, once aboriginal custom is reconciled with the

common law the resulting aboriginal right must be one of priority not exclusivity. [See Note 108 below] The Gladstone process of reconciliation was undertaken in the course of defining the fishing right as an independent aboriginal right not as a right incidental to aboriginal title. Elsewhere the Court draws a distinction between the "free-standing aboriginal right to fish" and "aboriginal title to the lands in the fishing area that gives rise to an incidental right to fish there," [See Note 109 below] suggesting that aboriginal title may secure to First Nations a more complete bundle of rights relating to land than mere aboriginal rights. [See Note 110 below] Indeed, in Delgamuukw in which fishing and water rights were not addressed, the Court confirmed that aboriginal title is the "right to exclusive use and occupation of the land held pursuant to that title." [See Note 111 below] Thus, the constitutional expression 'aboriginal rights' -- or what may be called 'aboriginal rights broadly defined' -- includes an exclusive right to land known as aboriginal title, as well as other 'free-standing' aboriginal rights -- or what may be called 'aboriginal rights narrowly defined' -- that exist independently of aboriginal title and that, if related to access to natural resources, are likely non-exclusive. The question yet to be determined by the Court is whether there may be fishing rights incidental to aboriginal title that are exclusive, even though the 'free-standing' aboriginal fishing right is not.

Note 108: Gladstone, supra note 1 at 770-771. In Gladstone, the Court defined the aboriginal fishing right as a constitutional 'aboriginal right' under s. 35(1) of the Constitution, supra note 2, and therefore applied the four-stage analysis that it has developed for s. 35(1), namely: (1) it defined the nature of the right claimed; (2) it determined whether the right was extinguished by some clear and plain legislative instrument prior to 1982; (3) as the right was unextinguished, it then determined whether the impugned government action infringed the right; and (4) having found infringement, the Court then considered whether the impugned government action was justified: Gladstone, supra note 1 at 742. Lamer C.J. defined the right in stage (1) in broad terms, concluding that the commercial fishing right in issue had no 'internal' limit and would therefore, given market demand, embrace the entire fishery unless limited in some way. Then, at stage (4) -- the justification stage -- he concluded that some government restriction of this right is lawful because, inter alia, the public has had a competing right of fishing since Magna Carta with which the aboriginal right must be reconciled: Gladstone, supra note 1 at 764-772. One can therefore interpret Gladstone as providing that the right itself is exclusive and is only reduced to one of priority at the justification stage. However, it is important to emphasize that the Court's four stage analysis was undertaken to define the constitutional aboriginal right under s. 35(1), and the relationship between these stages and aboriginal rights at common law is rather ambiguous. It would appear that Lamer C.J. did not consider the stage (1) right as representing the status of the aboriginal right at common law. Thus, although in Gladstone he waited until the justification stage to invoke Magna Carta and the public fishing right, it is clear from his comments that he considered the 'common law' aboriginal right to have been limited by Magna Carta and the public fishing right prior to the entrenchment of s. 35(1) in 1982: Gladstone, supra note 1 at 770. In other words, he concluded that, at common law, the aboriginal right in that case was not exclusive, and he used this conclusion as additional support for his view that some governmental limitation of the constitutional right if justified after 1982.

Note 109: Adams, supra note 1 at 122, Lamer C.J.

Note 110: Ibid. at 117, Lamer C.J. and at 136, L'Heureux-Dubé J.; Côté, supra note 1 at 197, LaForest J.; and Van der Peet, supra note 1,L'Heureux-Dubé J. at 579-581.

Note 111: Delgamuukw, supra note 8, para. 117.

¶ 39 Second, in Nikal, the Court held that a Crown grant of reserve land to an aboriginal nation in British Columbia did not include the land beneath the adjacent navigable, non-tidal river because the common law, as adjusted to local conditions, treated such waters like tidal waters. Consequently, the ad medium filum presumption did not apply and the Crown was restrained by Magna Carta from granting exclusive fisheries. [See Note 112 below] Although citing legal opinions from Upper Canada in support of this conclusion, the Court did not attempt to address the considerable differences existing between the legal-constitutional contexts of British Columbia and Upper Canada, differences that may affect the scope of the Crown prerogative powers in Upper Canada and the validity of the opinions cited.

Note 112: Nikal, supra note 1.

¶ 40 In other words, although Gladstone appears to preclude exclusive native fisheries at common law and Nikal appears to prevent their creation by Crown grant, it is submitted that neither case closes the door on Saugeen Ojibway claims to exclusive aboriginal and/or treaty fishing rights. To explain why, however, an analytical framework within which to analyze the effect of the introduction of English law on aboriginal customs is necessary.

A. An analytical framework

¶ 41 The principle according to which the common law acknowledged aboriginal rights and thereby distinguished aboriginal peoples from settlers is often identified as the principle of continuity. In its simplest form, the principle of continuity provides that aboriginal rights, possessions, customary laws, practices and usages continued after the assertion of British sovereignty and were recognized by and incorporated within British law as common law rights. [See Note 113 below] In other words, there was -- from the British common law perspective -- continuity of at least certain elements of local substantive law upon the transition from one legal regime to the next. Until recently, Canadian courts were not very explicit about the extent to which the continuity of aboriginal customary law provided a foundation for the recognition of common law aboriginal rights to lands and natural resources. [See Note 114 below] In Van der Peet, however, the Supreme Court of Canada expressly recognized that common law aboriginal title is based, in part, upon the "traditional laws and customs" [See Note 115 below] of aboriginal nations as recognized by the common law. However, the definition of 'aboriginal rights narrowly defined' articulated in Van der Peet is based upon a "concept of continuity" [See Note 116 below] that is doctrinally distinct from the principle of continuity found in earlier cases on British imperial constitutional law. According to the Van der Peet concept of continuity, aboriginal rights are those customs, practices and traditions integral to the distinctive culture of the claimant nation that were followed prior

to contact with Europeans and that, not having been expressly extinguished by government prior to 1982, continue to be followed today. [See Note 117 below] The Van der Peet concept of continuity is ultimately about the continuity of (elements of) the aboriginal cultures that pre-dated the time of European contact, a time that, in many parts of Canada, preceded the assertion of British sovereignty by over a century. In contrast the traditional imperial principle of continuity ensured the continuity of aboriginal laws, customs and/or possessions existing at the time British sovereignty was asserted, whether or not they were integral to aboriginal culture as it existed then or at some earlier date of European contact.

Note 113: See generally B. Slattery, The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territory (Saskatoon: College of Law, University of Saskatchewan, 1979) at 50-60; B. Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 10-15; G. Lester, Inuit Territorial Rights in the Canadian Northwest Territories (Tungavik Federation of Nunavut, 1984) at 13-15; P. McHugh, The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi (Oxford: Oxford University Press, 1991) c. 4 [hereinafter Maori Magna Carta]; M. Walters, The Continuity of Aboriginal Customs and Government under British Imperial Constitutional Law as applied in Colonial Canada, 1760-1860 (D. Phil. Thesis, Oxford University, 1995) [hereinafter Aboriginal Customs and Government] at 21-117; M. Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 at 791-792 [hereinafter "Legal Status of Aboriginal Customary Laws"].

Note 114: M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992), 17 Queen's L.J. 350 at 393-409.

Note 115: Van der Peet, supra note 1 at 546.

Note 116: Ibid. at 554-558.

Note 117: Ibid. at 556; Gladstone, supra note 1 at 747; Adams, supra note 1 at 129; and Côté, supra note 1 at 183.

¶ 42 In Delgamuukw, however, the Court has reverted (implicitly at least) to the more traditional conception of 'continuity' for the purposes of defining aboriginal title to land. Aboriginal title, says Lamer C.J., derives from two sources: (a) possession of the relevant land by the claimant nation at the time British sovereignty was asserted; and (b) the relationship between the common law and any "laws in relation to land" that the nation may have had "at the time of sovereignty" regardless (apparently) of whether these laws derived from, or were integral to, pre-contact aboriginal cultures. [See Note 118 below] In short, Canadian law on aboriginal rights broadly defined now contains two distinct conceptions of 'continuity' relating to the two general categories of 'aboriginal rights broadly defined' so far recognized: cultural continuity for aboriginal activities not incidental to aboriginal title, or 'aboriginal rights narrowly defined', and legal continuity for aboriginal title. As the purpose of this analysis is to consider the nature of aboriginal

fishing rights that are incidental to aboriginal title, the latter conception of continuity is applicable. Assuming that the Saugeen Ojibway did have exclusive possession of their fisheries at the time British sovereignty was asserted, the focus of attention shifts to the second branch of the Delgamuukw test for aboriginal title -- what Lamer C.J. describes as "the relationship between the common law and pre-existing systems of aboriginal law." [See Note 119 below] What follows then, is a legal interpretation of the legal-historical point of contact between the common law and aboriginal customary law as it relates to fishing rights, beginning in abstract terms and then shifting in Part IV to the specific question of Ojibway rights in colonial Canada. The discussion of the specific question will be assisted if, at the abstract level the relevant principle of continuity is considered in two distinct legal, dimensions, labelled for the purposes of this discussion the imperial and the municipal dimensions.

Note 118: Delgamuukw, supra note 8, paras. 114, 145-148.

Note 119: Ibid., para. 114.

(i) Common Law Aboriginal Rights in the Imperial Dimension

¶ 43 The recognition and incorporation by one legal system of the rights, possessions, laws and customs of another system was hardly unique to the British North American colonial experience. On the contrary, it was a policy employed by most imperialist powers and, as a result, was a recognized principle of the jus gentium. Citing Roman practice, Grotius stated that, although a conquering power was free to impose new laws upon a subjected people, the decision to leave in place their own laws and government was "not only an act of humanity, but often an act of prudence also." [See Note 120 below] In English common law, the principle was expressed as a presumption: the Crown could, without Parliament, legislate for any territories newly added to the empire, but until it took some positive step to abrogate local rights and laws, judges presumed that such rights and laws continued in force as part of British law. [See Note 121 below] Although the common law principle was often traced to the jus gentium, [See Note 122 below] a more indigenous source for the principle, the supposed continuity of Saxon law after the Norman Conquest, was also occasionally cited. [See Note 123 below]

Note 120: H. Grotius, De Jure Belli Ac Pacis Libri Tres (1626), Bk. III, Ch. VIII, Pt. I, para. 1, Ch. XV, Pts. IX and X; Ch. XIII, Pt. IV. Classics of International Law, J.B. Scott, ed.; F.W. Kelsey (trans.) (Oxford: The Clarendon Press, 1925).

Note 121: Calvin's Case (1608), 7 Co. Rep. 1a at 17b; Case of Tanistry (1608), Davis 28 at 30, plaintiff [hereinafter Tanistry]; Craw v. Ramsey (1669), 2 Vent. 1 at 4; Witrong v. Blany (1674), 3 Keb. 401 at 402 [hereinafter Witrong]; Dawes v. Painter (1674), 1 Freem. 175 at 176; Dutton v. Howell (1693), Show. 24 at

31, plaintiff; Blankard v. Galdy (1693), 4 Mod. 215 at 225-226 [hereinafter Blankard], Holt K.B. 341 at 342; Anon. (1722), 2 P.Wms. 75; and Campbell v. Hall (1774), Lofft. 655 at 741.

Note 122: Tanistry, supra note 121 at 30, plaintiff; Campbell v. Hall (1774), 20 St. Tr. 239 at 278-279, defendant; R. v. Picton (1804-12), 30 St. Tr. 225 at 906, Crown counsel; F. Maseres, Att. Gen. Quebec, A Supplement to the Tract written in the year 1766, and intituled Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec (c. 1767), PRO CO 42/87: 91; and J. Marriott, Advocate General, Plan of A Code of Laws for the Province of Quebec (London: 1774) at 12; Opinion of E. Thurlow, Att. Gen., 22 January 1773 in A. Shortt & A.G. Doughty, eds., Documents Relating to the Constitutional History of Canada, 1759-1791 (Ottawa: The King's Printer, 1918) at 440, 443.

Note 123: See M. Hale, The History of the Common Law, 4th ed. (London: W. Strahan & M. Woodfall, 1779) at 77, 95; F. Plowden, Jura Anglorum: The Rights of Englishmen (London: E. & R. Brooke, 1792) at 79; and J. Price, A General View of the Laws, Government, Revenue, Ecclesiastical, Civil, Military, and Naval Establishments of England, 2d ed. (London: G. Sael, 1799) at 20; and Case of Ship-Money (1637), 3 St. Tr. 826 at 1214-1215, 1021.

¶ 44 While Roman and Norman practice may have provided some historical inspiration for the principle of continuity, in fact the common law foundation for the principle derives from a rather more practical concern -- that of ensuring basic social order -- coupled with a constitutional concern -- that of respecting the separation of judicial and legislative powers. When confronted with legal disputes involving newly-acquired territories that the Crown had not expressly abrogated or altered local rights and laws, courts were driven by "necessity" to recognize the continuity of those rights and laws: the maintenance of civil peace and stability precluded recognition by the common law of either a legal vacuum or the ipso facto abolition of local rights and laws by the sudden introduction of English law. Indeed, unless judges were to assume the role of legislators and pre-empt the decisions of the Crown, they could not declare the introduction of English or any other law. In short, the only reasonable judicial option was to presume the continuity of the legal status quo existing upon the assertion of British sovereignty. [See Note 124 below]

Note 124: Blankard v. Galdy (1693), 4 Mod. 215 at 225-226:

"though a conqueror may make new laws, yet there is a necessity that the former should be in force till new are obtained" [emphasis added]; F. Maseres, Att. Gen. Quebec, "Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec (1766)" in Shortt & Doughty, supra note 122 at 261: continuity derived from "the necessity of the case, since otherwise the conquered provinces would be governed by no laws at all" [emphasis added]; and R. v. Picton (1804-1812), 30 St. Tr. 225 at 946, Lord Ellenborough: "the old laws continue till the new are introduced, or they must be positively in a lawless state."

¶ 45 Although the early cases justified the principle by reference to these practical concerns, the principle was far from being morally neutral; on the contrary, the principle can be seen to have been informed by judicial ideas of what fairness or (as Grotius said) "humanity" required under conditions of imperialist aggression that may have been, objectively speaking, inherently unfair. Nevertheless, the British imperial law's principle of continuity is very different from the Van der Peet "concept of continuity" designed to protect "distinctive cultures." Although the imperial principle of continuity may have had the effect of protecting local cultures, that protection was not its primary purpose but was only a possible incident to the protection of existing local law. Thus, the imperial principle of continuity was applied in relation to other European peoples (like New France [See Note 125 below]) whose cultures were not, in relation to Britain's, very distinctive, and any local customs that were regarded as too "distinctive" in light of British values were regarded as mala in se and deemed to be ipso facto abrogated. [See Note 126 below] The relevant time that local law and custom was considered was the point at which British sovereignty was asserted: the objective was to ensure civil order and a smooth and (to the extent possible) fair transition from one legal regime to the next without intruding upon the Crown's legislative powers. This objective could not have been achieved had courts upset expectations of local inhabitants by ignoring rights secured by existing laws and customs and by instead limiting legal protection to rights defined by externally-imposed and (from the local perspective) arbitrary criteria designed to preserve fragments of unique cultures that had pre-existed contact with other cultures. In short, the Delgamuukw approach to the continuity of aboriginal land law is much more in keeping with British imperial constitutional law.

Note 125: See e.g.: Maseres, Marriott and Thurlow, supra notes 122 and 124.

Note 126: Anon. (1722), supra note 121 at 76.

¶ 46 Insofar as the principle of continuity was articulated and applied by judges, it may be said to be a common law principle; however, it was not a principle of English municipal common law. It served to identify the municipal laws and institutions of British territories into which English municipal law had not yet been introduced. It was, in short, a principle of imperial common law. [See Note 127 below] In this respect, it parallels another imperial common law presumption: the "birthright" principle identified in Part II according to which judges presumed that the municipal law of a previously-uninhabited territory discovered and settled by British subjects was English municipal law, as adjusted to local conditions. [See Note 128 below] Indeed, these two imperial legal principles were sometimes applied in relation to the same territory. Although the presumption in relation to previously-inhabited territory was that existing local law continued as the municipal law governing both local and English inhabitants, [See Note 129 below] where for religious or cultural reasons local law was "little suited" to British settlers and English law was unsuitable for local inhabitants, the common law recognized both the introduction of English municipal law into British enclaves as the birthright of

settlers as if their settlement were in an uninhabited place, and also recognized the continuity of local law for local communities under the principle of continuity. By this means, two parallel municipal systems were possible. [See Note 130 below] Of course, the imperial continuity principle was, at common law, only a presumption: legislation introducing English municipal law might, if it extended to the native inhabitants, abrogate the existing local system.

Note 127: "Legal Status of Aboriginal Customary Laws", supra note 113 at 789-790. See also B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 737-738, quoted with approval in Côté, supra note 1 at 173. Slattery observes that the "unwritten British law" on aboriginal rights was not "part of English common law in the narrow sense . . . ."

Note 128: Supra notes 62-67.

Note 129: Campbell v. Hall (1774), Lofft 655 at 741.

Note 130: Adv.-Gen. (Bengal) v. Ranee (1863), 2 Moo. P.C. (N.S.) 22, (P.C.) at 60-61; The 'Indian Chief' (1801), 3 C. Rob. 12 at 31-32; Ruding v. Smith (1821), 2 Hag. Con. 371 at 378-389; Freeman v. Fairlie (1828), 1 Moo. Ind. App. 305 at 320-329, 343-343; and Re Justices of Bombay (1829), 1 Knapp. 1 (P.C.) at 31-32, counsel. See generally "Legal Status of Aboriginal Customary Laws", supra note 113 at 791-792.

¶ 47 The imperial model of aboriginal rights is reflected by British-Indian relations in eastern North America in the seventeenth and eighteenth centuries. Colonial statutes, as well as English and imperial judicial authorities and later American authorities, recognized that: (a) although English settlers brought English municipal law to the newly-discovered continent as their birthright, sovereignty over Indian nations was not asserted by discovery, or settlement, but rather by conquest or treaty (or, at least initially, not at all); and (b) once under British imperial sovereignty, Indian nations retained a distinct status independent to some degree at least from the municipal legal systems of the colonies in which they happened to be located. [See Note 131 below] This constitutional condition is best reflected by Mohegan Indians v. Connecticut (1704-1773) in which the Mohegan Indians, although located within the colony of Connecticut, were held to be a distinct nation under imperial sovereignty exempt from the municipal legal system established for settlers. Their claims to aboriginal and treaty rights were therefore determined not by Connecticut municipal law in local courts but by imperial law, which had incorporated their customary laws, in imperial tribunals. [See Note 132 below]

Note 131: "Legal Status of Aboriginal Customary Laws", ibid. at 789-803.

Note 132: Ibid.

(ii) Common Law Aboriginal Rights in the Municipal Dimension

¶ 48 As mentioned, certain commentators emphasized the Norman sources of the principle of continuity: the continuity of Saxon law after the Norman Conquest provided an early precedent from England for the principle. [See Note 133 below] Thus, the principle may be argued to explain the survival in common law of certain "remnants and patches" of pre-Norman law, like the customs of gavelkind and borough-english. [See Note 134 below] However, gavelkind and borough-english are more often cited as examples of particular customs that derived legitimacy at common law, not as remnants of another legal regime but because they were reasonable, certain and consistent customs to which the inhabitants of particular localities had acquiesced as if compulsory since time immemorial. [See Note 135 below]

Note 133: Warren's Case (n.d.) (pre-Conquest rights enforced against Conqueror's grantee), discussed in Tanistry, supra note 121 at 41 and Witrong, supra note 121 at 402. See generally Earl of Derby v. Duke of Atholl (1751), 2 Ves. Sen. 337, counsel.

Note 134: Calvin's Case, supra note 121 at 670. See also:

Tanistry, ibid. at 40; Clements v. Scudamore (1701), 2 Ld. Raym. 1024 at 1024-1025; Blackborough v. Davis (1701), 1 P. Wms. 41, 47-53; Fisher v. Nicholls (1701), 3 Salk. 127; Blackstone, supra note 52, vol. 1 at 74-75.

Note 135: Blackstone, ibid 1 at 76-78.

¶ 49 Although the continuity and particular custom principles were clearly distinct principles by the seventeenth century -- the former being part of the imperial common law, the latter being part of the municipal common law -- they did operate in tandem under certain constitutional conditions. Under the principle of continuity, local rights and laws continued in force as elements of British imperial law in part because English municipal law had not been introduced into the territory. Once English municipal law was introduced, then (if the legislation were interpreted to extend to native inhabitants) local law as a distinct system was abrogated. However, if local law continued to be followed in particular places, it was held that it might be recognized by the newly-introduced English municipal common law as a particular custom. [See Note 136 below] Both the particular custom and the continuity principles are needed to explain the common law's recognition of local customs under these conditions. The particular-custom principle cannot, on its own, explain the common law recognition of customs in territories newly acquired by Britain because its purpose is to explain the legal status of customs that have been exercised, notwithstanding the general applicability of the English common law, since time immemorial. [See Note 137 below] However, the principle of continuity only served to create a presumption of continuity of existing law until its abrogation by the introduction of an alternative legal system, and it would have ceased to be relevant after the introduction of English municipal law as the common law

of the territory and its extension to native inhabitants. However, by weaving the two rules together, the continuity of local customs after the introduction of English municipal law can be explained: to the criteria of the municipal particular-custom rule other than the immemoriality criterion can be added the criteria of the imperial-continuity principle to make a hybrid rule. [See Note 138 below] In essence, the continuity of law from a preceding legal system displaced the need for immemorial usage.

Note 136: Anon. (1579), 3 Dyer 363b (continuity of local Welsh custom not abrogated by 27 H. VIII, c. 26 (1536), which introduced English law into Wales, because it was "agreeable to some customs in England" and because English law was "to be ministered in like form as in this realm"), discussed at Tanistry, supra note 121 at 40; Blankard, supra note 121 at 225 (local laws continued until English law was introduced, but "even then some of their old customs may remain").

Note 137: Chamberlain v. Harvey (1696), 1 Ly. Raym. 146, 5 Mod. 182 at 182, illustrates problems inherent to applying principle of immemorial rights to newly-acquired territories: defendant argued that a slave could not have been a villein attached to a plantation in Barbados "for then the plaintiff and his ancestors must be seised of this negro and his ancestors time out of memory of man, which could not be, because Barbardoes was acquired to the English within the memory of man . . . ." Cf. Sir E. Northey, Att. Gen., 1713 in W. Forsyth, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence (London: Stevens and Haynes, 1869) at 161-162: New York acquired "within time of memory" therefore "no prescription can be there against the Crown."

Note 138: Cf. Tanistry, supra note 121 at 30: the plaintiff argued that the principle of continuity in Calvin's Case, supra note 121 at 17b, supported the proposition that the custom of tanistry survived the English conquest of Ireland (i.e., there was continuity in the imperial dimension), and then cited the English common law's recognition of the Kentish custom of gavelkind to support the proposition that tanistry survived the subsequent legislative introduction of English municipal law (i.e., there was subsequently continuity in the municipal dimension).

¶ 50 This second model of aboriginal rights can be applied to territories into which English municipal law ran automatically under the birthright principle, as well as territories where it was introduced by legislation, as illustrated by the Australian High Court's decision in Mabo v. Queensland. [See Note 139 below] According to Mabo, British sovereignty was established over lands and peoples lacking European forms of law and government by discovery and occupation, or settlement, and English municipal law applied automatically as the municipal law of the colony. However, because it was adjusted to local conditions, the local municipal common law recognized the continuity of aboriginal title to lands and resources as defined by native custom.

Note 139: Mabo v. Queensland (1992), 107 A.L.R. 1 (H.C.) [hereinafter Mabo].

(iii) The Imperial and Municipal Models as Applied to Fishing Rights

¶ 51 In light of the above discussion, it can be stated that British law provided two distinct foundations for the recognition of aboriginal rights: an imperial legal foundation according to which aboriginal customs and possessions continued in force as systems distinct from the English municipal systems introduced for settlers, and a municipal legal foundation according to which aboriginal customs remained in force as elements of the English municipal law introduced for settlers. For the determination of aboriginal fishing rights, the choice of analytical foundation has obvious significance.

¶ 52 If aboriginal fishing rights are defined under the imperial model, then the locally-adjusted English municipal law introduced for settlers would have no direct application; aboriginal fishing rights would be defined by the imperial common law. The locally-adjusted English municipal law might recognize a public right of fishing in large lakes protected from the royal prerogative by Magna Carta, but this right would exist as amongst settlers only and would not necessarily affect whatever exclusive aboriginal fisheries had been recognized under the imperial common law principle of continuity. Obviously the two rights could not exist over the same fisheries at the same time. Therefore, the survival of an imperial common law exclusive aboriginal fishery would depend upon there being a geographical limit placed upon the applicability of the English municipal system.

¶ 53 If aboriginal fishing rights were defined under the municipal model, then locally-adjusted English municipal law would be directly relevant: the status of aboriginal fishing rights at common law would be defined by the local municipal common law of the colony. Thus, the continuity of any exclusive aboriginal fisheries would have to be reconciled in some way with the existence of any public right of fishing that the municipal system might recognize. It might be argued that all exclusive aboriginal fishing rights would, under this model, be reduced to rights of priority to account for the public right of fishing. [See Note 140 below] However, it could also be argued that the principle of continuity -- even though operating on the municipal legal dimension -- somehow precluded the public right from fully vesting, in relation to fisheries, in the exclusive possession of aboriginal nations, at least until the aboriginal right were ceded or extinguished.

Note 140: Gladstone, supra note 1.

¶ 54 Whichever model is employed, the general character of aboriginal title to land at common law will be significant. At common law, the Crown acquired ultimate or radical title to Indian territories upon the assertion of British sovereignty over North America, but this title remained burdened by the aboriginal title: settlers could not acquire any property interest in such lands until the aboriginal title was surrendered to the Crown by the relevant aboriginal nation. [See Note 141 below] There was no general right of public access to unsurrendered aboriginal title territories: in law (though not always in fact) the pace of settlement was controlled by the Crown's monopoly over Indian land surrenders.

[See Note 142 below] In short, it may be argued that as long as aboriginal title remained unceded and unextinguished -- and upon the assumption that aboriginal title extended to lands covered by waters -- any public rights of access to waters in which exclusive aboriginal fisheries were located and, a fortiori, any public right of fishing, were at best inchoate. The limited nature of public rights in unsurrendered Indian lands has implications under both the imperial and municipal models. Under the imperial model, the geographical limits of the municipal system may be defined as the limits of Indian territories surrendered to the Crown. Only within ceded territories, then, did municipal law apply in full and did public rights of fishing, if any, vest. Under the municipal model, however, the fact that aboriginal title remained unceded might support an argument that fisheries incidental to that title never entered fully into the public realm, and, although municipal law applied to determine the extent to which aboriginal fishing rights continued in force, that law simply did not acknowledge a public right in unceded territories. To illustrate these arguments in more detail, and to establish that they have some judicial support, reference to cases on Maori fishing rights in New Zealand is helpful.

Note 141: See e.g.: Guerin v. R., [1984] 2 S.C.R. 335; and Delgamuukw, supra note 8, para. 129.

Note 142: Slattery, supra note 127 at 743.

¶ 55 The Crown purported to acquire sovereignty over New Zealand by the Treaty of Waitangi (1840), and this treaty guaranteed certain aboriginal rights, including "the full exclusive and undisturbed possession of their Lands and Estates, Forests, [and] Fisheries." [See Note 143 below] However, the colony was judicially regarded as a "settled" colony into which English municipal law ran automatically, [See Note 144 below] and the treaty was held to have no municipal legal status in the absence of implementing legislation. [See Note 145 below] Successive Native Lands Acts that allowed Maori land claims before special native land courts [See Note 146 below] made no express mention of lands covered by waters or of fisheries or fishing rights (although fisheries legislation after 1884 expressly stated that they did not "affect any Maori fishing rights"). [See Note 147 below]

Note 143: Treaty of Waitangi, 1840, Article the Second [emphasis added] in M. Chen & Sir G. Palmer, Public Law in New Zealand (Auckland: Oxford University Press, 1993) at 298-300.

Note 144: Maori Magna Carta, supra note 113 at 43.

Note 145: Hoani Te Heuheu Tukino v. Aotea District Maori Land Board, [1941] A.C. 308 (P.C.); New Zealand Maori Council v. A.G., [1987] 1 N.Z.L.R. 641 (C.A.).

Note 146: The first of these Acts were passed in the 1860s:

Native Lands Act 1862, 27 Vict., c. 42 (N.Z.); Native Lands Act 1865, 29 Vict., c. 71 (N.Z.).

Note 147: See Te Runanga o Muriwhenua Inc. v. A.G., [1990] 2 N.Z.L.R. 641 at 645 (C.A.) [hereinafter Te Runanga].

¶ 56 New Zealand cases defining native title under the native lands legislation confirm the following propositions: native title existed in relation to a tribe's "territory" that is regarded "in its entirety," there being no distinction "between dry land and land covered by water"; [See Note 148 below] public rights to navigable non-tidal rivers could not vest "so long as the soil in the river remained Native land and in the possession of the Native owners"; [See Note 149 below] and native title to a river bed could be established if, at the time British sovereignty was asserted, it was held pursuant to a native custom by which possession was exclusive -- the facts of colonization and public use being "completely extraneous" to the native custom by which title was defined. [See Note 150 below] Although "the common law of England" entered New Zealand with British sovereignty, "it came as part of our European law, and not as a body of principles to be applied in ascertaining and interpreting the Maori customs and usages . . . ." [See Note 151 below] These propositions support the idea that, under either the imperial or municipal models of aboriginal rights, public rights in navigable waters did not fully vest until native rights were extinguished, and that the scope of native rights was determined by looking at native custom in isolation from English common law concepts.

Note 148: Re the Bed of the Wanganui River, [1955] N.Z.L.R. 419 at 461 (C.A.), North J. [hereinafter Re Wanganui]. See also Re the Bed of the Wanganui River, [1962] N.Z.L.R. 600 at 612 (C.A.), Cleary J.

Note 149: Mueller, supra note 93 at 123. See also Re Wanganui, ibid. at 434, Cooke J.

Note 150: R. v. Morison, [1950] N.Z.L.R. 247 at 261 (H.C.).

Note 151: Re Wanganui, supra note 148 at 450-451. For a description of Maori customary law relating to waters, see N. Wheen, 'A Natural Flow -- A History of Water Law in New Zealand' (1997) 9 Otago L. Rev. 71.

¶ 57 Insofar as these cases were based upon the unique statutory context existing in New Zealand, they may be said to be inapplicable to defining aboriginal rights in Canada at common law. However, certain cases confirm that Maori rights have a non-statutory foundation at common law and/or under treaty. Indeed, in a recent case addressing Maori rights to river beds, the New Zealand Court of Appeal (relying upon, inter alia, Canadian judicial authority) described aboriginal title at common law as "a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonization." [See Note 152 below] It is worth noting that a similar conclusion has been accepted in obiter in

Australia -- namely, that the "exclusive use, possession and occupation of land" secured by common law native title extends to "similar or analogous" rights of fishing, there being "no relevant distinction . . . between dry land and land covered by water." [See Note 153 below]

Note 152: Te Runanganui o Te Ika Whenua Inc. v. A.G., [1994] 2 N.Z.L.R. 20 at 23-24 (C.A.) [emphasis added].

Note 153: Mason v. Tritton (1994), 34 N.S.W.L.R. 572 at 580 (C.A.), Kirby P. The other two judges were prepared to assume without deciding that s. 223(2) of the Native Title Act 1993 (Cth.), which defines native title as including rights of fishing, accurately reflects the position of Australian common law.

¶ 58 The leading New Zealand decision on the common law status of Maori title to land, R. v. Symonds, [See Note 154 below] relied upon the same American decision, Johnson v. M'Intosh, [See Note 155 below] which Canadian courts have relied upon when addressing aboriginal title. The general approach to aboriginal title to land taken in Symonds was extended to aboriginal fishing rights in 1870 by the decision of the Native Land Court in the Kauwaeranga case that recognized the possibility of "exclusive" Maori fishing rights in tidal waters. [See Note 156 below] In Kauwaeranga, a claim of native title was made to certain mudflats between the high and low water marks of the sea in which the Maori claimants had exercised fishery rights. After reviewing general principles -- derived from, inter alia, Johnson v. M'Intosh -- Fenton C.J. held that the evidence had established that the claimants had "consistent and exclusive use" of the fisheries from time immemorial, that this fishery was of the "highest value" to them, and that there was no reason why Maori could not have ownership of land covered by the sea at high-water. [See Note 157 below] "The real question," he stated, "is a question of fact -- Was the land now claimed, at the date of the Treaty of Waitangi, land or a fishery collectively or individually possessed by aboriginal natives?" [See Note 158 below] If it was, then the Treaty of Waitangi was intended to guarantee such exclusive possession. [See Note 159 below] What about the "common law of England" that entered the colony "with the sovereignty of the Crown"? [See Note 160 below] Was an exclusive aboriginal fishery in tidal waters (whether recognized at common law under Johnson v. M'Intosh or conferred by treaty) inconsistent with the public fishing right recognized by the English common law in tidal waters? In Fenton C.J.'s view, it was not. He observed that exclusive fisheries in tidal waters were possible under English law and that according to Hale's "De Jure Maris" such rights could arise by "custom and usage or prescription." [See Note 161 below] Then, addressing implicitly the Magna Carta restriction, Fenton C.J. stated:

Note 154: (1847), [1840-1932] N.Z.P.C.C. 387 (S.C.) [hereinafter Symonds].

Note 155: 8 Wheat. 543 (U.S.S.C., 1823).

Note 156: The judgment is printed at A. Frame, ed., "Kauwaeranga Judgment" (1984) 14 V.U.W.L.R. 227 [hereinafter Kauwaeranga] and is cited with approval in Re Wanganui, supra note 148 at 447; Re the Ninety Mile Beach, [1963] N.Z.L.R. 461 at 471; Te Weehi v. Regional Fisheries Officer, [1986] 1 N.Z.L.R. 680 at 686-687 (H.C.); Huakina Development Trust v. Waikato Valley Authority, [1987] 2 N.Z.L.R. 188 (H.C.); and Te Runanga, supra note 147 at 655.

Note 157: Kauwaeranga, ibid. at 239-240, including note 3.

Note 158: Ibid. at 243.

Note 159: Ibid. at 240.

Note 160: Ibid. at 243.

Note 161: Ibid.

> And accepting the principle that all properties, rights, privileges, or easements of this character [i.e., several fisheries] are held to be derived from the King, for prima facie they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And, in our case the title is older, for the ownership was before the King, and the King confirmed and promised to maintain it. [See Note 162 below]

Note 162: Ibid. at 244 [emphasis added].

An exclusive right to the fishery was therefore made out.

¶ 59 The Kauwaeranga case is critically important to answering the question of how the English municipal common law relating to fisheries affected aboriginal rights to fisheries -- in other words, it suggests how aboriginal fishing rights should be defined under the above-summarized municipal model. The case supports the following line of reasoning: the common law recognizes a public fishing right in tidal waters and it denies the validity of Crown grants of exclusive fisheries after the reign of Henry II, but it also recognizes the continuity of aboriginal rights, and if, as a matter of fact, an exclusive aboriginal fishery already existed at the time British sovereignty was asserted and English law was introduced, then, as a matter of common law, that fishery was not extinguished or modified by the public right, but continued in force and was capable of confirmation by the Crown by prerogative instrument. This approach is sound because, as seen, the public fishing right was, at common law, only a prima facie right rebuttable by proof of a lawful several fishery. In England, a several fishery supported by usage or Crown grant dating from the reign of Henry II rebutted the public right. In colonial territories, however, this sort of requirement is meaningless. In a legal sense, any exclusive fishing right exercised just prior to the Crown's assertion of sovereignty is, as Kauwaeranga states, "older" than that (or any other) date of legal memory because it pre-dates the

arrival of the Crown and of English law. Thus, the principle of continuity gives exclusive native fisheries a lawful foundation -- a common law foothold -- sufficient to rebut the prima facie public right. [See Note 163 below]

Note 163: See generally P. McHugh, "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 V.U.W.L.R. 247 at 255-256.

¶ 60 It may be argued that the fact that the Treaty of Waitangi expressly recognized the continuity of exclusive Maori fisheries distinguishes this case from Canadian law. However, this argument lacks merit. Either the Treaty had no municipal legal force, in which case it could not, on its own, limit the public right of fishing in tidal waters, or it did have municipal legal force and it did limit the public right of fishing in tidal waters. If the former interpretation is accepted, then the Kauwaeranga case can only be explained if Maori common law rights precluded the vesting of public fishing rights; if the latter interpretation is accepted, then the case supports the view that the Crown, by prerogative instrument (i.e., treaty), could limit public fishing rights in tidal waters. Either way, the result is relevant to the Canadian context and, in particular, the status of Saugeen Ojibway fishing rights. Of course, it might be said that fishing rights were only justiciable in New Zealand by virtue of local Native Lands Acts. However, Fenton C.J. did not purport to rely upon this argument. Although he cited legislation by which native land rights were recognized, in his view exclusive Maori fisheries had some foundation in law in 1840 after British sovereignty was asserted under the Treaty of Waitangi, but before the first Native Lands Act was made. [See Note 164 below]

Note 164: See comments by Frame, supra note 156 at 228 and McHugh, ibid. at 257.

¶ 61 The Kauwaeranga approach stands in stark contrast to the Gladstone reconciliation process summarized above. If the principles underlying Kauwaeranga are valid, Gladstone is either wrong or should be restricted to defining the so-called "free-standing" aboriginal fishing right. In other words, it should be regarded as inapplicable to defining exclusive native fisheries incidental to aboriginal title. Significantly, the validity of the Kauwaeranga approach has been confirmed by modern New Zealand cases that, relying upon Canadian cases, emphasize the common law foundation of aboriginal title.

¶ 62 In Te Runanga, [See Note 165 below] a Maori group sought to restrain the government from setting fishing quotas under fisheries legislation, arguing that the quotas violated their exclusive rights to commercial and non-commercial fisheries in coastal sea waters. The statute recognized a form of aboriginal priority: commercial quotas were to be set by the Minister "after allowing for the Maori, traditional, recreational and other

non-commercial interests." [See Note 166 below] Although relief was denied on the ground that the statute prevailed over Maori common law and treaty rights, the court made some important observations about Maori common law rights. In arguing against exclusive Maori fishing rights, the Crown cited Waipapakura v. Hempton in which it was stated:

Note 165: Supra note 147.

Note 166: Fisheries Act 1983, N.Z. St. No. 14 (as amended by the Fisheries Amendment Act 1986, N.Z. St. No. 34), ss. 28C and 28D. On Maori fishing rights and legislation, see generally J. Munro, "The Treaty of Waitangi and the Sealord Deal" (1994) 24 V.U.W.L.R. 389.

> Now, in English law -- and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us . . . -- there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast . . . . In the tidal waters . . . all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right. . . . An Act alone can confer such a right, just as an Act is required in England to confer such a right unless some charter from the Crown prior to Magna Carta can be proved . . . . [See Note 167 below]

Note 167: (1914), 33 N.Z.L.R. 1065 at 1071-1072 (S.C.).

¶ 63 This statement -- which echoes the legal opinions from Upper Canada cited recently in Nikal -- clearly contradicts the Kauwaeranga approach. Although not purporting to make a definitive statement of the law, Cooke P. (now Lord Cooke of Thorndon, a law lord in the House of Lords) suggested that Waipapakura v. Hampton is "a dubious authority" in light of the many cases that recognize the continuity of "native title" at common law after the assertion of British sovereignty over colonial territories. [See Note 168 below] In support of this proposition, he cited not only the Kauwaeranga case but, inter alia, the Supreme Court of Canada's decision in Guerin v. R., [See Note 169 below] and emphasized that Maori rights at "common law" should be no less respected than aboriginal rights in North America. [See Note 170 below]

Note 168: Te Runanga, supra note 147 at 654-655.

Note 169: [1984] 2 S.C.R. 335.

Note 170: Te Runanga, supra note 147 at 655.

¶ 64 To summarize, the argument that denies exclusive aboriginal fisheries on the grounds that they conflict with the public right of fisheries in navigable waters and the effect of Magna Carta is regarded by the New Zealand courts as highly questionable in light of the theory of the common law continuity of aboriginal title as developed by the pre-1996 Canadian cases on aboriginal rights. Although Gladstone now applies in Canada to limit the scope of "free-standing" native fisheries, the New Zealand cases may provide indirect support for the proposition that the Gladstone process of reconciliation is inapplicable to native fisheries in waters over which, according to their "traditional laws and customs," [See Note 171 below] native use and occupation was exclusive, that is, in aboriginal title territories. In other words, even under the above-defined municipal model of aboriginal rights, exclusive aboriginal fisheries may exist in waters that would otherwise be subject to a public right of fishing under municipal law.

Note 171: Van der Peet, supra note 1 at 546.

IV. Saugeen Fishing Rights Reconsidered

¶ 65 Having considered aboriginal fishing rights in abstract, it is now possible to reconsider Saugeen Ojibway fishing rights within the specific legal context of mid-nineteenth century Upper Canada. The constitutional history of aboriginal peoples in Upper Canada is not susceptible to a neat categorization under either of the two general models defined in Part III. However, the imperial and municipal models do provide a useful initial framework for analysis, and, in particular, they assist in illustrating the ways in which the constitutional history of Upper Canada was different from that of British Columbia.

¶ 66 During the seventeenth and eighteenth centuries, both Britain and France claimed the Great Lakes region within which the Saugeen territory is located; even after its conquest of New France and its acquisition of Canada under the Treaty of Paris 1763, Britain refused to acknowledge that its claims to this region derived from France. [See Note 172 below] Instead, Britain took steps to ensure that its rights to the region had some basis in treaties made with the local Indian nations, including the Ojibway. [See Note 173 below]

Note 172: Board of Trade to the King (5 August 1763), Shortt & Doughty, eds., supra note 122 at 110-112.

Note 173: "Proceedings at a Treaty held at D'troit by Sir Wllm Johnson, Bart, September 1761" in J. Sullivan, ed., The Papers of Sir William Johnson (Albany: State University of New York, 1921-65), vol. 3 at 471-479; "Congress with the Western Nations" Detroit, 7-10 September 1764 in ibid. vol. 4 at 526-530; Letter of Sir W. Johnson to C. Colden (23 August 1764), ibid. vol. 4 at 511-514.

¶ 67 Once the French claim to Canada was defeated, Britain organized its North American possessions under the Royal Proclamation of 1763. [See Note 174 below] By the Proclamation, the Great Lakes region, including the Saugeen territory, was constituted an Indian territory into which no form of local municipal colonial law or government was introduced. Although French-Canadian municipal law may have remained in force among the pockets of French settlers who remained in the region, [See Note 175 below] in light of the fact that Britain had previously denied French sovereignty therein, it is unlikely that the common law would have regarded French law as forming the general municipal law of the entire region. Imperial legislation proposed in 1764 (though not enacted) to supplement the Proclamation confirmed that Indian nations in this territory were distinct components of the empire governed internally by their own governments and constitutions. [See Note 176 below] Individual traders lawfully entering this Indian territory might have carried English municipal law with them to govern their relations with each other, and French communities remaining after the conquest may have been governed internally by French-Canadian municipal law, but neither English nor French municipal law was generally applicable so as to govern the internal affairs of Indian nations or the determination of their rights to land and resources. [See Note 177 below] According to the imperial common law doctrine of continuity, existing aboriginal customary laws, governments, and possessions would have remained in place as part of distinct municipal systems within the empire. If the Indian nations exercised exclusive rights to fisheries and waterways previously, these would have continued in force at imperial common law subject only to any rights of entry the Crown required to maintain its sovereignty. No "public" right of fishing under English municipal law could vest in favour of British subjects generally because English municipal law had not been introduced.

Note 174: R.S.C. 1985 (Appendix No. 1) [hereinafter Proclamation]. The Proclamation has the force of legislation: Campbell v. Hall (1774), Lofft. 655 at 741; Calder v. British Columbia (A.G.), [1973] S.C.R. 313 at 394-395.

Note 175: Drulard v. Welsh (1906), 11 O.L.R. 647 (Div. Ct.).

Note 176: See M. Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada" (1996) U.of Toronto L.J. 273 at 280.

Note 177: Connolly v. Woolrich (1867), 17 R.J.R.Q. 75 at 84, 96; 1 C.N.L.C. 70 at 79, 91 (Que. S.C.); aff'd sub nom Johnstone v. Connolly (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Que. Q.B.).

¶ 68 These imperial common law conclusions are consistent with the terms of the Proclamation, which provided that Indian nations were not to be "molested and disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds" and that the "Land and Territories" in the Indian territory, including the Great Lakes region, were reserved to them. [See Note 178 below] In light of the fact that at certain times of the year Indian nations in the Great Lakes region survived largely upon fishing, [See Note 179 below] it is not unreasonable to conclude that "Hunting Grounds" included fisheries. It may also be said that "Land and Territories" must have included territories covered by water, a conclusion consistent with the interpretation of Native Lands Acts in New Zealand [See Note 180 below] and the acknowledgment that the Proclamation recognized "territorial rights akin to those asserted by sovereign Princes." [See Note 181 below] Furthermore, the Proclamation suggests that these rights were exclusive. Not only was their "Possession" not to be "molested" or "disturbed," but public entry generally was restricted: all settlers were ordered to leave and rights of entry were limited to licensed traders, Indian Department officials and military personnel. In short, it may be said that during the 1760s an exclusive Saugeen Ojibway fishing right, if it existed by aboriginal custom, gained imperial legal recognition at imperial common law and was confirmed by imperial prerogative legislation. The Crown's power to enact this sort of legislation was not limited by any principles of municipal English law as this law had not been introduced. [See Note 182 below] The question, then, is whether these imperial common law and/or legislative rights were abrogated or modified by the subsequent introduction of municipal law and government into the Great Lakes region.

Note 178: Supra note 174 [emphasis added].

Note 179: Supra notes 14-17.

Note 180: Supra notes 148-151.

Note 181: Report of the Special Commissioners Appointed on the 8th of September 1856, To Investigate Indian Affairs in Canada, 1858 in Journals of the Legislative Assembly of Canada, vol. 16, Appendix 21 at 92; quoted in The St. Catharines Milling and Lumber Co. v. The Queen (1887), 13 S.C.R. 577 at 663, Gwynne J.

Note 182: Canada (A.G.), supra note 96 at 423 (the Magna Carta restriction relating to fisheries did not apply in those parts of Canada into which English common law had not been introduced).

¶ 69 The Quebec Act 1774 [See Note 183 below] annexed to the colony of Quebec much of the Indian territory, including the Great Lakes region, thereby introducing a colonial municipal legal system consisting of French-Canadian civil law and English criminal law. French-Canadian civil law recognized a public right of fishing in tidal and

non-tidal navigable waters but did not limit the French Crown's authority to grant exclusive fisheries. [See Note 184 below] Although there is debate about whether French law recognized aboriginal rights, it has been held that aboriginal title in the territories added to Quebec continued to be governed by the Proclamation and/or by British common law principles confirmed and recognized by the Proclamation. [See Note 185 below] It may be argued, however, that by introducing a municipal legal system into the region, the imperial legal status of aboriginal rights was abolished and those rights became a matter for Quebec municipal law (defined by a common law component of an otherwise civil law system). If so, aboriginal fishing rights existed within a municipal system that recognized a public right of fishing in navigable waters, and therefore the Gladstone reconciliation process applied to render the previously exclusive aboriginal right one of priority only.

Note 183: 14 Geo. III, c. 83.

Note 184: Cabot v. Quebec (A.G.), [1907] A.C. 511 (P.C.); Boissonault v. Oliver (1833), Stuart's L.C. App. Cas. 564; Dixson v. Snetsinger (1873), 23 U.C.C.P. 235.

Note 185: St. Catherine's Milling and Lumber Co. v. R. (1888), 14 App. Cas. 46 (P.C.); The King v. Lady McMaster, [1926] Ex. C.R. 68 at 72-74; R. v. Easterbrook, [1931] S.C.R. 210 at 217-218; Côté, supra note 1 at 171-174.

¶ 70 The short answer to this argument is that section 3 of the Quebec Act expressly stated that the Act did not "vary or alter" any "right, title or possession" to land. This provision has been held to preserve aboriginal title in this region. [See Note 186 below] If the aboriginal right of fishing incidental to aboriginal title was exclusive under imperial common law and/or legislation prior to the Act, then, according to the Act itself, that right was not varied or altered by the new legal regime introduced by the Act so as to become a right of priority only; it remained an exclusive right.

Note 186: R. v. St. Catharines Milling and Lumber Co., supra note 184 at 631-632, Strong J.; Ontario (A.G.) v. Bear Island Foundation (1989), 68 O.R. (2d) 394 (C.A.) at 410, aff'd [1991] 2 S.C.R. 570.

¶ 71 A more complicated response would be to argue that although a municipal legal system was introduced for settlers in the territories added to Quebec, that municipal system was not intended to extend over Indian nations. Instead, these nations occupied a Mohegan-like status as imperially-recognized units outside the scope of the settler-municipal system. [See Note 187 below] This second response requires a detailed explanation of the historical context of the Quebec Act that is beyond the scope of this analysis. However, it is important to observe that after 1774 Indian affairs remained

firmly within the control of the imperial Indian Department, a body that was constitutionally distinct from the local municipal colonial government and subject to regulations that characterized Indians as "free and independent" nations whose "Customs" were to be respected. [See Note 188 below] Within unceded Indian lands added to Quebec, it was later acknowledged that elements of "Indian sovereignty" [See Note 189 below] remained and that the Crown did not claim "absolute power or Sovereignty" until these lands were "fairly sold . . . at Public Treaties." [See Note 190 below] Indeed, royal instructions and local legislation confirmed the basic common law principle embraced by the Proclamation: there was no public right of entry into the unceded Indian territories added to Quebec. [See Note 191 below]

Note 187: Supra notes 131-132.

Note 188: F. Haldimand, Commander in Chief, Instructions to Sir J. Johnson, Supt. Indian Dept., 6 February 1783, PRO CO 42/44: 95, reissued by Lord Dorchester, Commander in Chief, as "Instructions for the good Government of the Indian Department" (27 March 1787) NA RG 10 vol. 789 at 67759-67765.

Note 189: J. Simcoe, Lt. Gov. Upp. Can., to A. Clarke, Lt. Gov. Low. Can., 20 August 1792 in E.A. Cruikshank, ed., The Correspondence of Lieutenant Governor John Graves Simcoe, with Allied Documents relating to his Administration of the Government of Upper Canada, vol. 1 (Toronto: Ontario Historical Society, 1923) at 200, and Simcoe to G. Hammond, British envoy to U.S.A., 27 September 1792, PRO CO 42/317: 13-17.

Note 190: Simcoe's speech to the Western Indians, 22 June 1793 in Cruikshank, ibid., vol. 1 at 363.

Note 191: Royal Instructions to Guy Carleton, Gov. Que., 3 January 1775, art. 31 in Shortt and Doughty, supra note 122 at 594-621; An Ordinance relative to the trade and intercourse with the said Indians (1777), 17 Geo. III, c. 7 (Que.).

¶ 72 In short, if the settler municipal system introduced by the Quebec Act was not intended to displace the imperial regime governing Indian affairs, and if Crown sovereignty over unceded Indian territories was of a limited nature, then there may be grounds to argue that aboriginal fishing rights were defined under the imperial model -- that there was a geographical limit to the applicability of municipal law and that the municipal public right of fishing did not apply within these territories. Of course, even if this interpretation of the Quebec Act is not accepted and it is held that the Act did abolish the distinct imperial legal status of Indian nations and subjected them to Quebec municipal law, if that law recognized aboriginal title to unceded Indian territories, including lands covered by navigable waters, the application of the Gladstone reconciliation process can be argued to be inappropriate for the reasons developed in Part III above.

¶ 73 The Constitutional Act 1791 provided for the partition of Quebec into the provinces of Upper and Lower Canada and the Union Act 1840 provided for their

reunification as the province of Canada; existing laws were preserved by both Acts. [See Note 192 below] The first statute of the new Upper Canada legislature provided that "from and after" its enactment "the laws of England" would constitute the rule for decisions in controversies relating to property and civil rights. [See Note 193 below] Arguments analogous to those possible in relation to the Quebec Act can be made here. Thus, the following may be said: the 1792 Act had the effect of introducing the English common law on waters and fisheries; this law (once adjusted to local conditions) recognized a public right of fishing in the Great Lakes that could not be abrogated by prerogative instrument; the aboriginal fishing right, once reconciled with the public right (as per Gladstone), was reduced to one of priority only at common law and the Magna Carta restriction prevented the Crown from conferring an exclusive right by treaty or letters patent.

Note 192: Constitutional Act 1791, 31 Geo. III, c. 31 (Imp.), s. 33; Union Act 1840, 3 & 4 Vict., c. 35 (Imp.), s. 46.

Note 193: An Act . . . to introduce the English Law as the rule of decision in all matters of controversy, relative to property and civil rights (1792), 32 Geo. III, c. 1 (Upp. Can.), s. 3.

¶ 74 This argument is supported by the opinion of Solicitor General James Cockburn given in 1866 after the Saugeen Ojibway complained that leases made under the 1857 Fisheries Act violated their exclusive fishing rights. [See Note 194 below] This opinion was cited with approval in obiter in Nikal. Cockburn stated:

Note 194: See supra notes 40 - 41 and accompanying text.

> Indians . . . have no other or larger rights over the public waters of this province than those which belong at common law to Her Majesty's subjects in general. Previous to the present statute [Fisheries Act 1857], the Crown could not legally have granted an exclusive right of fishing on the lakes and Navigable waters but under the 3rd section of that Act the power is conferred on the Commissioner of Crown Lands of granting licences for fishing in favour of private persons, wheresoever such fisheries are situated, the only exception is 'where the exclusive right of fishing does not already exist by law in favour of private persons.' This exception was intended as I understand to exclude the application of the Act from certain Fishing rights which had been granted under the French law in Lower Canada before the Conquest; it certainly does not apply to the Indian tribes who have acquired no such rights by law unless it may be contended that in any of those treaties or instruments for the cession of

> Indian Territory there are clauses reserving the Exclusive right of fishing and even in that case, if such should be the fact, I should say that without an Act of Parliament ratifying such a reservation no exclusive right could thereby be gained by the Indians, as the Crown could not by any Treaty or act of its own (previous to the recent Statute) grant an exclusive privilege in favour of Individuals over public rights . . . . [See Note 195 below]

Note 195: J. Cockburn, Sol. Gen. (3 April 1866) NA RG 10 vol. 323 at 216131-216136 [emphasis added]; see Blair, supra note 11 at 136-137.

¶ 75 The emphasized passages from this statement are important for two reasons. First, they confirm that the 1857 Fisheries Act was regarded as acknowledging the possibility that exclusive fisheries in navigable waters that pre-dated the British conquest of New France existed in law. Second, these passages, which identify an important qualification to the opinion, were left out of the portion of the statement quoted in obiter by Cory J. in Nikal. [See Note 196 below]

Note 196: Supra note 1 at 1031-1032.

¶ 76 Cockburn's opinion is problematic for a number of reasons. It is premised upon the assumption that upon the assertion of British sovereignty exclusive fisheries created under French law for French settlers continued in force but that no such exclusive fisheries could exist and continue in force for aboriginal peoples under aboriginal custom. In other words, the opinion is informed by an unequal application of legal principle. Either the imperial common law principle of continuity applied upon the assertion of British sovereignty or it did not: if it applied to save exclusive fisheries recognized in areas governed by French law, then it can be argued that it also saved exclusive fisheries recognized in areas governed by aboriginal custom.

¶ 77 Of course, Cockburn stated that the effect of the Fisheries Act was to save exclusive French fisheries in Lower Canada, where French civil law, not English common law, continued to govern. If (a) it is accepted that exclusive aboriginal fisheries could have survived the assertion of British sovereignty as an incident of aboriginal title pursuant to the imperial principle of continuity, and (b) the arguments made above are accepted that this common law continuity was confirmed by the Proclamation and saved by section 3 of the Quebec Act, then the question becomes whether these exclusive aboriginal fisheries survived the 1792 Act introducing English law into Upper Canada. Given his assumptions, Cockburn did not turn his mind to this question.

¶ 78 Again, a short answer is found in the statute itself. The 1792 Act introduced English law into Upper Canada but, by section 2, stated that it did not "affect any existing right, lawful claim or incumbrance, to and upon any lands, tenements or hereditaments" in the province. If an exclusive aboriginal fishery existed before the Act was made, it existed afterwards. [See Note 197 below] Aside from section 2, however, the very "local conditions" qualification upon which the public right of fishing in the Great Lakes depends may be said to apply to ensure the continuity of exclusive fisheries in these lakes. In other words, if a municipal model of aboriginal rights is used, exclusive fisheries may still exist. As seen, the municipal public fishing right is only a prima facie right, and it is rebuttable by proof of a several fishery existing from before the reign of Henry II, or, in colonial territories, from before the introduction of English law. [See Note 198 below] The Gladstone reconciliation process might reduce the free-standing aboriginal right to fish to one of priority, but aboriginal fisheries in territories over which aboriginal title is claimed might, pursuant to the Kauwaeranga approach, be exclusive.

Note 197: Dixon v. Snetsinger, supra note 184 at 243-244, Gwynne J. (French law recognized public rights in non-tidal navigable rivers, and the introduction of English law by the 1792 Act could not affect those rights because they were saved by section 2 of the Act).

Note 198: See supra notes 156-163 and accompanying text.

¶ 79 As in the case of the Quebec Act, there is also a more complex answer to the argument that the introduction of English law reduced aboriginal fishing rights to rights of priority. It may be argued that Indian nations continued to occupy a Mohegan-type status after the division of Quebec and the introduction of English law; therefore, English municipal law did not extend to Indian nations in unceded lands. Consequently, it may be argued that there would have been no need to attempt to balance imperial exclusive native fisheries with municipal settler public fishing rights -- in other words, that the imperial model of aboriginal rights applied. In fact, colonial judges and Indian Department officials of the early nineteenth century were of the view that municipal law did not extend to the internal affairs of natives resident in unsurrendered lands. This view was only slowly modified as the nineteenth century progressed. [See Note 199 below] Governmental control over Indian affairs remained firmly with the imperial Crown, through its Indian Department, until 1860. [See Note 200 below] Until then, Indian Department Superintendents were appointed by the imperial Crown to which they were "responsible directly . . . thus superceding the Provincial Governments." [See Note 201 below] In the same year that Lieutenant Governor Bond Head treated with the Saugeen Ojibway, he was advised by the provincial Attorney General that colonial legislation on Indian affairs, other than that directed at fraudulent settlers, was inappropriate because:

Note 199: Walters, supra note 176 at 273.

Note 200: The Act respecting the management of the Indian Lands (1860), 23 Vic., c. 151 (Can.), "declares the terms upon which Her Majesty the Queen assented to the transfer of the management of Indian affairs from under the direct supervision of the Imperial Government" (Ontario Mining Co. v. Seybold (1901), 32 S.C.R. 1 at 7); it was reserved by the governor for the assent of the imperial crown in London.

Note 201: St. Catharines Milling and Lumber Co. v. The Queen, supra note 186 at 608. See also, Mutchmore v. Davis (1868), 14 Grant 346 (Ont. Ch.) at 358; Re Indian Claims (1895), 25 S.C.R. 434 at 497-503; Ontario Mining Co. v. Seybold, ibid. at 3. See also, Minute of the Executive Council of Canada (25 November 1845) NA RG1 Canada State Books, 1841-67, vol. E at 84 (the Indian Department was "not one under the superintendence and management of the local authorities, but rather, one especially intrusted to Your Excellency by Her Majesty, as a matter, the direct control of which belongs to Imperial Authority").

Hitherto the Indians have been under the exclusive . . . care of His Majesty alone: the Territories which they inhabit within the Province are tracts of Crown lands devoted to their sole use as his 'Allies', and over which His Majesty has never exercised his paramount right. . . . They have within their own communities governed themselves by their own laws and customs . . . In all respects they appear to be most constitutionally within the jurisdiction and prerogative of the Crown. [See Note 202 below]

Note 202: R. Jamieson, Att. Gen. Upp. Can., to J. Joseph, Sec. to Lt. Gov. (18 February 1836) NA RG10 vol. 60 at 60737-60738. See also Province of Canada, Debates of the Legislative Assembly of United Canada, E. Nish, ed., (Montreal: Centre D'Etude du Quebec), vol. 1 at 936 (in response to a motion inquiring about an Indian reserve it was argued that Indian affairs "had always been under the especial protection of the Crown and that hitherto no interference had been allowed on the part of the popular branch of the Legislature").

¶ 80 This view was echoed in R. v. McCormick in which Robinson C.J. stated that "Indian land, in which the right of the natives had not been extinguished" fell within lands that had never "been reduced into actual possession of the Crown . . . ." [See Note 203 below] In short, Indian nations resident in unceded Indian lands were regarded, to some extent at least, as self-governing nations exempt from the settler municipal system, and unsurrendered Indian lands were regarded as outside the Crown's de facto possession. If so, then the imperial rather than municipal model of aboriginal rights may best explain aboriginal rights to lands and resources in mid-nineteenth century Upper Canada. Under this model, the municipal legal system, including the public right of fishing, has no application in Indian territories until they are incorporated within the municipal system by their surrender to the Crown.

Note 203: (1859), 18 U.C.Q.B. 131 at 136.

¶ 81 There are therefore a number of alternative grounds upon which to argue that exclusive aboriginal fisheries existed in Upper Canada. However, if these arguments are rejected and it is concluded that by the mid-nineteenth century Saugeen Ojibway fishing rights were not exclusive, the question remains whether the effect of the introduction of English municipal law by the 1792 Act was to confer upon the public a right of fishing in the Great Lakes that (though subject to an aboriginal right of priority) could not have been abrogated by prerogative Crown grant of an exclusive fishery to an aboriginal nation by treaty or letters patent. If the cases examined above in relation to settler rights are applied to aboriginal rights, the answer must be that the Crown was prohibited by the Magna Carta restriction in colonial Canada from doing this. Indeed, this appears to have been the conclusion reached by Cockburn and applied to British Columbia in Nikal.

¶ 82 However, the approach taken to the prerogative in Nikal is questionable on general grounds. It may be argued that the very "local conditions" qualification to the introduction of English law that premises the argument also undermines it; for the scope of the royal prerogative, like any other principle of common law, might also have been affected by "local conditions." Thus, it might be said that any public right of fishing that vested under the English municipal law in relation to waters subject to aboriginal rights of priority would have been more limited than that recognized in relation to tidal waters in England. The Crown had the exclusive authority to obtain the cession of aboriginal title and aboriginal rights. If the Crown had the power to accept a cession of aboriginal title and/or rights relating to certain of these lands and waters, thereby making the public right to fishing complete and no longer subject to the aboriginal right of priority, then perhaps it also had a concomitant power to create Indian reserves in which the public was wholly excluded. This approach, it may be said, is a necessary adjustment to English law in light of local conditions: where an infant colony was established in unceded aboriginal territories occupied by potentially hostile aboriginal nations, perhaps the common law would not have denied the Crown's prerogative power to confer exclusive rights on these nations over relatively small areas in return for their surrender -- to the great benefit of the public -- of their rights of priority to resources over a significantly larger areas.

¶ 83 The approach taken to the Crown's powers in British Columbia in Nikal is also distinguishable from the unique constitutional context existing in the provinces of Upper Canada and Canada. From 1763 until 1792, the Crown had the authority to grant exclusive fisheries in the region: English municipal law and its Magna Carta restriction had not been introduced. [See Note 204 below] Could a local colonial statute in 1792 abolish the imperial Crown's authority to grant exclusive fisheries to Indians? Although the colonial legislature had plenary legislative power within the territory of the colony, [See Note 205 below] this legislative authority was not limitless. Colonial statutes could be declared ultra vires if they conflicted with imperial statutes, [See Note 206 below] were extra-territorial in application [See Note 207 below] or were on matters that were of "imperial concern." [See Note 208 below] Colonial legislatures could regulate or limit the exercise of the royal prerogative in the colony, [See Note 209 below] but it has been argued that this authority extended only to so-called "minor" prerogatives defined by

English municipal common law. They could not limit or abrogate the "fundamental" or "major" prerogatives of the Crown: those inherent powers of the Crown as sovereign of the empire. [See Note 210 below] Included among the Crown's fundamental prerogatives were its powers over the empire's foreign affairs, military, and treaties of war and peace, [See Note 211 below] hearing appeals from the colonies, [See Note 212 below] and regulating relations between political components within the empire. [See Note 213 below] In colonial Canada, Indian trade was within colonial legislative competence, [See Note 214 below] as was the protection of Indians and Indian lands from settler fraud and encroachment, [See Note 215 below] but, as seen, jurisdiction over managing relations with Indians and negotiating the acquisition of Indian territories was, at least as a matter of policy, retained by the Imperial Crown until 1860. [See Note 216 below] It may be argued that these aspects of Indian affairs were matters of fundamental prerogative beyond local legislative competence because they were linked inherently to matters of "imperial concern" such as military and foreign relations [See Note 217 below] or relations between political units within the empire. [See Note 218 below] Indeed, it may be argued that as long as the Imperial Crown exercised the royal prerogative over Indian affairs, colonial statutes purporting to limit that prerogative were ultra vires as extra-territorial. [See Note 219 below] According to the doctrine of crown divisibility, the crown's "situs" depends upon the location of the ministers upon whose advise it acts. [See Note 220 below] Until 1860, the situs of the Crown when exercising the royal prerogative over Indian affairs in the province of Canada was Britain: "the Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, not through the responsible ministers of the province, but directly as representing the Crown . . . ." [See Note 221 below] Thus, courts have consistently held that colonial legislation on public lands could not have been intended to extend to Indian lands as long as the imperial Crown managed those lands directly. [See Note 222 below] Applying the same principle to the 1792 Act introducing English law, it may be argued that it could not have been the intention of this Act to abolish existing prerogative powers of the imperial Crown in relation to Indian affairs, powers that included treating with aboriginal nations in such a way as to confer upon them certain exclusive rights over small reserves of lands and waters in return for the surrender of their title to vast territories within the province.

Note 204: Supra note 182.

Note 205: Opinion of Sir J. Campbell, Att. Gen., and Sir R. Rolfe, Sol. Gen., 6 August 1838 in Forsyth, supra note 137 at 465-466; McNab v. Bidwell (1830), 1 Draper 152 (U.C.K.B.) at 160-161.

Note 206: Phillips v. Eyre (1870), 6 L.J.Q.B. 28 (Ex.) at 36; Colonial Laws Validity Act (1865), 28 & 29 Vict., c. 63 (Imp.), s. 3.

Note 207: Campbell and Rolfe, supra note 205; British Coal Co. v. The King, [1935] A.C. 500 (P.C.) at 516.

Note 208: Sir H. Jenkyns, British Rule and Jurisdiction Beyond The Seas (Oxford: The Clarendon Press, 1902) at 70.

Note 209: J. Chitty, A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject (London: J. Butterworth, 1820) at 26; Opinion of Sir J. Campbell, Att. Gen., and T. Wilde, Sol. Gen., 1841 in Forsyth, supra note 137 at 10-11; Liquidators of Maritime Bank v. Receiver-General New Brunswick, [1892] A.C. 437 (P.C.) at 441; Sir K. Roberts-Wray, Commonwealth and Colonial Law (London: Stevens & Sons, Ltd., 1966) at 377-378.

Note 210: Chitty, ibid. at 25-26; Roberts-Wray, ibid. at 379, 557-558.

Note 211: Chitty, ibid.; C. Clark, A Summary of Colonial Law, The Practice of the Court of Appeals from the Plantations, and the Laws and their Administration in All the Colonies (London: S. Sweet, 1834) at 47.

Note 212: Roberts-Wray, supra note 208 at 379-380; Cuvillier v. Aylwin (1832), 2 Knapp. 72 (P.C.) at 78; R. v. Eduljee Byramjee (1846), 5 Moo. P.C. 276 (P.C.) at 295.

Note 213: Penn v. Baltimore (1750), 1 Ven. Sen. 444; Aboriginal Customs and Government, supra note 113 at 807-811.

Note 214: For example, see Royal Instructions to Lord Dorchester, Gov. Upp. Can., 16 September 1791, PRO CO 43/4: 217-274 ([section]55).

Note 215: Jamieson to Joseph, supra note 202.

Note 216: See supra notes 200 - 202 and accompanying text.

Note 217: Royal commissions to superintendents of the Indian Department described "the Indians inhabiting our Province of Upper Canada" as "Allies": Royal Commission to Sir J. Johnson, 16 September 1791, PRO CO 42/316: 65. As the Governor of Upper Canada, Lord Dorchester, said in 1799: "[The] Indians, the Indian department, and all Indian concerns, without exception, are under the protection and control of the Commander in Chief; the Indians make part of the military strength of the Country . . . ." (Dorchester to Duke of York, 12 July 1799, PRO CO 42/330: 123-124).

Note 218: See generally Walters, supra note 113.

Note 219: Halsbury's Laws of England 4th ed. (reissue) (London: Butterworth's, 1991), [section]1027 (colonial statutes could not "affect the exercise by the Crown in the United Kingdom of the Crown's legislative, executive or judicial powers in respect of the [colonial] territory" [emphasis added]).

Note 220: R. v. Foreign Sec., Ex parte Indian Association of Alberta, [1982] 1 Q.B. 892 (C.A.) at 928.

Note 221: Re Indian Claims (1895), 25 S.C.R. 434, Strong J. at 503 [emphasis added].

Note 222: Mutchmore v. Davis (1868), supra note 201 at 357-358; Church v. Fenton (1878), 28 U.C.C.P. 384 at 391-392 (Ont. Ch); St. Catharines Milling and Lumber Co. v. The Queen (1887), supra note 186 at 661-665.

¶ 84 British Columbia has been described as a "settled" colony into which English municipal law ran automatically and in which aboriginal rights could not have existed as a separate "system" under the principle of continuity. [See Note 223 below] In other words, it is a jurisdiction in which aboriginal rights are determined under the municipal

model and not the imperial model. In contrast, Upper Canada (which may not have been a settled colony) was one in which aboriginal rights existed under the imperial model, at least between 1763 and 1774 when the region was part of the Indian territory established under the Royal Proclamation of 1763. The initial (and arguably continuing) status of aboriginal rights under the imperial model differentiates Upper Canada from British Columbia, for all subsequent imperial and local statutes introducing municipal law and government expressly saved existing rights. Upper Canada is distinguished from British Columbia for another reason: in the former colony, the Imperial Crown managed Indian affairs directly until 1860, and this fact must be considered when deciding the effect of colonial legislation on the Crown's power to recognize or grant exclusive fisheries by treaty or otherwise. In short, there are grounds upon which to argue that the exclusive Saugeen Ojibway fisheries described in Part I above had some legal foundation in mid-nineteenth century Upper Canada under either common law, prerogative instrument, or both.

Note 223: Delgamuukw v. The Queen (1993), 104 D.L.R. (4th) 470 at 569-570 (B.C.C.A.).

Conclusion

¶ 85 The recent Supreme Court of Canada cases on aboriginal fishing rights suggest that there is an unresolved conflict within the present law of aboriginal rights in Canada between the objective of ensuring that aboriginal rights throughout the country derive from one common doctrinal foundation and the objective of avoiding the definition of aboriginal rights in a vacuum without reference to the particular legal-historical context of specific aboriginal claims. Given the vastly different ways in which British law and institutions were introduced and in which native peoples were treated in various regions of Canada, it is not surprising to find certain First Nations armed with better common law, treaty and/or legislative arguments than other First Nations when formulating their claims to lands and resources. Although the entrenchment of aboriginal rights within the Constitution provides the basis for a new foundation for aboriginal rights underlying the claims of all aboriginal peoples in Canada, it is hoped that this entrenchment will not serve as an excuse for levelling aboriginal rights to the lowest common denominator. In the case of fishing rights, the above analysis suggests that there is a legal basis for a conception of aboriginal title, applicable throughout Canada, which secures exclusive rights of fishing in waters that would otherwise be subject to public rights where such exclusive rights existed under aboriginal custom. If this conception of aboriginal title is rejected, however, the analysis also demonstrates that in certain parts of the country the imperial Crown may have had the prerogative power to confer exclusive rights of fishing by treaty or other form of prerogative instrument. In particular, the analysis suggests that -- obiter dicta in Nikal notwithstanding -- the modern-day successors of the Saugeen Ojibway, like the Chippewas of Nawash, have a sound legal-historical basis for their claims to exclusive rights to, and jurisdiction over, their traditional fisheries in the waters of Lake Huron and Georgian Bay.

* * *

RE AUTHOR:-- Mark D. Walters, Fellow of New College, Oxford. The author wishes to thank Peggy Blair and Darlene Johnston for providing copies of archival materials used in evidence in R. v. Jones (1993), 14 O.R. (3d) 421 (Prov. Ct.) [Jones and Nadjiwon] and Jim Morrison for directing him to certain other sources he had not previously considered.

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EXHIBIT “G”

This is Exhibit ....G..... referred to in the affidavit of ..Paul.....Jones..... sworn before me, this .....15th..... day of .....August..... 20..13..

A COMMISSIONER FOR TAKING AFFIDAVITS

Schedule A – Framework Agreement

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FRAMEWORK AGREEMENT

BETWEEN:

THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

-AND-

SAUGEEN FIRST NATION

(Collectively, the "Saugeen Ojibway Nation" or "SON")

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE
MINISTER OF NATURAL RESOURCES
("MNR")

(Together the "Parties")

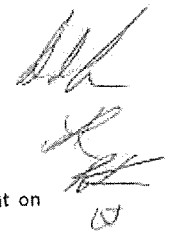
WHEREAS the Saugeen Ojibway Nation ("SON") has sustained itself historically by engaging in fishing for commercial, cultural, ceremonial, and subsistence purposes;

WHEREAS the relationship between SON and the Crown is marked and governed by Treaties, Promises, and Proclamations including Treaty 45 ½, Treaty 72 (1854), Treaty 82 (1857), and the Imperial Proclamation of 29 June 1847;

WHEREAS as expressed in *R v. Jones and Nadjiwon* (1993) 14 O.R. (3d) 421 (Ont. Prov. Ct.) SON's aboriginal and treaty rights to fish for commercial and ceremonial purposes were recognized and protected under Section 35 of the *Constitution Act*, 1982

WHEREAS the Parties have been working together through commercial fishing agreements since June 2000;

AND WHEREAS the Parties agree that the purpose of this Framework Agreement is to have the Parties, on a Government to Government basis, enter into a long-term Substantive Commercial Fishing Agreement by October 31, 2011 as an important step in their constructive, ongoing and harmonious relationship in order to continue the process of reconciliation.



NOW THEREFORE the Parties enter into this Framework Agreement on the following terms and conditions:

I. GOALS, PRINCIPLES, OBJECTIVES, AND COMMITMENTS

A. GOALS

The Goals the Parties intend to reach through this Framework Agreement are as follows:

a. To create a constructive, ongoing and harmonious, long-term relationship between SON and MNR by reaching agreements regarding the fishery and the waters defined in a long term Substantive Commercial Fishing agreement.

b. To accomplish this long term relationship, the Parties will engage in good faith to implement this Framework Agreement and the commitments made herein. The results of the implementation of and work under this Framework Agreement will be the basis for a long-term Substantive Commercial Fishing Agreement arrived at through good faith negotiations, mutual commitments and shared obligations.

c. The Parties understand that this Framework Agreement, and any Substantive Commercial Fishing Agreement that results, are part of a continuum of building and maintaining a new and positive relationship.

B. PRINCIPLES

The Principles that shall govern this Framework Agreement are as follows:

a. New Relationship: Willingness and commitment to forge a new relationship based on the Principles below, recognizing the past but seeking to build a more positive and beneficial future for the parties.

b. Mutual Respect: Willingness and commitment to listen to and hear each other and to act honourably and in good faith toward each other, including through meaningful recognition of the Parties' perspectives, constraints, values, and culture.

c. Mutual Understanding: Willingness and commitment to understand each other's cultures, responsibilities and limitations.

d. Mutual Participation: Willingness and commitment to create and implement mechanisms that achieve further participation between the Parties in decisions about commercial fishing in the waters that will be defined in a long-term Substantive Commercial Fishing Agreement.

e. Mutual Accountability: Willingness and commitment to create and implement mechanisms to ensure that the Principles and provisions of this Framework Agreement are carried out in their spirit and intent.

f. Mutuality Requires Balancing: Acceptance of the fact that there are many parties who hold interests in the waters around the Bruce Peninsula and their interests must be considered in any long-term Substantive Commercial Fishing Agreement between the Parties.

C. OBJECTIVES

The objectives of this Framework Agreement are:

a. To cultivate an improved relationship between the Parties through the establishment of meaningful processes, committees, and working groups in which SON has the capacity to participate;

b. Through those processes, committees, and working groups to provide for the implementation of collaborative initiatives that improve the mutual understanding and cooperativeness between the Parties for the sustainable management, and use of the fishery, that respects the Principles above; and,

c. To use best efforts to ensure that economic development, and capacity building is created and exists for SON and its members, while giving appropriate consideration to other interests in the fishery.

D. MUTUAL COMMITMENTS

SON and MNR agree that they share the following commitments:

1. Protection, conservation and sustainability of the resource;

2. That mutual trust and respect will be established by the implementation of meaningful processes to develop proposals, pursuant to this Framework Agreement, for inclusion in a long-term Substantive Commercial Fishing Agreement regarding:

   a. Mutual economic benefits for the parties;
   b. Capacity for SON;
   c. The setting of TAC based on sound scientific principles;
   d. Monitoring and enforcement;
   e. Implementation and governance of a long-term Substantive Commercial Fishing Agreement;
   f. The impact of stocking programs in the waters to be defined in a long-term Substantive Commercial Fishing Agreement;
   g. The Bays and other areas of fishing activity as agreed to by the parties;
   h. Communications and public education; and
   i. Such other issues as the Governance Committee may determine appropriate in the circumstances.

3. Engagement of the Federal Crown, and any other agency or ministry in a long-term Substantive Commercial Fishing Agreement or as agreed to herein;

4. Consideration of the interests of third parties in the waters to be defined in a long-term Substantive Commercial Fishing Agreement;

5. The Parties, in working toward a long-term Substantive Commercial Fishing Agreement, will use their best efforts and be guided by the principles and commitments listed above. In so doing the Parties agree to:

i. Identify and communicate with each other about issues of concern;

ii. Address those issues in a manner consistent with the Principles animating this Framework Agreement in a collaborative way; and

iii. Where there is a disagreement between the Parties and after reasonable efforts, they are unable to reach agreement, the matter will be referred to Dispute Resolution as set out below.

II. GOVERNANCE AND IMPLEMENTATION

This Framework Agreement and the mutual commitments made herein will be governed by the following:

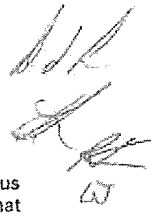
A. Governance Committee

1) A Governance Committee comprised of four representatives of SON and four representatives of MNR will be established. At least two of the representatives of SON will be the Chiefs of SON and of the four representatives of MNR, one shall be an Assistant Deputy Minister (ADM) of MNR. Quorum of the Governance Committee is two representatives from each Party with at least one Chief and one ADM

2) The Governance Committee will supervise, discuss and work collaboratively to meet the objectives, commitments and goals of this framework agreement set out herein.

3) The Governance Committee will work together on seeking the engagement of the Federal Crown, and any other agency or Ministry as agreed to herein, or in a long-term Substantive Commercial Fishing Agreement.

4) The Governance Committee will, as soon as practicable, establish budgets, work plans and working groups with sufficient resources to recommend proposals for inclusion in a long-term Substantive Commercial Fishing Agreement that address the commitments outlined in Section I-D of this Framework Agreement.



5) The Governance Committee will make decisions on a consensus basis that reflects the approval of both Parties. Where that consensus cannot be reached, the matter may be referred to Dispute Resolution as set out below.

6) The Governance Committee may agree upon the attendance of experts or advisors at its meetings from time to time.

B. Working Groups

1) The work of any Working Group may be combined, restricted or modified as the Governance Committee sees fit;

2) The Governance Committee will appoint representatives and if necessary advisors to the Working Groups, subject to agreement on funding;

3) Each Working Group will have joint chairs composed of a representative of each Party. The joint chairs will prepare agendas for Working Group's meetings;

4) The Working Group representatives for each Party will be given a copy of the Working Group records of each Working Group meeting and the work completed;

5) Each Working Group will complete the work set out in the approved work plan and shall meet in accordance with the approved work plan, and more often as required to complete the work set out in the work plan;

6) The quorum for any Working Group meeting is two Working Group representatives for SON and two for MNR, providing that notice of such meeting was sent at least one week in advance to all such representatives;

7) Each Working Group will make decisions on consensus as between the Parties through their Working Group Representatives. If consensus cannot be reached, then the matter will be referred to the Governance Committee;

8) Each Party may replace and appoint its Working Group representatives at anytime. The Parties agree that consistency and continuity in representatives and advisors are important.

III. TIMEFRAMES

1) The Parties will use best efforts to enter into a long-term Substantive Commercial Fishing Agreement by October 31, 2011.

IV. DISPUTE RESOLUTION

1) Disputes that arise in interpretation, application or implementation of this Framework Agreement are to be resolved by a meeting of the Governance Committee.

2) If, after reasonable efforts, the Governance Committee cannot resolve the dispute or matter in issue, it will be referred to a mutually appointed facilitator or mediator to assist the parties in resolving the dispute or matter in issue.

V. GENERAL PROVISIONS

A. WITHOUT PREJUDICE AND CONFIDENTIAL

1) This Framework Agreement and the work here under including the negotiation of a long-term Substantive Commercial Fishing Agreement will be conducted on the basis that they are confidential to the Parties and without prejudice.

2) In particular, the Parties agree that any documents shared in the negotiations shall be shared on a without prejudice basis and shall be kept confidential. The Parties acknowledge that such documents are subject to applicable access to information and privacy legislation, but nothing in this Agreement shall be construed as a requirement of any Party to make available information that is by law privileged or exempt from disclosure under the Freedom of Information and Protection of Privacy Act or otherwise.

B. TERMINATION

1) This Framework Agreement may be terminated:

(i) By mutual consent;

(ii) By either Party where in its reasonable opinion the Goals, Principles, Objectives or Commitments of the Framework Agreement are not being met; and then only after resort to facilitation or meditation which shall take place within thirty days of notice by one Party to the other of its opinion.

C. NON-DEROGATION

1) Nothing in this Framework Agreement shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal, or treaty rights of the SON as recognized and affirmed in section 35 of the *Constitution Act, 1982.*

D. FUNDING

1) The Governance Committee will, with input from Working Groups as required, develop a work plan and budget for the work to be undertaken under this Framework Agreement

E. BINDING

1) This agreement is binding upon the Parties and their successors.

NOW HEREIN THE PARTIES AGREE TO THIS FRAMEWORK AGREEMENT:

SIGNED
in the presence of:

Witness

Date:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Natural Resources
per:

Honourable Linda Jeffrey
Minister

Date: August 10, 2011

SIGNED
in the presence of:

Witness

Date:

Saugeen First Nation
As represented by: Chief Randall Kahgee

Chief Randall Kahgee

Date: August 10th/2011

SIGNED
in the presence of:

Chippewas of Nawash Unceded First Nation, as represented by: A/Chief Scott Lee

I have authority to bind the Saugeen First Nation.

EXHIBIT "H"

bayshore broadcasting
NEWS CENTRE

This is Exhibit ....H..... referred to in the affidavit of ...Paul Jones..... sworn before me, this ....15th..... day of ....August..... 20..13.
A COMMISSIONER FOR TAKING AFFIDAVITS

SON Gets Funding to Fish

Wednesday, March 13, 2013 5:40 PMby Manny Paiva
As part of new fishing deal, SON will receive 850 thousand dollars over 5 years.

click to open MP3 version
or click the play button to listen now.

(Regional) -

There are more details of the commercial fishing agreement for the Saugeen Ojibway Nation that has angered local politicians.

MP Larry Miller and MPP Bill Walker have read the fine print of the five year agreement and it shows the Ministry of Natural Resources is giving native commercial fishermen 170 thousand dollars a year.

That is a total of 850 thousand dollars -- and both politicians don't know what the money is for.

Bayshore Broasdcasting News has talked to staff at the MNR and they tell us the funding will pay for a review of fish stocking programs -- and it will also ensure compliance with the agreement. (see below)

Miller tells Bayshore Broadcasting News it's like kicking a man when he is done and it adds insult to injury.

MPP Bill Walker says it is upsetting commercial fishermen are being paid to fish in Colpoys and Owen Sound bays, where local sport fishermen love to fish.

Both Walker and Miller have already expressed disappointment and concerns for the implications the deal could have on local sport fishing, tourism and the economy.

Miller says Georgian Bay is big enough that commercial vessels can stay in the large bay while sportsmen can enjoy the smaller Bays.

Miller says he is deeply disappointed in learning the details and hidden aspects of this new agreement that will no doubt kill local sport fishing in these bays.

Miller calls the financial aspect of the agreement a a complete insult and a shameful act by the Ministry of Natural Resources.

Walker adds he finds it strange the Liberal government can find room for an 850 thousand dollar agreement while facing a 12 billion dollar deficit.

The five year agreement will come into effect on April 26th.

Calls have been made to the Ministry of Natural Resources to explain how the 850 thousand dollars for the Saugeen Ojibway Nation will be spent.

Miller says he has also tried to contact the Chiefs of Saugeen First Nation and Chippewas of Nawash.

Below are some of the points in the MNR SON agreement for the 850 thousand dollars.

MNR will provide SON up to $850,000 over a five year term of a new substantive commercial fishing agreement. This sum to be provided as follows:

Year 1: $250,000 for April 2012- March 2013 (subject to deductions made in accordance with the MOU signed by the parties on February 23, 2012)
Year 2: $180,000 for April 2013- March 2014
Year 3: $170,000 for April 2014- March 2015
Year 4: $150,00 for April 2015- March 2016
Year 5: $100,000 for April 2016- March 2017

Key activities include:

- ensuring effective governance
- setting safe harvest levels
- ensuring compliance with agreement
- collaborating on effective public communication
- review of stocking programs potentially affecting the waters defined in a long-term Substantive Commercial

Fishing Agreement
- Economic benefits and capacity for SON.

Ensuring effective governance

MNR will continue to seek input on the management of the fishery through fisheries management zone councils (groups made up of 15-20 volunteers representing a variety of stakeholder and interest groups) and meetings with our partners. MNR and SON will monitor commercial fishing and recreational use and meet in October 2013 to make sure that both commercial and recreational anglers can safely coexist, while maintaining a sustainable fishery.

Setting safe harvest levels

Under the terms of the agreement the parties have established three management zones covering the water of the agreement and a standing working group that will make annual recommendations on total allowable catch. All commercial catch by SON fishers must be reported. This data, along with data from independent netting and other sources will allow these recommendations to be based on a statistical analysis of the fish populations. 2013 quotas will be jointly established for lake whitefish, well in advance of when the limits are expected to be reached. The agreement also includes a process to consider establishing quotas for other species if harvest levels are a concern to either party.

Ensuring compliance with agreement

Enforcement is a shared responsibility. Ontario and SON have obligations under the agreement that they are committed to meeting. A joint governance committee from MNR and SON will meet regularly to, among other things, ensure the terms of the agreement are met. The new agreement commits to a cooperative approach to achieving compliance with the terms of the agreement and implementing its objectives and commitments.

Owen Sound , 97.9 The Beach, Port Elgin

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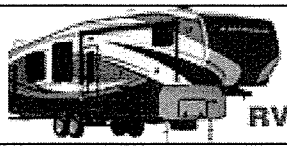
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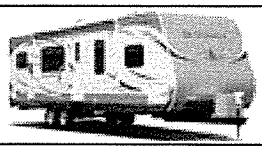
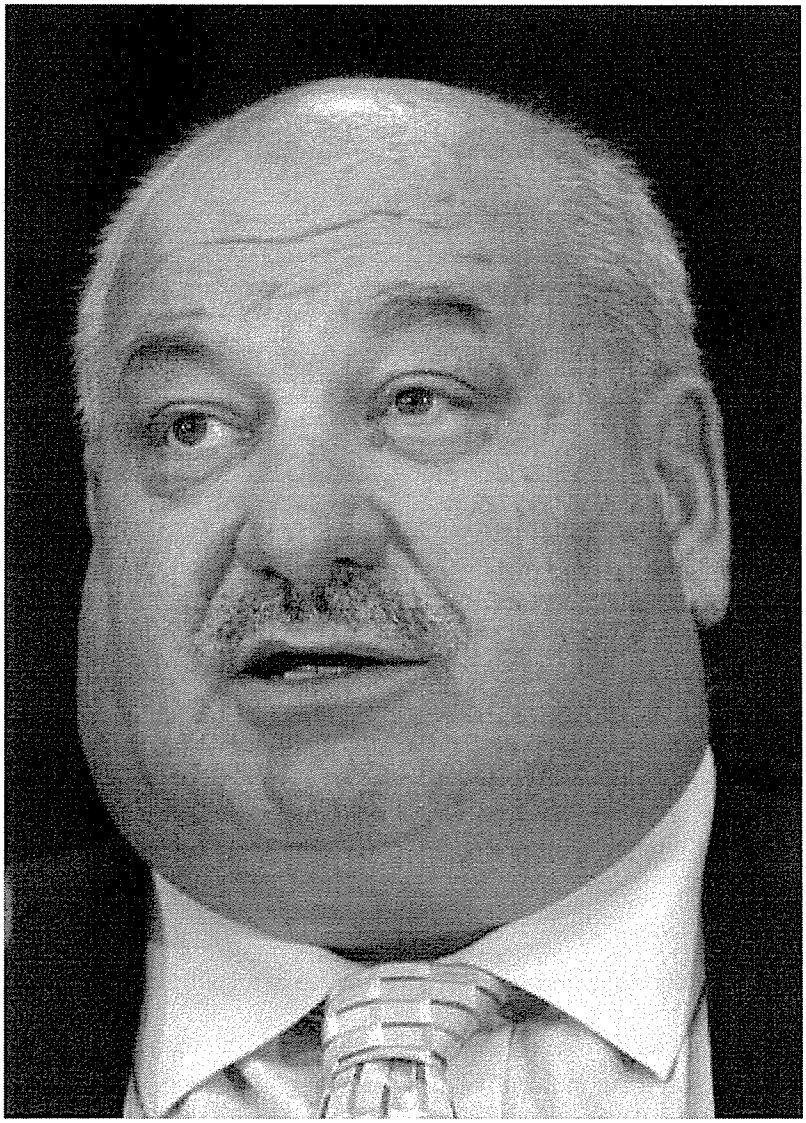


Miller calls fishing agreement a mess

By Denis Langlois, Sun Times, Owen Sound
Thursday, March 14, 2013 12:12:50 EDT PM



Bruce-Grey-Owen Sound Conservative MP Larry Miller

Allowing commercial fishing in Owen Sound and Colpoys Bay is a "slap in the face" to local sportsmen's groups and others who support the recreational fishing industry, says MP Larry Miller.

"I am very disappointed," the Bruce-Grey-Owen Sound Conservative politician said in an interview Tuesday.

He said based on the information released, the new commercial fishing agreement between the provincial government and

Saugeen Ojibway Nation is a "mess."
Proper consultation did not take place, he said. "This thing has not been handled right. People are very frustrated right now."
The deal could lead to "more dissension" on the water as recreational and commercial fishermen attempt to coexist on Owen Sound and Colpoys Bay.
He said there is "lots of room" in Georgian Bay for both sports and commercial fishing, but the two bays are not the place.
Sports groups, like the Sydenham Sportsmen's Association, do a "tremendous amount of work" to stock the bays with fish to support the sports fishery, he said.
Commercial fishing in the bays will hurt the sports fishery and events like the Salmon Spectacular, he said.
Miller said he plans to meet with local fishing groups and others to hear their concerns. He said he also hopes Cape Croker Chief Scott Lee will return his telephone calls.
The Ministry of Natural Resources announced in a news release Monday that the province and Saugeen Ojibway Nation have signed a new five-year agreement which will allow commercial fishing to "resume in Owen Sound and Colpoys Bay on April 26, 2013, and continue year round over the term of the agreement."
The MNR says the agreement will also contain measures to allow commercial and recreational fishing to coexist in the two bays.
The province says both the MNR and SON will monitor commercial fishing and recreational use in Owen Sound and Colpoys Bay and will meet in October to make sure both commercial and recreational anglers can continue to safely coexist while maintaining a sustainable fishery.
According to a background document from the MNR, nets will be marked "in an effective and standard manner that will be communicated to all recreational boaters" and will not be longer than 300 metres.
To cut down on catches of trout and salmon — species raised in hatcheries by local sports fishing clubs — nets set in the two bays will have a mesh size of 4.5 inches or greater and have a maximum height of 50 rows of mesh, the MNR says.
During March, April, October and November, commercial fishermen will make best efforts not to set nets within a one-kilometre radius of the mouths of Bothwells Creek, Colpoys Creek, Waterton Creek, Keefers Creek and Gleason Brook to protect spawning salmon and rainbow trout.
Miller said the use of the words "best effort" are a concern. "Those kinds of words mean there's nothing concrete," he said.
The agreement covers waters surrounding the Bruce Peninsula from Point Clark in the main basin of Lake Huron to the international border and around the Bruce Peninsula into Georgian Bay to Craigleith. This area is recognized by SON as its traditional waters.

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MaryAnn Wilhelm

Every year we go through this, the bogeyman is here, the natives are going to decimate the fish.

Last year's sport fishing derby was a success and yes during that time, aboriginals did exist and they were fishing, shopping, eating in restaurants, doing "normal" stuff, contributing to the economy, paying taxes, volunteering, and heck you know what, we even went to the library and went swimming at the YMCA. The point here is that sports fishing was successful last year and natives were still around enjoying their constitutionally/court acknowledged rights. So,what's in it for Geberdt to jump on the wagon to spread unfounded fear? I don't get it. Last year, he commented on the success of the derby that he co-chaired. Fred Geberdt said more fish entered this year(2012) indicatesthe ecosystem is "rebalancing" from invasive species and the loss of the alewife, a fatty little fish which salmon used to gobble up, produce derby-winning

30-pounders of the past. This is good news for the sports fishing industry. The only downside to this is that the primary fish that native fishermen catch is whitefish, this is the fingerling that salmon adapted to eating amongst other native fingerlings.

Miller is in denial of aboriginal's legal rights and he is using this issue(like he regularly does), as a platform to throw waves in an already sensitive situation. Saugeen First Nation, Chippewas of Nawash and other stake holders all have vested interests in the success of the fishing industry as well as tourism. Let's understand it for what it is; Miller's attempt to garner people's attention onto him and his party by using native rights as a ploy to stir animosity. This reflects terribly on Conservatives. If we fall for his ploy, then he will prove that we are a bunch of ill informed viewers incapable of doing our research that is available on the internet.

As for that 850,000, I would simply remind viewers that this is not uncommon even outside of a First Nation community. Many small towns, who don't have a money to do research, or run a service mandated by municipal law/agreements receive such monies. And yes, that information is on the internet too.

If there is anything that can be agreed on, yes, there is lots of room in Georgian Bay and Lake Huron.

By the way, yes, there are quotas, all commercial fishermen must have quotas, and they abide by it. It's no big secret, it's not a mystery, they aren't under a cloak of invisibility. They fish in public, they dock in public and they are hospitable. So go out there, buy a fish, go to local community events that host fish fry dinners. :)

·´¯`·.¸.·´¯`·... ><((((º>

(Edited by author 3 months ago)

3 months ago 5 Likes Flag Like

cobycray

Hurray for Larry Miller
It is about time someone questioned these deals that are made behind closed doors and advise the general public after the deal is done.
You refer to the return of the alewife and other bait fish. If the ecosystem is so fragile, and is finally starting to recover, why on earth would the MNR, with all their infinite wisdom, now change things and risk screwing it up.
You also stated that last years derby was successful and at the same time the natives where also successfully carrying on their commercial netting business.
If this is the case, why are the natives so anxious to start dropping nets in these, some what sheltered bays, where the non native, TAX PAYING, public, can take our children and grandchildren in a small family boat to enjoy the sport of catching a fish.
You are correct, there is lots of room on Georgian Bay, that's why it is so ridiculous to allow commercial fishing in the waters of these two bays.
This is just another typical case of "we want it all, and can never get enough"
Are you really suggesting the white man should have no rights to fish these waters, we should be happy going to community fish fry and buy the fish you are selling, after our tax dollars that stocked them in the first place.

3 months ago in reply to MaryAnn Wilhelm Flag Like

fromthecheapseats

1) Did the MNR ever disclose the contents of the initial agreement. I know there were a number of Freedom of Information requests that were ignored by the gov't.
2) What are the contents of this agreement, they should be published and why no input from the rest of the stakeholders?
3)There's a quota? How was it determined and really, is there a quota at all? If there is, what is it, how many tonnes? I don't believe this gov't.

4)Who is going to monitor the catch. The same inspectors who don't do it now?
5)MPP Larry Miller should demand that the Minister for the MNR come to Owen Sound and explain the details of this agreement
60Anyone who belives that the Indians will be the "stewards of conservation" are dreaming in technicolour. The fishery is doomed to collapse.

3 months ago 1 Like Flag Like

skyhawk41

Law abiding citizens can ask intelligent questions,we can express disappointment, we can be frustrated etc. until the cows come home, and nothing will change.For my part, I would like to get to know these people at the MNR who take it upon themselfs to make significant fishing agreements with Indian people without any input or consultation from local residents, business people and tourist associations. I bet they haven't, got the balls to release their names or come to Owen Sound and Wiarton to face the music from residents who are fed up with this new treatment. Actions by the MNR and representatives of Indian people in the area do not create harmonious relations ships in the greater community.

I hope Larry Miller will get his telephone calls answered since he represent the Federal Government, the talking partner for Indian people in this area.

3 months ago in reply to fromthecheapseats 3 Likes Flag Like

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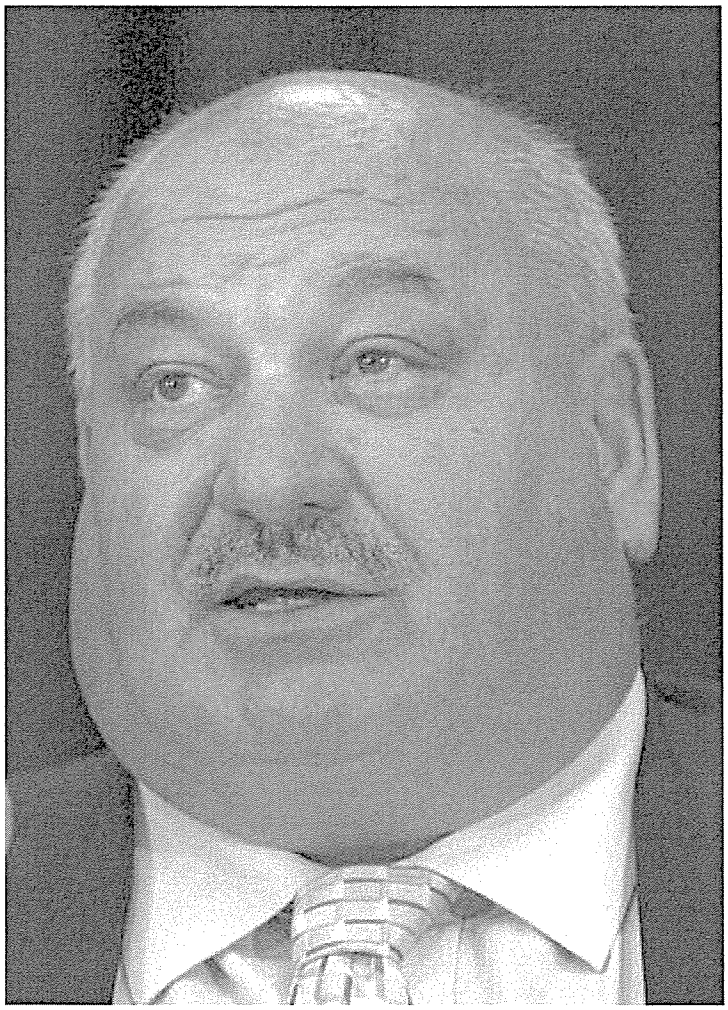
NEWS LOCAL

Miller, Walker condemn payments to SON

By Scott Dunn, Sun Times, Owen Sound
Thursday, March 14, 2013 12:08:06 EDT PM



Larry Miller

An $850,000 payment over five years to Saugeen Ojibway Nation under the latest native commercial fishing agreement announced this week drew cries from Bruce-Grey-Owen Sound Conservative MP Larry Miller and Progressive Conservative MPP Bill Walker on Wednesday.

The pair issued a joint news release condemning the annual payments to be made on a sliding scale starting at $250,000 in the fiscal year ended this March and dropping to $100,000 in the year ending March 2017.

Details about the agreement announced Monday were made public Tuesday.

Walker warned Monday that by allowing native commercial fishing nets into Colpoys and Owen Sound bays, local sports fishing and tourism opportunities could be destroyed. Wednesday he went further.

"Not only are vessels being put in the bays where local sport fishers love to fish, but they are being paid to be there. This is very upsetting," Walker said in the release, adding he wondered where the provincial government would find the money.
Miller said Wednesday "I am deeply disappointed in learning the details and hidden aspects of this new agreement that will no doubt kill local sport fishing in these bays.
"When I found out that commercial fishing rights were being granted I felt it was a slam against local recreational fishers, after reviewing the agreement and finding out that about $850,000 will be provided by the province, I feel as though this is a complete insult and a shameful act by the ministry."
The new 40-page, five-year agreement, which runs until Feb. 25, 2018, contains many detail which will be digested in the coming days.
But the Ministry of Natural Resources highlighted one key change when announcing the new agreement — that native commercial fishermen may set nets in Owen Sound and Colpoys bays year-round starting April 26.
While the last agreement was in effect native nets were pulled back during the annual Salmon Spectacular fishing derby in August so as not to interfere with sports fishing during the derbies as was seen in the past.
Repeated efforts seeking comment from the chiefs of Saugeen Ojibway Nation since Monday have been unsuccessful. Mike Morencie, director of the fish and wildlife services branch of the Ministry of Natural Resources, responded Wednesday to questions raised by Walker and Miller.
"The SON have a court-affirmed sustenance commercial fishing right to be in those waters," Morencie said. "The SON is not being paid to fish. The payments are for the assessment and doing all the data collection for that fishery and their fishery," said Morencie, who was part of the team which negotiated the agreement for the MNR.
Jessica Spindler, in the office of the minister of natural resources, followed up by e-mail on the payments calling the money "implementation funding."
The money will be spent ensuring effective governance, setting safe harvest levels, ensuring compliance with the agreement, collaborating on effective public communication, review of stocking programs potentially affecting the waters defined in the fishing agreement, economic benefits and capacity for SON, she wrote.
The new agreement also allows for consideration of further spending beyond the $850,000 over five years but funding won't be guaranteed, Morencie said. He noted the money is coming from the MNR's fish and wildlife branch budget, not from a separate account comprised of hunting and fishing licence revenue.
Morencie wouldn't say how much money was provided to SON in or outside of the previous two commercial fishing agreements struck in 2000 and 2005. He said that's because they were never made public. That lack of disclosure is something Miller and former MPP Bill Murdoch have fought through a freedom of information request, while both native communities comprising SON have opposed those efforts.
Walker said Wednesday it's ironic local volunteer sport fishing groups receive at most $10,000 for stocking programs when the fishing agreement provides $850,000 to SON.
Morencie agreed but said that's not the whole story. "I spend I don't know how many millions of dollars raising fish for stocking in water bodies right across the province. We raise and stock throughout this province about 8.5 million fish at various life stages to many water bodies, like hundreds of water bodies," including lake trout for Lake Huron.
The ministry also provides fish eggs to some clubs and has another program which provide funds.
The fishing agreement also directly addresses native commercial fishing concerns that stocked fish may be harming the commercial fishery. The agreement provides for a fish stocking working group to study the science around the claims.
"We're going to have a look at it," he said. "We're also doing a broader stocking plan on Lake Huron, where all the clubs and all the recreational folks have been engaged and provided input already to date. So we're going to marry the two of them up."
Asked if this could lead to the end of fish stocking in the territorial waters of SON, Morencie said he doubted it.
"The outcome is still yet to be determined but my personal opinion is no, stocking will not stop. It may be at different levels. I'm presupposing an outcome and I prefer not to do that."
The agreement provides for the creation of a governance committee, working groups which will make recommendations to it, including total allowable catch limits, stocking, communication/education and economic development.
Data exchange provisions are included, the agreement says, to "ensure the sustainability of the fishery, to ensure the parties' mutual responsibility for fisheries assessment work and to assess the TAC," or total allowable catch.
The MNR agrees to exchange annual Lake Huron lake-wide harvest data from commercial fishermen who are not SON members and, to the extent available, from recreational anglers, the agreement says.
SON agrees its commercial fishermen shall report to SON their daily catch for all species and their fishing effort, including location of catch, gear type and the length of time nets were set. The SON agrees to share that information with the MNR in accordance with a process set out by the governance committee under Schedule D, which covers total allowable catches and data exchanges.
The agreement also contains a dispute resolution process and stipulations concerning data exchange, compliance and funding.

scott.dunn@sunmedia.ca

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Kitty Bird

Umm, fromthecheapseats: did you actually read the news article? They say that the catch levels will be the same as before. I guess I just don't get it: under the native fishery, the population levels are actually up. And from what I follow in the news, its the two Indian bands that are the ones who are standing up to question water and fish issues these days, which I (as a non-native) appreciate. Because Larry Miller certainly did not do any favours to regional tourism or the sports fishery when he stood by and let his government destroy all the federal legislation that protects water and fish in the last budget. I'd say, based on the record that the Saugeen people had for thousands of years before my family got here, they have a better track record of protecting fish and water than the government did before the native fishery started back up again, and than this government does....

4 months ago 8 Likes Flag Like

fromthecheapseats

To Daylin Robson:
OK...You are clearly in the know here unlike the rest of us mushrooms (kept in the dark and fed horse manure).The SON and MNR make an agreement basically in secret and you tell us not to worry. Forgive me for my skepticism, but I have trouble with secret deals. Is there a quota and on what basis was it established? Is the quota for whitefish only or does it include other incidental catches of salmon and rainbow trout. How many metric tonnes are allowed? How was the quota established? Are the catches going to documented, monitored, enforced and by who? I don't care who it is doing the netting, my biggest concern is the sustainablity of the fishery for all of us to enjoy. Just saying, "Trust us" doesn't cut it with me. Please explain how this will not have a detrimental impact on the fishery. Non-Indians need to be convinced that this deal is not going to decimate the fish populations in these bays. I have little faith in commercial fishermen (regardless of who they are) and even less faith in the MNR and Provincioal Gov't. I look forward to your response.

4 months ago 2 Likes Flag Like

Daylin Robson

And jsut to clear things up i am an aboriginal first nations of this area and i am a white person with irish and scotish bood in me there is no racism or discrimination involved here i take full grasp of both my heritages i understand where a non-native comes form but the difference in me is i see from both sides dont look at a small portion look at the big picture

4 months ago 3 Likes Flag Like

Daylin Robson

But then again everyone knows more than me even though im first nations to this area and iv lived here for some time my family si form all around here but nope i know nothing everyone elses knows more than me lol

4 months ago Flag Like

Daylin Robson

still everyone here is looking at the negative side of things but listen to this.

'Every year we seem go through this, the bogeyman is here, the natives are going to decimate the fish:Forget for now that he wanted to encourage Canada to separate itself from the United Nations; he's now after something closer. Every renewal of fishing agreements, he gets in front of cameras, foaming at the mouth eager to take a bite at constitutionally bound rights of the Aboriginals in Grey Bruce. Last year's sport fishing derby was a success and yes during that time, aboriginals did exist and they were fishing, shopping, eating in restaurants, doing "normal" stuff, contributing to the economy, paying taxes, volunteering, and heck you know what, we even went to the library and dare I say it- we went swimming at the YMCA. Let's get back to my point here and that is sports fishing was successful last year and natives were still around enjoying their constitutionally/court acknowledged rights. Now, I can understand why Miller would do this, but what's in it for Geberdt to jump on the wagon to spread unfounded fear? I don't get it. Last year, he commented on the success of the derby that he co-chaired. Fred Geberdt said more fish entered the derby in 2012 which indicated the ecosystem is “rebalancing” from invasive species. He went on to attribute the real problem which is the loss of the alewife, the food that made 30 pound salmon possible. The only downside to this is that the primary fish that native fishermen catch, which is whitefish, is the same fingerling that salmon adapted to eating amongst other native fingerlings.Miller is in denial of aboriginal's legal rights and he is using this issue (like he regularly does), as a platform to throw waves in an already sensitive situation. Saugeen First Nation, Chippewas of Nawash and other stake holders all have vested interests in the success of the fishing industry as well as tourism. Let's understand it for what it is; Miller's attempt to garner people's attention onto him and his party by using native rights as a ploy to stir animosity. This reflects terribly on Conservatives. If we fall for his ploy, then he will prove that we are a bunch of ill informed viewers incapable of doing our research that is available on the internet.As for that 850,000, this is not uncommon even outside of a First Nation community. Many towns, who don't have a money to do research, or run a service mandated by municipal law/agreements receive such monies. And yes, that information is on the internet too.By the way, there are quotas, all commercial fishermen have quotas, and they abide by it. It's no big secret, it's not a mystery, they aren't under a cloak of invisibility. They fish in public, they dock in public and they are hospitable, unlike Miller.If there is anything that can be agreed on, yes, there is lots of room in Georgian Bay and Lake Huron.

4 months ago 3 Likes Flag Like

inthebush

The Harper Regime is the worst thing that could have happened to Canada and Canadians. Arm Canada to the teeth with billions and billions of dollars of dinosaur technologies "ready" to chase bogeymen around the world. Scrap almost all environmental laws in Canada. Open up uncontrolled development of tar pits, stop protecting lakes and rivers, selling off huge Canadian assets to foreign countries, mis-appropriating huge amounts of money??? Throwing potheads in jail all the while previous prime ministers can hide money from the taxman and then when the taxman finds out REV CAN only taxes them on 50% of what was "claimed". No penalties, no interest, no further investigation. Yes I'm referring to our dishonourable Brian Mulroney, "Con"-servative.
Insane really. Parties on the "left" need to re-align and stop this dictator from ruining what is left of the Canada that almost all of our grandfathers and grandmothers fought for. More people voted for someone other than the "con" servatives yet they are running (ruining) the country.

(Edited by author 4 months ago)

4 months ago in reply to Daylin Robson 2 Likes Flag Like

MaryAnn Wilhelm

I have heard of the "left" aligning themselves, there is lots of buzz out there for it to happen. I suppose it wouldn't be much different than when the right aligned themselves.

4 months ago in reply to inthebush 1 Like Flag Like

inthebush

It seems unfortunate that more people voted for other parties than the one that is in power, yet the current 'government" seems ok to rule like a dictator. History will reflect poorly on the "con"servatives/reformers. Even his own

party members are afraid to poke/question the beast as they may be severely reprimanded and/or sent to the bronies!

4 months ago in reply to MaryAnn Wilhelm 3 Likes Flag Like

artie99

" paying taxes"... yeah, right!

4 months ago in reply to Daylin Robson 1 Like Flag Like

Daylin Robson

yep is that a shock to u lol artie u need to get educated b4 u start to pick a fight lol r u native no do care no and u wont ask quewstions ot get a better underestand so u dont sit there looking liek an idiot ignorance gets you very far in life bud educate urself ask questions b4 u start comign to conclutions

4 months ago in reply to artie99 4 Likes Flag Like

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Bill Walker MPP

Sport Fishers sold out by MNR

Joint News Release: MPP Bill Walker and MP Larry Miller
For Immediate Release
March 12, 2013

Sport Fishers sold out by Ministry of Natural Resources: Response from MPP Walker and MP Miller

Bill Walker, MPP for Bruce-Grey-Owen Sound, and Larry Miller MP, are very disappointed with the new 5-year fishing agreement announced for the local commercial fishery.

"I am very concerned about the implications of this agreement. What happens to the fishing derbies such as the Salmon Spectacular? What is the potential impact on tourism and our economy?" stated Walker. "I definitely want to hear from our local clubs and stakeholders."

"Conservation and sportsmen's groups who have worked tirelessly to support and promote the local sports fishery, have once again been ignored and snubbed by the province", said Miller. "Georgian Bay is big enough for both the commercial and sports fishery. There is no need for commercial fishermen to be in Colpoys and Owen Sound Bays".

Among the principal concerns that have been expressed in regards to this decision is that of safety. A commercial fishery could have severe repercussions on safety due to the presence of commercial fishing vessels in the bays of Colpoys and Owen Sound.

Walker and Miller will be discussing with local stakeholders on the issue and will be speaking with Ministry officials about their concerns with this decision.

Contact:
Ana Sajfert, EA
Office of MPP Bill Walker, Bruce-Grey-Owen Sound
416-325-6242
or
Chad Richards, LA
Office of MP Larry Miller, Bruce-Grey-Owen Sound
613-996-5191

IMPORTANT ANNOUNCEMENT **April 20, 2013.**

Concerned Anglers to Host Session on Commercial Fishing Agreem

Attention anglers! Attention community leaders! Attention conservationists! Attention community businesses! Attention First Nations! Attention MNR!

Are we truly concerned about the future of sport-fishing in Owen Sound and Colpoys Bay? Are we concerned about the volunteer sport-fish rearing programs by local clubs? Are we concerned about sustaining and enhancing our sportfish populations and fish conservation? Are we concerned about our fishing image on the world stage, tourism and the international reputation we have achieved as one of North America's premiere sport-fishing destinations? Are we concerned about the huge economic spin-off benefits that a healthy sport-fishery generates within the fishing industry, our fishing tackle shops, the marinas, restaurants, motels and much more? Are we concerned about waterfowl conservation? Are we concerned about boater safety and the loss of and damage to fishing gear, boats and marine equipment? Are we concerned about improving relations with MNR and First Nations people?

If you agree on some or all counts, then this is your invitation to attend an upcoming Town Hall style, non-confrontational information meeting on the recently released Fishing Agreement between MNR and the Saugeen-Ojibway Nation (SON). The meeting has been arranged by concerned anglers and is scheduled for Saturday, April 27th in the Club House Lounge at the Hepworth-Shallow Lake Legion., located in Hepworth. Start time for the morning meeting is 9:00 a.m.

Concerned anglers would like to see a large contingent in attendance to offer their thoughts on where do we go from here, on the new SON commercial fishing agreement, which could adversely impact sportfish, lake trout and whitefish populations and sport-fishing in Owen Sound and Colpoys Bay, and beyond. This is not a segragated forum. As stated above, the reserve chiefs are invited to attend to offer their input.

Aside from a predicted marked decline in the sport-fishery in Owen Sound and Colpoys Bays, we are looking at potentially significant mortality rates on wild and stocked rainbow trout, brown trout and chinook salmon that will be captured and killed in non-selective gill nets. We are looking at the potential end of major fishing tournaments, such as the Owen Sound Salmon Spectacular. We are potentially looking at our communities no longer being a formidable tourist fishing destination. We are looking at our club hatcheries possibly closing their doors. MNR's attempt to re-establish self-sustaining lake trout stocks in the waters of southwestern Georgian Bay is in trouble. Will over-fishing lead to the end of this restoration effort?

Gill netting in Owen Sound and Colpoys Bay is not just a trout and salmon issue. We are looking at the indiscriminate killing of waterfowl and other diving birds, such as loons, who become entangled in gill net mesh. Both bays are becoming increasingly significant stopover, winter resting and feeding waters for these various bird species.

We are looking at marine equipment damage due to entanglements in gill net sets, not to mention the threat of boater safety. Have we forgotten about the four anglers that drowned near Manitoulin Island when their fishing boat sank after being pulled under when their down-riggers became tangled in a gill net?

For all of the above reasons, sport and commercial fishing is just not compatible in our local waters. Both cannot co-exist in the confined environment of Owen Sound and Colpoys Bay due to so many conflicts.

There is a solution. Owen Sound and Colpoys Bay should be declared sanctuary waters by MNR and SON from all forms of commercial fishing. If the Saugeen-Ojibway people truly wanted to improve relations, respect and trust with the sport-fishing community and related benefactors and local municiplaities, then they should look at this approach, and declare these waters off-limits to commercial fishers from both bands, restricting their commercial fishing efforts to the outer waters described in previous Fishing Agreements. There is established precedent by a Native community in northern Ontario, to their credit, which has already taken a pro-active, very positive step to eliminating conflict and damage to the sport-fishery by declaring specific waters off-limits to their commercial fishers. Kudos to that native community for such forward, conservation minded thinking. Could the SON not follow this northern

Ontario band's lead?

How ironic is that in their April 9, 2013 Press Release, Chief Lee and Chief Kahgee say "these waters are sacred to us." If the waters of Owen Sound and Colpoys Bay are truly "sacred" then sit down with MNR and other stakeholders and re-negotiate a new Fishing Agreement which allows for the fair sharing of the fisheries resource, outside of the confined, sensitive waters of both bays. MPP Bill Walker has already called for repealing the current Agreement and has a Petition circulating to that effect. This offers a perfect opportunity to an amended Fishing Agreement with a negotiating process that is open to transparency and public dialogue.

On a broader note, the MNR-SON Fishing Agreement also pertains to waters spanning from central Lake Huron north to the Bruce Peninsula and down the southwestern Georgian Bay coast to Nottawasaga Bay. There was no public consultation by MNR-SON, despite previous promises to do so by MNR, with the shoreline communities, outdoor clubs and the tourist-business sector, on suggestions for protecting sport-fish and sportfishing, while at the same time, enabling a viable SON commercial fishery.

We remind MNR and SON about the front page headline in the October 29, 2008 Sun Times... **'Sportsmen Get Voice In Next Fish Talks.'** The Hon. Donna Cansfield, MNR Minister at the time, made it quite clear in the Sun Times article that talks would be public. *"I did make a commitment ... that when the the agreements come up in the future, there would be some really good conversations that goes on and that their views (the Bruce Peninsula Sportsmen) would be heard and respected."* Minister Cansfield went on to say *"I say to them (the sportsmen), it's not about them, it's not about the First Nations - it's about the fish. The sustainability of that fish and that fish population is my responsibility as the minister of natural resources. How do we get as much input as possible from everyone who has a role to play from the scientists and the biologists to the recreational fishing folks and the First Nations? It should be a very good conversation with everyone."*

To all area Lake Huron-Georgian Bay outdoor clubs, municipal officials, sport-fishermen, the business community, MNR staff and the Saugeen-Cape Croker Chiefs, by way of this announcement, are invited. Let's have some constructive fisheries management dialogue, Saturday, April 27th, 9:00 a.m. at the Hepworth-Shallow Lake Legion.

Concerned Lake Huron-Georgain Bay Anglers:
A. Clark
B. Harron
D. Fidler
R. LeGrand

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Chief Council
-Son. Jake Linklater

Small turnout at commercial fishing protest

By Denis Langlois, Sun Times, Owen Sound
Friday, April 26, 2013 9:08:50 EDT PM

One of the main organizers of a "peaceful protest" Friday against the province's new commercial fishing agreement with Saugeen Ojibway Nation said he figured more people would have showed up for the event.

There has been a lot of "talk" about the five-year deal, said Michael Hutt, and more than 1,000 signatures have been collected on a petition that calls for it to be repealed.

"Everybody complains, complains, complains so I figured, have a gathering to show your support (for the sports fishery). But, there's a lot of people that I think are afraid to show up," he said in an interview at the west-side boat launch.

Hutt said the protest was against the government of Ontario, not native commercial anglers.

About 80 people attended the event, which was held on the day the controversial agreement took effect.

Several police officers, including some in a police boat, stood watch.

Most people stood and chatted on the harbour wall. No one held placards or chanted slogans.

About six small recreational fishing boats with Canadian flags on them were launched at the start of the protest.

Hutt said he is concerned about the "future of fishing" and the safety of anglers on the water — because of gill nets — now that the agreement states that commercial fishing can resume year round in Owen Sound and Colpoys Bay.

He said he is also upset with the provincial government for not consulting with local sports fishing groups before the deal was signed.

"It feels like the agreement was done up and no one was told about it," he said.

Dave Fidler, a recreational fisherman for about 50 years, said he doesn't think the entire agreement should be repealed. Commercial fishing, however, should be banned from Owen Sound and Colpoys Bay, he said.

"I have concerns about what these gill nets will do to the fish," he said.

Arnie Clark, an avid angler, said he would like the two bays declared "sanctuary waters" where sports fishing is allowed but not commercial fishing.

He said he would like the current agreement repealed and a new one negotiated with consultation from the sports fishing community.

Natural Resources Minister David Orazietti has said his ministry "very clearly represented the interests of non-Aboriginal anglers" while negotiating the agreement.

He has said SON voluntarily negotiated it with the province even though they are not obligated to do so under their treaty rights to fish.

A petition from Bruce-Grey-Owen Sound MPP Bill Walker was being passed around for people at the event to sign. It asks the Ontario Legislature to repeal the agreement immediately and re-negotiate a new one "in consultation with all key stakeholders including the sports fishing community."

Walker, who was at the protest, said he will continue to meet with local sports anglers and other stakeholders and come up with possible amendments to the agreement to present at Queen's Park.

Bruce-Grey-Owen Sound MP Larry Miller also showed up for the protest.

A meeting, organized by "concerned anglers," is scheduled for Saturday at 9 a.m. at the Royal Canadian Legion in Hepworth.

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skyhawk41

I agree with Bev003. On the other hand, the smaller then expected turnout is typical of Canadians who prefer to talk about and criticize contentious issues, rather then show their disagreements with a personal demonstration on the streets etc. We are now living in a political climate where the average citizen who has a concern, is not being

heard; just like peeing against the wind.
We should get our ultimate satisfaction by throwing the Liberal bums out at the next provincial election.

1 month ago 4 Likes Flag Like

Bev003

If this event had been held at a different time there might just have been a larger turnout. There is still a few of us that have jobs that require us to go to work every day. At least that's why myself and several others did not attend. Just so you know Machael we are not affraid!!!

1 month ago 4 Likes Flag Like

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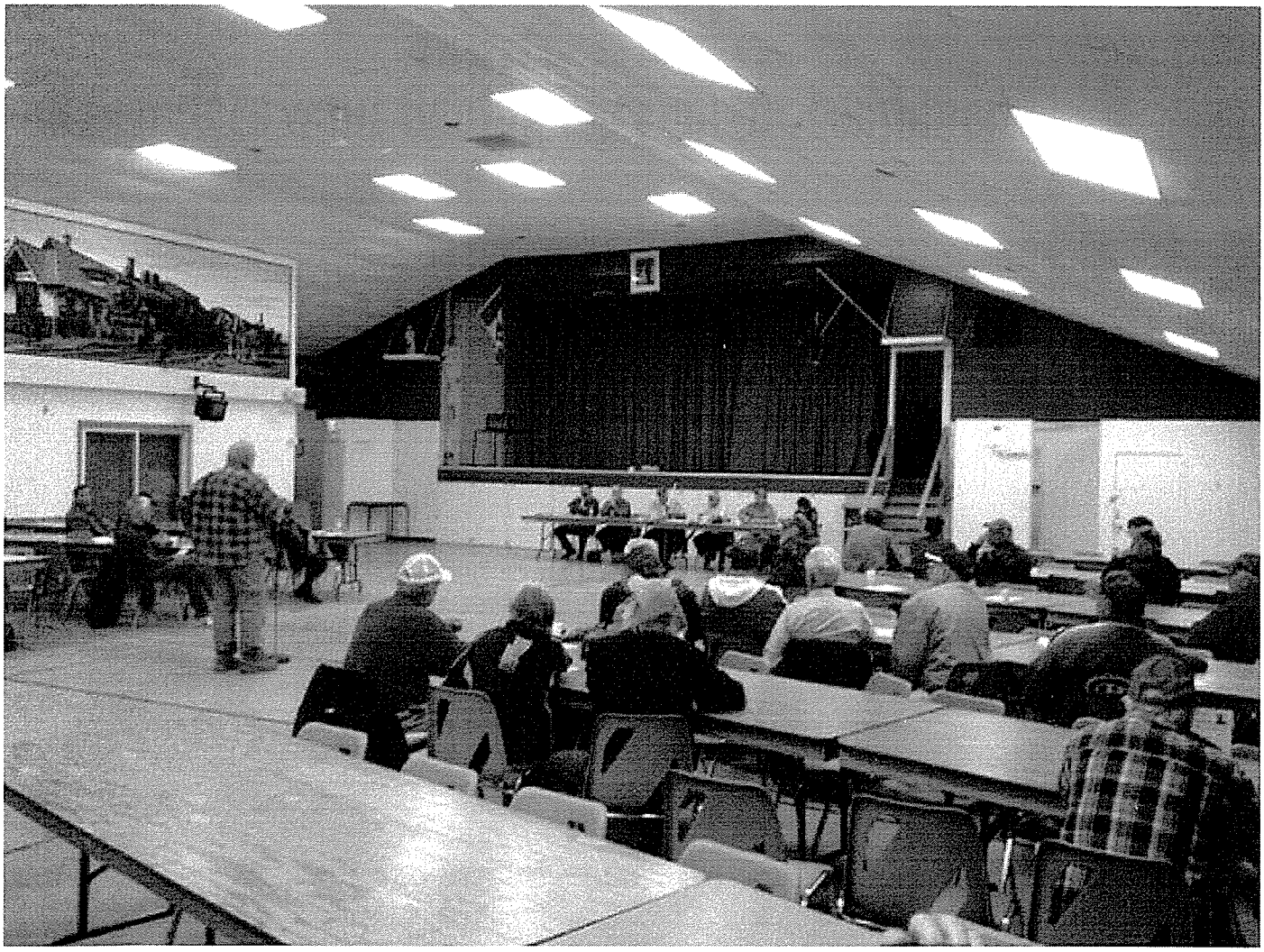
Sports anglers want fishing agreement reopened

By Denis Langlois, Sun Times, Owen Sound
Saturday, April 27, 2013 2:35:45 EDT PM



A man speaks to a panel of concerned anglers at a forum Saturday in Hepworth on the commercial fishing agreement between Saugeen Ojibway Nation and the provincial government. (DENIS LANGLOIS/QMI AGENCY)

Sports anglers and local politicians at a forum Saturday made repeated calls for the province to reopen its commercial fishing agreement with Saugeen Ojibway Nation and consider including amendments in consultation with stakeholders.

Georgian Bluffs Mayor Al Barfoot said his council has instructed him to send a letter to Natural Resources Minister David Orazietti to ask if the province would consider revisiting negotiations.

"We'll see if he responds to that," Barfoot said at the forum, organized by concerned anglers, at the Royal Canadian Legion in Hepworth.

He said the issue is a "huge concern" for Georgian Bluffs since it is the only municipality that borders both Owen Sound and Colpoys Bay.

The agreement, which took effect Friday, says commercial fishing can resume in the two bays year round.

Bruce-Grey-Owen Sound Progressive Conservative MPP Bill Walker said he hopes to convince the Liberal government to reopen the agreement and add clauses that protect the sports fishery.

He again criticized the MNR for not consulting with him before the deal was finalized.

"This is happening in my backyard. Why wasn't I there?" he said.

About 120 people attended the forum. It was moderated by former Chatsworth Mayor Howard Greig, who said the purpose was to send a message to Queen's Park that sports anglers are not happy with the agreement.

A panel of four concerned anglers, none of whom represented a specific group, addressed the crowd before a microphone was made available to audience members who wanted to make a comment.

Almost everyone who approached the mic criticized the five-year agreement and voiced concerns about the future of sports fishing in local waters.

Orazietti, who was in Grey-Bruce last week for a ceremonial signing of the agreement, has said Saugeen Ojibway Nation voluntarily negotiated the deal with the MNR even though they are not obligated to do so under their treaty rights to fish.

He said the MNR "very clearly represented the interests of non-Aboriginal anglers" while negotiating the agreement.

The group Peace and Justice Grey Bruce made available at the forum a leaflet that says several court decisions have upheld the "unfettered rights" of Saugeen Ojibway to fish local waters.

"We have no proof that sports fishing will be harmed," the two-sided leaflet says. "A much bigger danger to the future of the Salmon Spectacular and the fish in Georgian Bay is coming from somewhere else: the Asian carp."

Bruce-Grey-Owen Sound Conservative MP Larry Miller told the crowd at the forum that there is nothing in the native commercial fishing agreement that protects the local sports fishery.

Gaye Smith, an angler from Paisley said he does not like that people are called racists when they voice concerns about the agreement. That's simply not true, he said.

People are concerned about the local sports fishery and are upset, he said, that the deal was done behind closed doors with no consultation from recreational anglers.

"We are very, very frustrated at what has happened," he said.

Ray Marklevitz, manager of the Bruce Peninsula Sportsmen's Association hatchery, said if the agreement were to be reopened, he would like to see SON and the province renegotiate what type of equipment can be used by commercial anglers in Owen Sound and Colpoys Bay.

Instead of gill nets, he said equipment that allows anglers to release live sports fish back into the water but keep whitefish should be used.

David McLaren, who lives at Cape Croker and has worked with Ontario First Nations, said seeking to reopen and renegotiate the agreement is most likely a non-starter.

"But there is room for talk" with local First Nations, he told the crowd, "to see if accommodations can be made that way."

Colleen Purdon, an Owen Sound city councillor, said the agreement has stirred up a lot of emotion, but "the path forward for us as a community is to work together" with local First Nations.

She suggested efforts be made to "engage in respectful dialogue" with First Nations officials.

The two-hour forum in Hepworth was held a day after sports anglers held a protest against the provincial government and the commercial fishing agreement at the west-side boat launch in Owen Sound. About 70 people attended that event.

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CHIEFS AND COUNCILS

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Chippewas of Nawash, RR 5, Wiarton ON N0H 2T0 519-534-1689

FOR IMMEDIATE RELEASE: APRIL 9, 2013

TAKING THE HIGH ROAD: THE SON/MNR FISHING AGREEMENT

"....we have achieved success by maintaining the high road, sheer determination and perseverance...."

- The Late Chief Ralph Akiwenzie, Ipperwash Inquiry 3 September 2006

We have a duty to protect our people. We have faced racism, ignorance and violence. In the wake of this we have maintained the high road. We have decided to respond to the reaction to the SON/MNR Fishing Agreement publically at an appropriate time. This is that time.

On February 25, 2013, The Saugeen Ojibway Nation ("SON") entered into a Substantive Commercial Fishing Agreement with the Government of Ontario (MNR). Following its release, MP Miller referred to the Agreement as a "mess." He also reported that he received calls about the potential for violence. Did he report these threats of violence to the police? We do not know. We put the police on alert. MP Miller and MPP Walker also issued a joint press release referring to the Agreement as an "insult." These actions, by individuals who, as elected officials, are bound to uphold the rule of law, have ignited negative and uninformed public reaction to the Agreement. Mutual trust and respect have suffered. Over the last several weeks SON has declined to respond to visceral and uninformed reactions to the Agreement.

But our reply, to the critics, is simple. SON has proven existing aboriginal and treaty priority rights to fish for commercial purposes within the waters of Lake Huron and Georgian Bay protected under s. 35 of the *Constitution Act, 1982*. These waters also include Owen Sound Bay and Colpoys Bay. These rights were recognized on April 26, 1993 in *R. v. Jones and Nadjiwon*. The decision was both an end and a beginning. It *ended* 150 years of exclusion of our people from the fishery. It was the *beginning* of the reclamation of our rights over the fishery. Overcoming exclusion requires perseverance to overcome its effects. Determination is what is required to educate others when they are uninformed.

We will never forget the past, but we will build a better future. This Agreement is a step toward reaching that goal.

It has been said that our people are being paid to fish. This is nonsense. In 1999, the Ontario Conservative Government paid non-aboriginal fishermen $15.8 million *not to fish* in our Traditional Waters to "retire" their licenses. This was in addition to a prior payment of $7 million. Paying a total of $22.8 million dollars to non-aboriginal fisherman *not to fish* pales in comparison to the $850,000.00 (spread over 5 years) allocated for the assessment and the setting of safe harvest limits based on sound science to ensure conservation of the resource. Indeed, unlike non-native fishers, who derived millions of dollars from the fishery over the last 150 years, our people have not been compensated for their exclusion from the waters to the benefit of others.

This Agreement, as well as those that preceded it, are based on a simple principle: the sustainability and conservation of the fish and the waters, which support the fishery, is paramount. It is our collective duty to protect the waters in which we have fished from time immemorial.

SON understands the importance of the recreational fishery. This Agreement will not decimate it. Rather, the Agreement provides new and flexible mechanisms so that we can work together with Ontario to protect the waters and ensure safety on them. Achieving these goals requires commitment, capacity, resources and determination. We will work with Ontario and other Government agencies to implement the agreement and all the commitments contained in it. Both SON and Ontario called upon Canada to participate in negotiating this agreement. Canada refused.

Rather than condemning the Agreement, people should see the opportunities contained in it to build upon it based on the principles of mutual trust and respect. Words of condemnation, uttered without a full understanding of the past and the Agreement, serve no purpose but to incite violence and misunderstanding.

For those that truly want to understand the history of SON and the Agreement, you may wish to read our submissions to the Ipperwash Inquiry. It tells the story of our people and our fishery. We also ask those who have condemned the Agreement to read these submissions and, if they truly are interested in mutual trust and respect - and the sustainability of the waters - they will take the time to learn about how we can work to overcome the past and protect the waters in the future. The submissions can be downloaded at:

http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/under_siege.pdf

The waters and the Bays are sacred to us. Our people have fished in these waters from time immemorial. We will continue to do so. The Agreement provides a mechanism by which we can all safely co-exist. Time will tell whether critics of the Agreement will open their minds to this possibility.

Chief Scott Lee

Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee

Chippewas of Saugeen First Nation

cc. The Honourable David Orazietti (minister.mnr@ontario.ca)
cc. The Honourable Larry Miller (larry.miller@parl.gc.ca)
cc. The Honourable Bill Walker (bill.walker@pc.ola.org)
cc. The Honourable Frank Iacobucci (fiacobucci@torys.com)
cc. The Honourable David Zimmer (minister.maa@ontario.ca)

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Email: rkahgee@saugeenfirstnation.ca

Letters to the Editor

The Owen Sound Sun Times
Tue Apr 9 2013
Page: A5
Section: Editorial/Opinion
Column: Letters to the Editor

Both commercial and recreational fisheries can exist

Editor:

I am writing in response to some media coverage regarding the agreement recently signed between Ontario and the Saugeen Ojibway Nation (the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation).

The five-year fisheries agreement with the Saugeen Ojibway Nation demonstrates Ontario's commitment to working with First Nations to manage our resources sustainably. Ontario's new government has pledged to build constructive, cooperative relationships with First Nations through mutual respect and understanding.

This agreement recognizes both commercial fishing and recreational fishing activities, and will provide clarity and certainty about how the Saugeen Ojibway Nation will exercise its sustenance commercial fishing right. The First Nations have a court-recognized Aboriginal and treaty right to engage in such fishing. It was the Ontario Court of Justice in R.v. Jones and Nadjiwon that recognized this right in 1993, a right that is protected under the Constitution. Having reached an agreement with the province, the Saugeen Ojibway Nation has demonstrated responsible stewardship for the long-term sustainability of our fishing resources.

Funding for the agreement will help to ensure that all commercial fishing takes place in a sustainable manner, is based on sound science and reflects a collaborative setting of total allowable catch. It covers such measures as monitoring, data collection, assessment, and information sharing that will help Ontario determine sustainable harvest limits.

These measures, combined with a cooperative approach to enforcement by the Saugeen Ojibway Nation and MNR will help ensure a safe, productive and sustainable commercial fishery. MNR also provides financial support to non-Aboriginal fisheries and requires similar collection and sharing of harvest data through its commercial fishing licensing system.

My ministry and the Saugeen Ojibway Nation will closely monitor commercial fishing and recreational use in the bays and will meet in October 2013 to evaluate the measures in place to ensure that both fisheries continue to safely co-exist.

I have been in contact with Bruce-Grey-Owen Sound MPP Bill Walker and Bruce-Grey-Owen Sound MP Larry Miller on this issue.

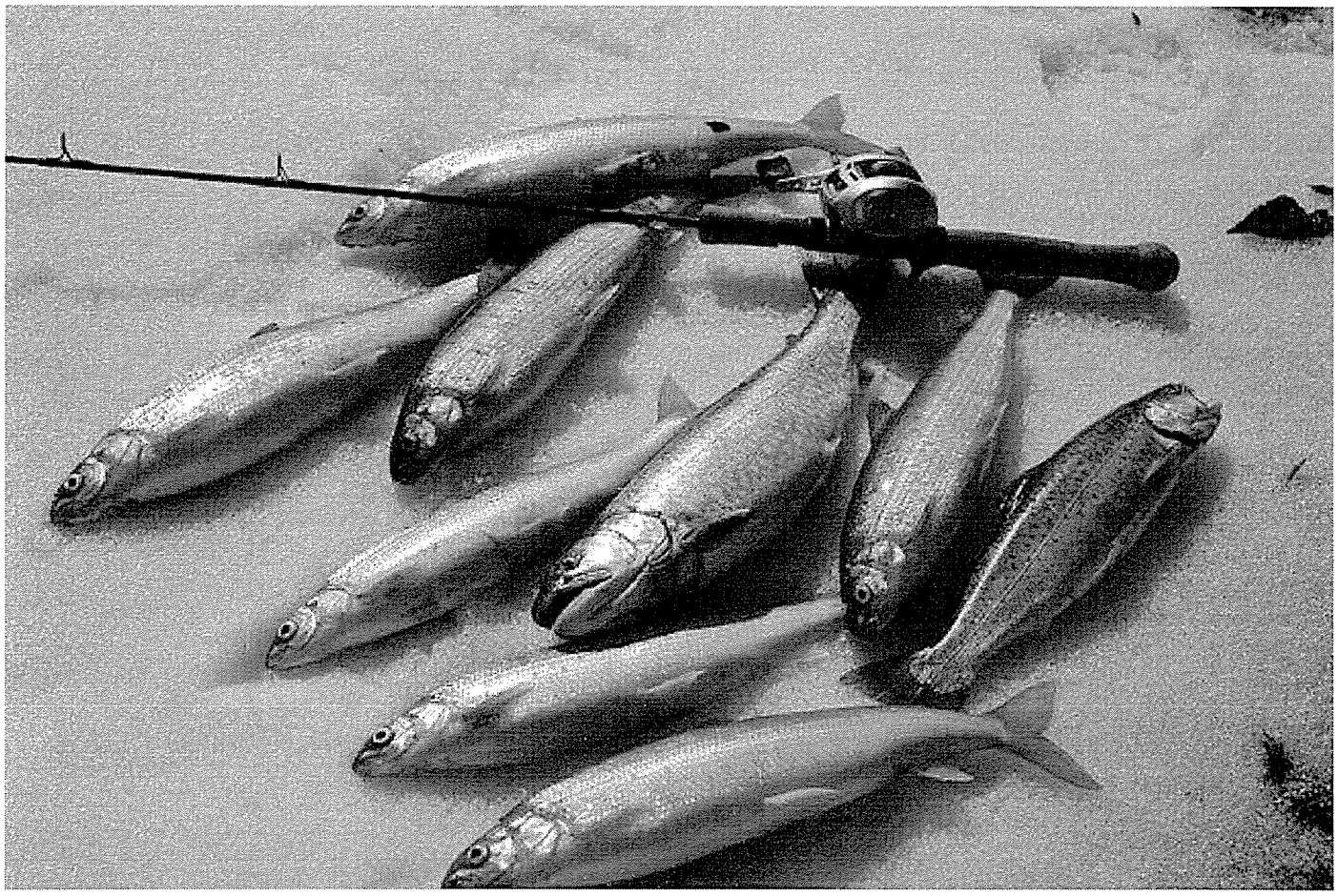
It is in the interest of all parties to work together in a spirit of goodwill. I hope that everyone will consider ways to share the resources in these waters in a manner that encourages fairness, cooperation, safety and sustainability.

David Orazietti Minister of Natural Resources

OPINION COLUMN

Some context for native fishing agreement

By Josh Choronzey, For The Sun Times
Thursday, March 14, 2013 12:11:27 EDT PM



Local anglers Tyler Goodings and Devon Shute took advantage of the warm weather last weekend to fish for whitefish in Owen Sound Bay. Primarily a small boat fishery, the late winter whitefish opportunity is popular each year with local anglers. The whitefish in this photo were caught in the exact same location and depth as the lake trout (centre) and brown trout (right) shown.

If you have been reading The Sun Times this week, it will be apparent that the most recent commercial fishing agreement between the MNR and the Saugeen Ojibway Nation (SON) has caused quite the stir.

Within hours of the agreement becoming public, social media outlets started to buzz, my phone rang countless times and e-mails from the likes of concerned anglers, citizens and politicians began to fill up my inbox. The announcement has sparked an outcry from anglers as the issue has brought forth some valid concerns for those with a vested interest in the local sports fishery.

Yet as emotions run high with news of the agreement, a lack of understanding of the overall situation seems to prevail while informed opinion seems to be lost on the water, so to speak.

Fact: The new agreement doesn't actually grant native netters any sort of new legal rights. In order to fully understand, one must look at past court decisions that have shaped the current issue at hand. Two specific cases have set the precedent here: The Sparrow Decision of 1990 in which the Supreme Court of Canada dealt with aboriginal treaty/fishing rights, and the Fairgrieve ruling (aka Jones-Nadjiwon) of 1993, which affirmed the local bands' right to fish their traditional waters of Owen Sound and Colpoys Bay. These were monumentally important decisions that have reaffirmed the legal rights of aboriginal people to harvest resources in traditional waters. Both decisions are full of legal literature, but to summarize, the local Saugeen Ojibway Nation fishermen have the legal right to fish Colpoys Bay as well as Owen Sound. This right has been decided by high courts and public opinion is not about to change these decisions.

In 2000 the Saugeen Ojibway Nation and the Ministry of Natural Resources established the first agreement concerning commercial fishing in the area. The agreement was a set of guidelines establishing how commercial fishing was operated and took into account resource management and geography. Thus, this new agreement between the SON and MNR is not the first agreement regarding native commercial netting in the two bays. In fact this is the third such agreement between the two parties since the Fairgrieve decision. Each renegotiation has resulted in greater expansion of the "agreed upon" areas that SON netters may fish. This latest agreement is creating a such a stir because it opens up substantial waters within both bays to netting, areas which are focal points for recreational angling and areas which have received the efforts of multiple volunteer angling clubs.

Not unlike past agreements, the new one sets the new boundaries for SON netting, as well as "guidelines" for gill net mesh size and total lengths of net. The agreement also sets a total allowable catch (or TAC) for native netters in certain geographical locations throughout the local waters of Georgian Bay. However, it must be noted that this is not a TAC that is governable by law due to the fact that court decisions have ruled that imposing quotas on local native commercial fishermen goes against treaty rights. Still, the agreement also states that the MNR and SON are to collaborate while determining TACs for each season through data sharing and further negotiation. The latest "agreed" TAC for lake whitefish by SON was listed as 48,901 kilograms. This TAC applies to Zone 3 which incorporates Colpoys and Owen Sound bays.

The new agreement also states that native commercial netters will not fish in the far inner portions of each bay — beyond Balmy Beach in Owen Sound and inside of the government dock in Wiarton. The agreement states that SON "will make the best effort" to not net within a one-kilometre radius of key rainbow trout spawning creeks such as Gleason Brook/Oxenden, Colpoys Creek, Bothwells Creek, Keefers Creek and Waterton Creek during the early spring and fall.

What seems to have angered local sport anglers about this agreement the most is the lack of consideration concerning recreational angling that takes place in the two bays. The words "sport fish" and "angler" are nowhere to be found in the new agreement and anglers are voicing their displeasure and arguing they were kept out of the negotiation process. But the fact is the MNR and SON didn't have to consult anyone else — the court rulings set precedence establishing that aboriginal rights to a fishery come first, before those of recreational angling. The MNR did not have to undertake a large-scale public consultation with local anglers since the needs and wants of the anglers play second fiddle anyway. The MNR will undoubtedly take plenty of heat over this new agreement, but the reality is that, for the most part, the MNR is looking out for fish populations as best they can within the confines of the legal rulings regarding native treaty rights.

Yet perhaps being denied a platform from which to voice their concerns may have exacerbated the ire of local anglers. Some concerns ring true whether they are spoken aloud or not. In this instance I'm talking about the simple fact that gill nets kill fish. They are far from a sustainable method of harvesting fish. For the most part gill nets are not effectively selective in the fish they harvest. The new agreement sets a standard for mesh size at 4.5 inches or larger. This mesh size will effectively kill lake whitefish, which are the primary target of the native commercial fishery. Unfortunately, this gill net size will also effectively and indiscriminately kill steelhead (rainbow trout), brown trout, lake trout and salmon. These are fish that create a recreational fishery and are largely dependent on the stocking efforts of local clubs. Incidental catches are to be expected and within the confines of both bays the rate of by-catch increases resulting in more dead salmon and trout. That is thousands upon thousands of dollars and time wasted if these hatchery raised trout and salmon find themselves in a gill net and plenty will.

How will anglers react when SON nets enter areas of the bay which have not seen netting in any regular occurrence for quite some time? I doubt the SON nets will be greeted with cheers and travelling anglers will no longer put Wiarton and Owen Sound on their lists of favourite trolling destinations. Gill nets pose a safety risk to recreational angling and pleasure boating. Tourism will surely suffer from the expansion of netting further into the bays as fisherman head somewhere else in the province.

The purpose of the agreement between the two parties is to make an attempt to manage the commercial fishery. Both parties understand this and this agreement sets some valid guidelines to monitor commercial fishing. Will the guidelines be followed? Will the TAC guidelines be followed? Will SON commercial fishermen set nets in the local bays during the numerous derbies that take place each summer? These are some of the many questions that will be answered in the near future and it appears that these answers will be totally dictated by the actions of SON, not the MNR or recreational anglers.

I hope the SON fisherman understand the responsibility that comes with this agreement, as both the MNR and SON have confirmed that they will work together to monitor the fishery. Most importantly, they have agreed to practise commercial fishing with sustainability in mind . . . if that is indeed possible. Let's hope so, the endurance (and perhaps the very existence) of a popular recreational fishery could be at stake.

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Sarah

$850,000 over 5 years? That's $175,000 per year. Gee whiz, that doesn't cover the cost of one senator.

3 months ago 1 Like Flag Like

Guest

Comment removed.

3 months ago 2 Likes Flag Like

davidlbq

Easy buddy, your true colors are showing. No one here said they hate white men or natives, was that Freudian slip perhaps? Take a deep breathe and calm down.

3 months ago in reply to Guest Flag Like

NoJusticeinCanada

Sorry davidbq
You are right, All those comments against anyone who disagrees with the white fisherman or native fisherman made by david , kitty or you need to take a deep breath and calm themselves.

This just shows what the reaction MIGHT be by the people who put long hours in raising fish, working 40 years, no handouts, trying to get by on what the ontario govt. gives my wife and I. Paying for life saving medications not paid for by the goverment who will pay $850,000.00 over the next 5 years for keeping fishing stats.

Please forgive me.....

3 months ago in reply to davidlbq 1 Like Flag Like

davidlbq

Nice catch photo. I looked out and and noticed it was still winter out there. That would explain the variety. While whitefish prefer deeper water, they will of course surface higher in the water in the winter. Then again, since everyone is so suspicious, how do we know the anglers "really" fished that in the owen sound bay? Then again, how do we really know that these fish were caught on the same depths? Is it that their words are better to trust than anyone else for that matter?

3 months ago 1 Like | Flag Like

David

The bay is 120 miles (190 km) long and 50 miles (80 km) wide, and the depth (generally 100–300 feet [30–90 m]) reaches a maximum of 540 feet (165 m) What a little bay. Equally can be said that the whole of Lake Huron is available to sports. People can whine all they like, but these people were robbed too. Boy do I like wearing my white pants proudly. Where's my gun, my cousin and the beer?

3 months ago 2 Likes | Flag Like

Kitty Bird

Hmmm.... Isn't the analogy more like you've been raising cattle on your land for 4000 or 5000 years, and then 150 years ago someone comes along and takes your land and uses it to raise an exotic species like alligators which have been destroying the cattle, and then whines and complains when the court rectifies the situation and says, "whoops, you're right, you had the right to raise cattle - you can do that" but the alligator hunters think this is "robbery"...

I would also point out that the most active voices these days trying to protect the water and fish habitat in the region is the first nations. The biggest threat to the Salmon Spectacular isn't the native fishermen, its the threat to the health of water and fish habitat caused by all the intensified shoreline use in the region which is polluting the water and digging up fish habitat. It would have been nice if Mr. Miller had been as vocal about protecting fish and fish habitat when the federal government gutted all the legislation that protects water and fish habitat in the last budget omnibus bill....

3 months ago 7 Likes | Flag Like

Andy Churchley

Native, or non Native I do not care. This idea to net out these small bays is ludicrous. It is my understanding that the "target" species here is whitefish. Why come into a shallow bay such as Colpoys and string out nets when you are targeting large schools of whitefish. would you not want to go out in large water where the big schools will be in 200ft plus of water? It seems to me that anyone doing that is just trying to net what ever they can. I don't care how big the holes in the mesh are, you are coming into an area that is stocked full of fish that you are not even targeting. You better bet you are going to net those fish. It doesn't take a rocket scientist to figure that out. The Sportsman Club must be amazed with the MNR decision. Let me put this into perspective..You put your time and money into raising a farm of cattle, until one day Mr government steps in and tells your neighbor to back a semi up to the barn, take your cattle, and gives him a fat cheque to do so. When you go to talk to your neighbor.. he tells you he wanted sheep but all you had was cattle... Robbery is the only word i can think of.. a robbery funded by the MNR.. The Sportsman Club will never be able to keep up with such a robbery with the budget they run on.. Our sport fish numbers that "isn't" being targeted will decline. In which case no one will want to come to our area to fish.. Just curious.. does anyone know what kind of money the Salmon Spectacular brings to our community?

3 months ago 7 Likes | Flag Like

davidlbq

I'd like to know how many of whitefish, pickerel, and walleye are being gobbled up by the salmon.

3 months ago in reply to Andy Churchley 3 Likes Flag Like

regee and sandy

when will the taxpayer be " OFF THE HOOK " if its not blocking traffic its paying for this and paying for that ! ! !. If after all these years they still have certain rights fishing ..WHY DO WE HAVE TO GIVE OUT ....$ 850000..,.? Im amazed at decsisions made by Govt for the people of Ont ...ask me to give them or any other group money ...I would tell them to be " IDLE NO MORE " and WORK for it..... The gravy train should be over....so remember to voice your displeasure to your politicians..

3 months ago 7 Likes Flag Like

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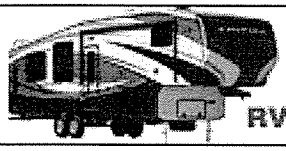

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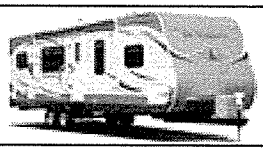

Minister, SON chiefs say fish deal a new chapter

By Scott Dunn, Sun Times, Owen Sound
Monday, April 22, 2013 7:08:01 EDT PM

Local First Nations chiefs and the Ontario Natural Resources minister heralded their latest five-year commercial fishing agreement as one which marks the beginning of a new relationship between them.

"It's Earth Day today. What a fitting day to celebrate this agreement," said David Orazietti, the Minister of Natural Resources, at the conclusion of the ceremonial signing of the fishing agreement, which has drawn so much attention since it was announced in March.

Orazietti repeated his publicly expressed position that the Saugeen Ojibway Nation didn't need to enter into a fishing agreement with the MNR because they have a court-recognized aboriginal treaty right to a commercial fishery.

But by entering into the agreement, the MNR obtained some safeguards to help ensure a sustainable fishery and compliance with the terms of this joint commercial fisheries management agreement, which is the government's interest, he said.

"As the Crown, we're responsible for the broader community's interest. And we're quite confident that they can peacefully co-exist, that the recreational sport fishermen, industry and associations and groups can prosper and can continue to enjoy recreational fishing as they've done for years."

That doesn't conflict with native right to the commercial fishery here, he said.

"We are the first government in the history of the province of Ontario to create a separate, independent Ministry of Aboriginal Affairs. It's something that I think is long, was long overdue," Orazietti noted.

Chippewas of Nawash Chief Scott Lee expressed his "deepest gratitude" at the comments from the Ministry of Natural Resources about the fishing agreement. "We've never heard that kind of commitment, those kind of acknowledgements of our rights.

"It's something many of our ancestors have fought for. Have sat at many tables to hear that."

Lee said he wanted to celebrate having this new relationship with the provincial government, "a partner that we can uphold and rely on."

Saugeen First Nation Chief Randall Kahgee stressed the agreement represented the fruits of a "government-to-government relationship."

All three remarked on the criticism from parts of the sports fishing community and local federal and provincial parliamentarians. The agreement allows native commercial fishermen to set nets in Owen Sound and Colpoys bays as of April 26 and after that year-round.

Setting nets in the bays is viewed by critics as an attack on the sports fishery, which relies largely on stocked salmon, rainbow and brown trout in the same waters plied by native commercial fishermen seeking lake whitefish. The agreement's stocking working group will examine impacts and make recommendations.

SON has a longstanding concern about the impact of stocked, non-indigenous fish into Lake Huron and Georgian Bay.

Lee echoed an ode Kahgee expressed to the memory of Chief Ralph Akiwenzie, a longtime Cape Croker chief and one-time professional teacher, who believed the cause of native rights would be served by continued efforts to educate people about them.

"I believe that that responsibility falls back on us as the leadership to come. To continue that educational piece for those who will listen and even for those who won't because maybe eventually they will come around with some acknowledgement of our rights. And I think this is a great step forward in what we accomplished here."

He said the benefits and opportunities from the agreement, for both native and non-native people, need to be highlighted and discussed. Part of the fishing agreement includes a commitment to do that. The first meeting of the governance committee is scheduled to take place today.

"There has been a lot of negative things said about this agreement. A lot of it uninformed. A lot of it very unfortunate. But we are committed to work with those who would want to work with us to understand that rich history we have in this place."

The connection to "the lands, and the waters and the resources" has sustained the community and will do so for generations, Kahgee said. "And it's that relationship that we alway seek to protect. And we are grateful that we have a government that is willing to sit down with us in a spirit of reconciliation. I can't remember a time when that has been the case in a very long time."

Kahgee said "it's very easy for our people to mistrust the government because there is a dark chapter in our history. But we need to move beyond that. And we need to start looking at how we can reconcile and how we can continue to move forward and protect those things that are important to us."

Kahgee said he finds it "so fundamentally offensive" when he hears people say "Oh, the First Nations are going to obliterate the fishery . . . It's not in our best interest to see that resource disappear."

Kahgee said they have the right to fish commercially in local waters and opinion that doesn't acknowledge that "comes from a deeply ingrained ignorance, something that nothing I could never do, no one else could ever do could change that."

Rather than "pander" to those people, he wants to educate those willing to listen.

Poll

Do you think the SON/MNR fishing agreement will damage recreational fishing in the Owen Sound and Wiarton area?

Friday, June 21, 2013

- ◯ Greatly
- ◯ Somewhat
- ◯ No

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John McLeod

Why don't the so called Sport Fishermen, go Fishing in the Mackenzie River North of Edmonton. I hear there are great Fishing there, full of Trophy Fish, and good eating !!!

1 month ago 3 Likes Flag Like

fromthecheapseats

Part of the problem as I see it is that these agreements have been made in secret. All of us should be suspicious of these types of deals Does anyone know how many fish are even available in the affected area? Is there going to be a quota or is it take as many as the nets will hold? A Liquor Inspector once told me, "Bars aren't in business to promote responsible drinking, they are in business to make money and will do whatever they can get away with". That can be said for the commercial fishing industry whether it is Indians or non-Indians. There are limits set for sports fishermen and we all know that there are those who illegally take more then they are allowed. Indian commercial fishermen given the same opportunities, why would they be any different? At the end of the day these comments are moot. The Indians will be do whatever they want because the court has said they can. It remains to be seen whether the sports and commercial fisheries can co-exist and I guess the only way we will know is whether there are any fish left in the next few years. My comments are not directed toward the Indians in any mean-spirited way but I don't trust commercial fishermen of any ilk.

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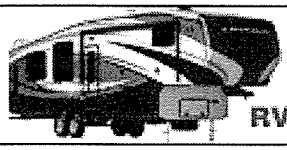
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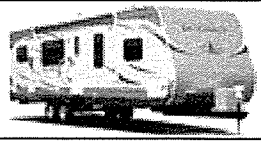

Minister praises SON for negotiating fishing agreement

By Denis Langlois, Sun Times, Owen Sound
Thursday, April 18, 2013 10:41:37 EDT PM

Ontario's Minister of Natural Resources David Orazietti.

The Saugeen Ojibway Nation "voluntarily" negotiated with the province for a new commercial fishing agreement even though they are not obligated to do so under their treaty rights to fish, Natural Resources Minister David Orazietti said Thursday.

Those rights are "unfettered," he said. First Nations officials are not compelled to negotiate, for example, catch quotas or the timing or location of commercial netting with the province or to consult with other stakeholders, such as sports anglers.

"I commend the First Nations for, while they have a court-recognized treaty right that is without exception, that they were prepared to sit down with the Ontario government, the Ministry of Natural Resources, to enter into an agreement because they too are concerned about the long-term sustainability of the fishing resource," he said in a telephone interview.

Orazietti is scheduled to attend a ceremonial signing Monday of the five-year agreement which, among other things, permits commercial fishing to "resume in Owen Sound and Colpoys Bay on April 26 and continue year round over the term of the agreement."

The signing event is tentatively set to take place at the Saugeen First Nation band office.

Both Bruce-Grey-Owen Sound MPP Bill Walker and MP Larry Miller, along with many sport anglers, have raised concerns about the agreement's potential impact on the area's recreational fishery and events such as the Salmon Spectacular derby. The province has also been criticized for not consulting with sports fishing groups and others before signing the deal.

A group of "concerned anglers" has scheduled a "town hall-style, non-confrontational information meeting" on the agreement for April 27 at 9 a.m. at the Hepworth-Shallow Lake Legion in Hepworth.

The group, in a letter to The Sun Times, says the agreement could adversely impact sports fishing in the area.

"Owen Sound and Colpoys Bay should be declared sanctuary waters by MNR and SON from all forms of commercial fishing," the letter says.

The two bays are confined, have been stocked with fish by the Sydenham and Bruce Peninsula sportsmen's associations for decades and support a "tremendous sports fishery," group member Arnie Clark said.

He said the agreement should be revoked pending full consultation. Former natural resources minister Donna Cansfield said in 2008 that there would be consultation with all parties before the next agreement is signed, he said.

The Ontario Federation of Anglers and Hunters released a statement Thursday that says the agreement will impact the Owen Sound Salmon Spectacular and the recreational fishery on Lake Huron.

"The provision in the agreement that allows for the netting of fish in close proximity to the mouths of tributaries could negatively affect the spawning runs of several fish species. And the expansion of the commercial fishing area into both Colpoy's and Owen Sound Bays could pose a serious threat to public safety and impact negatively on conservation of the resource," the statement says.

The OFAH is criticizing the province for not consulting with "all affected parties" before signing the agreement.

Orazietti said the MNR "very clearly represented the interests of non-Aboriginal anglers" while negotiating the agreement.

"Staff are well aware of the recreational importance of, for example, the Salmon Spectacular derby, the recreational opportunities and the tourist opportunities and how that is important to the region and the economy and have very clearly made those representations as part of the discussions," he said.

People have also criticized the agreement for including an $850,000 payment to SON over five years.

Orazietti said the money is to be used to ensure the "management and sustainability" of the fish resource.

"This is not, as some may suggest, a payment for fishing. That is absolutely the furthest thing from the truth. It's about the expenditures that need to take place to make sure the resource is managed properly."

Orazietti said this is the first time the province has made the commercial fishing agreement "transparent."

He said he is confident both recreational and commercial anglers can safely coexist on Owen Sound and Colpoys Bay and a "thriving" sports fishery can continue.

"I believe that no one that has an interest in the fishery in the region wants to see any negative impacts. That's the reason why we have been working with the First Nations and that's the reason they have been working with us. They also want to see the sustainability of the resource and so do I," he said.

Orazietti met Tuesday with Owen Sound Mayor Deb Haswell, Walker, Saugeen First Nation Chief Randall Kahgee and Chippewas of Nawash Chief Scott Lee at his office at Queen's Park.

Haswell said she was pleased with the meeting and the MNR's commitment to distributing information to the public on the agreement as soon as possible.

"Owen Sound's interest is to make sure all fishing communities can be safe on the bay," she said Wednesday.

Walker said he reiterated to the MNR at the meeting it was wrong to not consult with recreational anglers when drafting the deal.

"I communicated that had the local sport fishing groups and I been involved in the discussions, perhaps the outcome would have been more positive," he said in a statement.

He said he pressed the MNR to initiate communication with local sport fishing associations and keep the lines of communication open.

"It is my hope this is the start of meaningful dialogue to find a solution that meets the aboriginal community's needs while continuing with the sport fishing traditions of the area. The goal needs to be that this matter can bring the community together rather than one that perpetuates frustration and finger pointing," he said.

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Mush Morant

The native commercial fishermen, regardless of their treaty rights and the regulations of this agreement, need to remember that at the end of the day they have a product to sell (mostly to non-natives). If they "poison the waters" through their fishing practices and draw a boycott on that product, they will only be doing themselves a disservice.

If they can continue to make their living in the main basin of Georgian Bay, why would they choose to inflame the situation by setting nets in Colpoys and Owen Sound bays when they know from previous experience exactly what the response will be?

Do the natives have a specific need to fish in the bays, or are they just using this agreement to highlight the strength of their position?

They clearly don't need this agreement from any legal perspective.

2 months ago 1 Like | Flag Like

Rolfke

Frankly, I have more faith in the Indian bands to protect the fish and water than I do in the government or the people who were fishing it out before they won that court case. The level headed ones who are focussed on keeping the peace and helping the fish seem to be the Ojibway, not Miller or Walker.

2 months ago 7 Likes | Flag Like

Karl Chittka

For the First Nation people to initiate and negotiate a fishing agreement with the provincial Government [MNR] voluntary when they under no obligation to do so is a good gesture of cooperation and concern for the future of fishing in th area. For a change it is good to see cooperation rather than confrontation . Hats off to SON and MNR

2 months ago 10 Likes | Flag Like

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EXHIBIT "I"

Ontario

This is Exhibit ....I..... referred to in the affidavit of Paul Jones sworn before me, this ....15th.... day of ....August.... 20.13....

A COMMISSIONER FOR TAKING AFFIDAVITS

WHEREAS the Chippewas of Nawash Unceded First Nation and Saugeen First Nation (collectively the "Saugeen Ojibway First Nation" or "SON") and Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources (MNR) (together, the "Parties") are pleased to come together on this 22nd day of April to reaffirm their commitment to the five year Substantive Commercial Fishing Agreement (attached) ratified on February 25, 2013.

WHEREAS on August 23, 2011 the Parties entered into a Framework Agreement in which the Parties agreed to binding goals, principles, objectives and mutual commitments that are to be implemented in a Long Term Substantive Commercial Fishing Agreement;

AND WHEREAS on February 25, 2013 the Parties entered into a five year Substantive Commercial Fishing Agreement and agree that this is an important step in their constructive, ongoing and harmonious relationship;

NOW THEREFORE the Parties reaffirm their commitment to these same goals, principles, objectives and mutual commitments.

SIGNED
in the presence of:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION
by:

April 22nd/2013
Date

Chief Scott Lee
Chief Scott Lee

SAUGEEN FIRST NATION
by:

April 22, 2013
Date

Chief Randall Kahgee

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIOAS REPRESENTED BY THE MINISTER OF NATURAL RESOURCES

April 22/2013
Date

The Honourable David Orazietti

EXHIBIT "J"

This is Exhibit ..1.. referred to in the affidavit of ..Paul Jones.. sworn before me, this ..15th.. day of ..August.. 20..13..
A COMMISSIONER FOR TAKING AFFIDAVITS

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

Chippewas of Saugeen, RR 1, Southampton ON N0H 2L0 519-797-2781
Chippewas of Nawash, RR 5, Wiarton ON N0H 2T0 519-534-1689

July 15, 2013

SENT VIA E-MAIL AND MAIL

The Honourable Gail Shea
House of Commons
Minister of Fisheries and Oceans
Parliament Buildings, Wellington Street
Ottawa, Ontario K1A 0A6
Min@dfo-mpo.gc.ca

URGENT

Attention: The Hon. Gail Shea

Dear Minister Shea:

Re: Unacceptable Status of the Relationship between DFO and the Saugeen Ojibway Nation: Request for an Urgent Meeting

We are writing to express our profound disappointment that the Department of Fisheries and Oceans has made unilateral changes to an agreement that was negotiated between us with the assistance of an independent facilitator, Karen Wianecki, in August 2012. For the reasons that follow, we are requesting to meet with you in the next 30 days on an urgent basis.

By way of background, on May 25, 2012 following negotiations facilitated by retired Supreme Court of Canada Justice Frank Iacobucci, DFO and SON signed a Memorandum of Understanding under which DFO and SON agreed to negotiate a relationship agreement by September 15, 2012 that would facilitate consultation and communication and address issues of mutual concern. A copy of the MOU is attached to this letter as Schedule "A".

The MOU is an important foundational document committing the SON and DFO to important provisions contained in paragraph 2(f) relating to the sustainability of fish habitat, economic prosperity for SON members, appropriate recognition of SON traditional values and approaches to fish habitat and ultimately a proper respect for the environment. All of these provisions require capacity and resources, a commitment contained in the May 25, 2012 MOU at paragraph 2(i) by DFO.

Pursuant to the terms of the MOU, SON and DFO representatives proceeded to negotiate a consultation framework agreement entitled "*Our New Relationship*" in sessions facilitated by Ms. Wianecki within the agreed upon time frame as set out in the MOU. A copy of the Agreement is attached as Schedule "B". After a number of requests for a meeting to discuss the content of the mutually negotiated agreement, SON leadership met with DFO staff and RDG Burden on December 3, 2012 to discuss the draft agreement. Following that meeting DFO fundamentally changed the mutually negotiated agreement to such an extent that it simply no longer reflects the commitments contained in the May 25, 2012 MOU and nor for that matter the draft agreement that was negotiated by the end of August, 2012. It also bears mention that during our December 3, 2012 meeting DFO declined SON's request to re-engage either The Honourable Frank Iacobucci or Ms. Wianecki to facilitate further discussions regarding the draft agreement that our respective staff negotiated. We are at a loss to understand why.

It is not acceptable to SON that DFO proposes to ignore the terms of our May 25, 2012 MOU, and unilaterally change the terms of the Relationship Agreement negotiated by your own representatives with SON in good faith. This is not honourable, and in SON's view, DFO constitutes a breach of the commitments contained in the MOU. We are also at a loss to understand why DFO will not, at the very least, commit to a facilitated meeting with either facilitator who were previously acceptable to both DFO and SON in an effort to re-build mutual trust and respect.

There are underlying issues between DFO and SON that remain unresolved. The *Fisheries Act* (in its soon to be amended version) requires a process that minimizes serious harm to fish, which includes fish habitat, where that fish habitat supports an Aboriginal fishery. In addition to this requirement under the *Fisheries Act,* DFO also has a constitutional obligation to minimize infringements on proven Aboriginal rights, such as SON's court-proven fishing rights. DFO is not currently meeting its obligations with respect to SON's fishery and its proven s. 35 rights. Our traditional waters are under ever increasing threat arising from dredging and other activities of DFO that are occurring in the absence of consultation and, in some of instances, even notice.

Given the unacceptable and dysfunctional state of our relationship (a fact recognized in the May, 2012 MOU) at paragraph 2(c)), we are requesting a meeting with you and SON leadership within the **next 30 days** to discuss the situation that has developed since the signing of the MOU. We believe that it would be of great assistance if The Honourable Frank Iacobucci and Karen Wianecki attend this meeting to assist us in resolving the current impasse so that we can move forward.

SON remains of the view that the May 25, 2012 MOU and the mutually negotiated "Framework Agreement – *Our New Relationship*" provides the appropriate mechanism and structure to forge a new and improved relationship between SON and DFO. Sadly, in SON's view the agreement that DFO provided to SON is inconsistent with both the MOU and DFO's constitutional obligations to consult with and where appropriate find the appropriate accommodation and reconciliation for SON's aboriginal and treaty rights recognized under s. 35. We have attached for your review the draft and amended relationship agreement provided by DFO following our December 3, 2012 meeting with RDG Burden. As you will see it bears little resemblance to the agreement negotiated by SON and DFO staff in July and August, 2012. Nor does it reflect the commitments contained in the May 25, 2012 MOU.

We look forward to hearing from you with respect to our request for a meeting with you.

Miigwetch,

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc: David Burden, Acting Regional Director General, DFO (via Email: dave.burden@dfo-mpo.gc.ca

cc: The Honourable Frank Iacobucci (via Email: fiacobucci@torys.com)

cc: Ms. Karen Wianecki (via Email: karen.wianecki@sympatico.ca)

Schedule "A"

Memorandum of Understanding: May 25, 2012

Signed Copy.

MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING made between SON and DFO (the "Parties") the 25th day of May, 2012.

1. The Parties desire to enter into a Relationship Agreement in order to build a positive relationship between DFO and SON to deal constructively with fish habitat and related fresh water activities and other issues of mutual concern as set out in this Memorandum of Understanding.

2. The Parties agree that the basic principles and provisions of the Relationship Agreement will include:

   (a) mutual trust and respect for each other;

   (b) a relationship that reflects a partnership approach between the parties on common issues to achieve reconciliation and harmony for the future;

   (c) a recognition of the past that regrettably reveals a record of collective failure and missed opportunities in order to build a more harmonious relationship;

   (d) a recognition that each of SON and DFO have genuine constraints that govern their roles and conduct;

   (e) by entering into this Memorandum of Understanding and any resulting Relationship Agreement SON and DFO do not in any way either abandon or prejudice their constitutional, statutory, or other rights or claims.

   (f) the Relationship Agreement shall contain the following provisions:

      (i) sustainability of the fish habitat based on scientific evidence;

      (ii) economic prosperity for members of SON who properly participate in fresh water activities;

      (iii) appropriate recognition of SON's traditional values and approaches to fish habitat;

      (iv) a proper respect for the environment.

   (g) to reflect the importance of effective communication, the parties will develop a communications protocol to ensure each party is adequately informed of issues and developments to permit their input and collaborative participation where appropriate; such protocol will include the identification of individuals who will act as contact persons on various issues as agreed upon and the protocol will also

provide that the Chiefs of SON and the Regional Director General (Central & Arctic Region), and Area Director, Ontario - Great Lakes Area of DFO will meet at least once a year to review and discuss issues arising under the Relationship Agreement;

(h) to ensure that an effective relationship between the parties is established and sustained, the parties will agree on a governance structure that will manage the issues for discussion and development of outcomes relating to issues that are considered of importance by the parties;

(i) the matter of adequate financial capacity and resources of the parties to prepare, enter, and implement the Relationship Agreement will be addressed therein;

(j) as a next step, a working group comprising five representatives from each of SON and DFO will prepare a draft Relationship Agreement for review and discussion between DFO and SON by September 15, 2012.

SON

By: Name:

Witness

Name:

DFO

By:

Name:

Schedule "B"

Framework Agreement Between SON & DFO: *Our New Relationship* (Version 4)

Version 4:

FRAMEWORK AGREEMENT BETWEEN SON & DFO

OUR NEW RELATIONSHIP

Version 4

Version 4:

Framework Agreement

BETWEEN:

THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

-AND-

SAUGEEN FIRST NATION

(collectively, the "Saugeen Ojibway Nation" or "SON")

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

(Fisheries and Oceans Canada, Central and Arctic Region "DFO")

Version 4:

WHEREAS:

A. The Saugeen Ojibway Nation ("SON") and the Department of Fisheries and Oceans ("DFO") wish to build a strong, constructive, cooperative and mutually respectful and beneficial relationship;

B. The Parties reaffirm the commitments, principles and obligations contained in the DFO and SON Memorandum of Understanding dated May 25, 2012 ("the MOU", attached to this Agreement as Schedule 1), setting out mutual commitments and goals including the shared goal of entering into a "Relationship Agreement" that deals constructively with fish habitat and related fresh water activities and other issues of mutual concern;

C. The people of SON reside in the SON Traditional Territory ("SONTT"), known to SON as Anishnaabekiing, and have sustained themselves historically by engaging in fishing for commercial, cultural, ceremonial, and subsistence purposes. Under Anishinaabe law, the people of SON have obligations to protect the SONTT, including the duty to protect the land, water, animals, fish, birds, plants, and Anishinaabe burial, ceremonial and cultural sites in the SONTT and the right to harvest for sustenance, cultural and livelihood purposes;

D. The parties to this Agreement are respectful of the Parties' treaty relationship and are aware of each Party's respective legislative, constitutional and statutory obligations and wish to ensure that the process of consultation, accommodation and reconciliation occurs consistent with the terms of this Agreement.

E. Under Canadian law, SON asserts various Aboriginal and treaty rights and claims in respect of the SONTT.

F. As stated in *R v. Jones and Nadjiwon* (1993) O.R. (d) 421 (Ont. Prov. Ct.), SON has existing Aboriginal and treaty rights to fish for commercial and ceremonial purposes, which are recognized and affirmed under Section 35 of the *Constitution Act*, 1982.

G. DFO has a responsibility to ensure that SON is consulted and accommodated where DFO's conduct and actions may adversely impact SON's rights due to the obligations imposed by Section 35(1) of the *Constitution Act*, 1982.

H. DFO and SON agree that this Agreement is based on a Government to Government relationship, as an important step toward their constructive, ongoing and harmonious relationship in order to continue the process of reconciliation;

NOW THEREFORE THE PARTIES AGREE:

Version 4:

ARTICLE 1 – DEFINITIONS

1.1 In this Agreement:

"Aboriginal Traditional Knowledge": means knowledge which has been passed down and is shared within the Aboriginal community;

"Crown" means Her Majesty in Right of Canada;

"DFO" means Fisheries and Oceans Canada within the *Fisheries Act*;

"Dispute" means any disagreement between the Parties on any matter in connection with this Agreement, including their respective obligations or the interpretation or performance of this Agreement;

"Dispute Resolution Process" means the dispute resolution process set out in Article 12;

"Environment" means X

"Fish" includes l

(a) parts of fish;

(b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals; and

(c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals;

"Fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which Fish depend directly or indirectly in order to carry out their life processes;

"*Fisheries Act*" means the *Fisheries Act*, R.S.C. 1985, c.F-14;

"Governance Committee" means the Committee established pursuant to Article 8 of this Agreement, and charged with the obligation of ensuring that the goals, commitments and objectives of this Agreement are implemented over the course of this Agreement;

"MOU" means the Memorandum of Understanding dated May 25, 2012, as attached to this Agreement as Schedule 1)

"SON" means the Saugeen Ojibway Nation, consisting of the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation;
"SON Rights [and interests]" include SON's Aboriginal and treaty rights, SON's land claims, the use of the SONTT for harvesting, gathering, cultural or ceremonial purpose and the right to be sustained by and protect the lands, waters and resources in the SONTT, including the right to be sustained economically by the SONTT and its resources;

"SON Traditional Territory" ("SONTT"), known to SON as *Anishnaabekiing*, means the territory that SON has traditionally used and occupied, including the waters that SON asserts as its traditional waters, as illustrated in the map attached as Schedule 2;

"Technical Team" means any group established by the Governance Committee under this Framework Agreement;

"Terms of Reference" means the terms of reference developed by the Technical Teams as set out in 5.2, 10.8 and Schedule 4; and

"Working Group" means the committee established pursuant to Article 9 of this Agreement, reporting to the Governance Committee, and charged with the negotiation of matters referred to it by the Governance Committee.

ARTICLE 2 – PURPOSE

2.1 The purpose of this Agreement is to implement the commitments made by the Parties in the MOU and as set out in this Agreement.

ARTICLE 3 – VISION

3.1 The Parties agree to a new government-to-government relationship based on mutual respect, trust, recognition and accommodation of Aboriginal title and rights. The Parties' shared vision includes respect for their respective laws and responsibilities. Through this new relationship, the Parties commit to the principles of consultation, reconciliation and accommodation of Aboriginal and Crown titles and jurisdictions. By entering into this Agreement, the Parties wish to build a positive relationship between SON and DFO to deal constructively with Fish Habitat, fresh water activities, and related issues as set out in the MOU. The Parties have a mutual desire to continue to work toward reconciling their differences, mindful of the past, with a view to improving their ongoing relationship.

ARTICLE 4 – PRINCIPLES

4.1 The Parties agree that this Agreement will be governed by the following Principles:

(a) New Relationship: The Parties are willing and committed to forging a new relationship based on the Principles below, recognizing the past but seeking to build a more positive and beneficial future for the Parties.

(b) Mutual Respect: The Parties are willing and committed to listening to and hearing each other and to acting honourably and in good faith toward each other, including through meaningful recognition of the Parties' perspectives, constraints, values, and culture.

(c) Mutual Understanding: The Parties are willing and committed to understanding each other's cultures, responsibilities and limitations.

(d) Mutual Participation: The Parties are willing and committed to creating and implementing mechanisms that achieve further participation between the Parties in areas where they have mutual interests in decisions affecting commercial fishing in the waters defined herein.

(e) Mutual Accountability: The Parties are willing and committed to creating and implementing mechanisms to ensure that the Principles and provisions of this Agreement are carried out in their spirit and intent.

(f) Mutual Partnership: The Parties are willing and committed to a partnership approach between the Parties on common issues to achieve reconciliation and harmony for the future;

(g) Mutual Recognition of Constraints and Opportunities: The Parties are willing and committed to recognizing each other's genuine constraints and to exploring and identifying innovative solutions that address constraints and opportunities;

(h) Mutual Commitment to Responsible Development: The Parties are willing and committed to work together to ensure responsible development, including:

(i) sustainability of Fish based on sound scientific principles (sound scientific principles include western science and Aboriginal Traditional Knowledge);

(ii) economic prosperity for members of SON who properly participate in fresh water activities;

(iii) appropriate recognition of SON's traditional values and approaches to Fish Habitat; and

(iv) respect for the environment.

4.2 The Parties recognize that prudent, fair and reasonable funding is necessary in order to ratify and implement this Agreement in a collaborative manner..

ARTICLE 5– ENGAGEMENT RESPONSIBILITIES AND FUNDAMENTALS

5.1 The Parties agree to engage with each other on the following issues:

(a) Fish Habitat;

(b) Small craft harbours;

(c) Species at risk programs;

(d) Invasive species control programs;

(e) Real property; and

(f) Any other matters that the Parties may agree upon.

5.2 Within 45 days of the signing of this agreement in principle the Technical Teams, at the direction of the Governance Committee, will develop Terms of Reference and budgetary requirements that will more particularly define the engagement procedure between the Parties in a manner consistent with the engagement fundamentals set out in paragraph 5.3 and in accordance with the process set out in Schedule 4.

5.3 The Parties agree that the following fundamentals will apply to the engagement process:

(a) Engagement is a two-way process; it is reciprocal;

(b) Engagement must occur at the earliest opportunity;

(c) Engagement must be ongoing;

(d) Effective decision making is premised on meaningful engagement;

(e) Engagement must recognize the need for SON to consult with its members at the community level;

(f) Engagement must recognize both DFO and SON's decision making process (including the timing required for the process);

(g) Engagement requires the exchange of adequate information between the Parties for the purpose of properly assessing the scope of potential impacts on SON's rights; and

(h) Engagement requires capacity and resources.

5.4 In keeping with these engagement process fundamentals, the Parties will:

(a) Convene a meeting of the Governance Committee at least once a year;

(b) Establish the Working Group and convene meetings of the Working Group as the need arises.

(c) Establish Technical Teams as issues and/or needs arise;

(d) Report on progress and document measures of success;

(e) Document lessons learned through project-specific follow-up; and

(f) Make an unwavering commitment to continually improve their relationship.

ARTICLE 6 – CAPACITY

6.1 The Governance Committee contemplated by this Agreement shall meet no later than sixty (60) days after the signing of this agreement in principle to negotiate and establish a budget for the final ratification of this Agreement. At this meeting the Governance Committee will discuss, review and approve the Terms of Reference and budgetary requirements recommended by the Technical Teams pursuant to paragraph 6.2 on a consensus basis.

6.2 If the Governance Committee agrees upon the Terms of Reference and budgetary recommendations of the Technical Teams, the Governance Committee shall ratify this agreement for implementation including the identification of any priority items. If no agreement is reached regarding the Terms of Reference and budgetary recommendations, the Governance Committee may request, on such terms and conditions, further recommendations from the Technical Teams for consideration by the Governance Committee in order to ratify this agreement.

6.3 Upon the signing of the this agreement in principle , the Technical teams will meet within 45 days to discuss and make recommendations to the Governance Committee as to the appropriate resource requirements needed to effectively implement the terms of this Agreement and the Terms of Reference to be included herein. .

ARTICLE 7– GOVERNANCE STRUCTURE

7.1 The Parties agree that this Agreement will be implemented in accordance with the governance model illustrated in Schedule 3 attached to this Agreement.

7.2 The Parties agree that this Agreement and the mutual commitments made herein will be implemented by the Governance Committee, the Working Group, and Technical Teams as set out in Articles 8, 9 and 10.

ARTICLE 8 – GOVERNANCE COMMITTEE

8.1 A Governance Committee will be established by the Parties and comprised of four SON representatives and four DFO representatives. Two of SON's representatives on the Governance Committee will be the Chiefs of SON and two counsellors, and one of DFO's representatives on the Governance Committee will be the Regional Director General, Central & Arctic Region, DFO.

8.2 Quorum of the Governance Committee is two representatives from each Party with at least one Chief of SON, and a counsellor from SON and the Regional Director General from DFO.

8.3 The Governance Committee will ensure that the goals, commitments and objectives of this Agreement are implemented during the term of this Agreement.

8.4 The Governance Committee shall accomplish this by:

(a) Supervising the Working Group and Technical Teams, and discussing and working collaboratively with each other to ensure that the implementation of this Agreement occurs based on the mutual commitments made herein;

(b) Working together to resolve any matters which the Working Group forwards for discussion or resolution by the Governance Committee;

(c) Working together to seek the engagement of any other agency or Ministry required to assist the parties in implementing this Agreement over the course of its term.

(d) Working together to secure and agree upon the funding necessary to implement this Agreement, having regard to principled, prudent and sound financial decision-making.

8.5 The Governance Committee will meet at least once a year (or as otherwise agreed to by the members of the Governance Committee) to ensure that this Agreement is implemented;

8.6 The Governance Committee will make decisions on a consensus basis. Where consensus cannot be reached, the matter may be referred to Dispute Resolution pursuant to Article 12.

8.7 The Governance Committee may agree upon the attendance of experts or advisors at its meetings from time to time.

ARTICLE 9 – WORKING GROUP

9.1 After the signing of this Agreement, the Governance Committee will establish and will appoint representatives to the Working Group.

9.2 The work of the Working Group may be restricted or modified as the Governance Committee sees fit.

9.3 The Working Group shall be comprised of five (5) DFO representatives and five (5) SON representatives.

9.4 Quorum of the Working Group will consist of three representatives from each of DFO and SON.

9.5 The Working Group will appoint from the members of the Working Group a representative of each Party as joint chairs of the Working Group. The joint chairs will prepare agendas for the Working Group's meetings.

9.6 The Working Group will make decisions on a consensus basis. If consensus cannot be reached, then the matter will be referred to the Governance Committee;

9.7 The Working Group will periodically report to the Governance Committee on implementation progress and issues, as the Working Group deems necessary or as requested by the Governance Committee.

9.8 The Working Group will meet as it deems is required or as otherwise directed by the Governance Committee.

9.9 The Working Group may invite technical experts to attend the Working Group's meetings as the Working Group deems is required.

9.10 Each Party may replace and appoint its Working Group representatives at any time. The Parties agree that consistency and continuity in representatives on the Working Group are important.

ARTICLE 10 – TECHNICAL TEAMS

10.1 The Governance Committee willestablish the following Technical Teams:

(a) Fish Habitat;

(b) Sea Lamprey control and invasive species ;

(c) Species at risk;

(d) Small craft harbours;

(e) Real property; and

(f) Other Technical Teams as required.

10.2 The Governance Committee will appoint representatives to each established Technical Team, to advise the Governance Committee and the Working Group or undertake other activities necessary to implement this Agreement.

10.3 Each Technical Team will have the same number of representatives from each of DFO and SON and will have a minimum of two (2) representatives from each of DFO and SON.

10.4 The Governance Committee may combine, restrict, or modify the work of any Technical Team.

10.5 Each Technical Team will appoint, from the members of the Technical Team, a representative from each Party as joint chairs of the Technical Team. The joint chairs will prepare agendas for the Technical Team's meetings.

10.6 The quorum for each Technical Team meeting is two representatives from SON and two from DFO.

10.7 Each Technical Team will make decisions on a consensus basis. If consensus cannot be reached, then the matter will be referred to the Working Group.

10.8 Each Party may replace and appoint its Technical Team representatives at any time. The Parties agree that consistency and continuity in representatives and advisors on the Technical Teams are important.

ARTICLE 11– PARTICIPATION OF OTHERS

11.1 In order to meet the objectives and commitments of this Agreement, the Parties may agree to include the participation of other agencies or governments as required.

ARTICLE 12 – DISPUTE RESOLUTION

12.1 In the event that the Parties are unable to agree on any matter in connection with this Agreement, including their respective obligations or the interpretation or performance of this Agreement, the Parties will use all reasonable efforts to resolve the Dispute amicably and in accordance with the following terms:

(a) If the Parties are unable to resolve a Dispute through cooperative means within a reasonable period of time, then either Party may refer the Dispute to the Governance Committee to resolve;

(b) The Governance Committee will meet at their earliest convenience to resolve the Dispute;

(c) If the Governance Committee is unable to resolve the Dispute, either Party may notify the other Party of its intention to proceed to mediation;

(d) The Parties will then work together to jointly appoint a mutually acceptable mediator;

(e) If the Parties fail to jointly appoint a mutually acceptable mediator within fifteen (15) business days after a Party has given notice of its intention to proceed to meditation, or such other period as agreed to by the parties, either Party may, upon advance notice to the other Party, apply to a recognized mediation service or centre for mediation pursuant to its mediation rules to have a mediator appointed for the Dispute.

(f) DFO will pay the mediator's reasonable fees and disbursements;

(g) The Parties will record all resolved disputes in writing, which will be signed by the members of the Governance Committee;

(h) The Parties agree that any mediator involved in a Dispute must have experience with Aboriginal matters; and

(i) The procedures for resolving Disputes set out in this Article shall not prejudice the right of any Party to apply to any court of appropriate jurisdiction for temporary or preliminary injunctive or any equitable relief.

ARTICLE 13 – TERM

13.1 Subject to the Articles 12, 14, and 16, the Parties agree that the term of this Agreement will be a period of five (5) years, and the Parties agree that this Agreement may be renewed thereafter on such additional terms or conditions and for such additional period as agreed to by the Parties.

ARTICLE 14 – REVIEW OF AGREEMENT

14.1 The Parties agree to initiate, as directed by the Governance Committee, a review of this Agreement within two (2) years from its effective date. This review will:

(a) Assess this Agreement's success in achieving its purpose;

(b) Determine amendments required to ensure the Agreement's effective operation and implementation;

(c) Evaluate the effectiveness and progress of the Working Group and Technical Teams and the functions assigned to them; and

(d) Evaluate the sufficiency of capacity, funding and resources necessary for the proper and continued implementation of this Agreement.

14.2 When directed to do so by the Governance Committee, the Working Group s and Technical Teams will prepare a report and recommendations regarding the review elements listed in 14.1 for consideration by the Parties. Upon receipt of such a report from the Working Group, either Party may request that the Parties negotiate amendments to the Agreement, and upon such request the Parties will negotiate amendments to the Agreement.

ARTICLE 15 – AMENDING THE AGREEMENT

15.1 The Parties may amend this Agreement by mutual Agreement and in writing.

ARTICLE 16 – TERMINATION

16.1 This Agreement may be terminated:

(a) By mutual consent confirmed in writing; or

(b) By either Party, where in its reasonable opinion the Principles or commitments contained in this Agreement are not being met; and then only after the Party has referred the issue to the Dispute Resolution Process and the issue has not been resolved after completion of that process.

16.2 If a Party wishes to terminate this Agreement pursuant to 16.1(b), that Party will serve a Notice of Termination on the other Party setting out the reasons for the termination. The Parties agree that ninety (90) days after the Notice of Termination is served in accordance with this Agreement, the Agreement will be terminated.

ARTICLE 17 – NON-DEROGATION

17.1 Nothing in this Agreement shall be construed or implemented so as to abrogate or derogate from any of SON's treaty or Aboriginal rights..

17.2 This Agreement is without prejudice, and shall not be relied upon by either Party in a judicial or quasi-judicial proceeding, except for the purposes of enforcement of this Agreement.

ARTICLE 18 – CONFIDENTIALITY

18.1 The Parties agree to keep the terms of this Agreement strictly confidential other than as necessary to enforce any continuing obligations of the Parties hereunder, as required by law, or as required under the federal *Access to Information Act*.

ARTICLE 19 – NOTICE

19.1 Any notice or other communication required or permitted to be given in this Agreement will be in writing and will be delivered by hand or transmitted by facsimile transmission and addressed as follows:

(a) If to SON:

The Saugeen First Nation
Attention: The Chief of the Saugeen First Nation
R.R.#1
Southampton ON N0H 2L0
Fax: (519) 797-2978

and

The Chippewas of Nawash Unceded Nation
Attention: The Chief of the Chippewas of Nawash
RR 5
Wiarton, ON N0H 2T0
Fax: (519) 534-2130

(b) If to the DFO:

[●INSERT ADDRESS AND FAX NUMBER]

or such other address or fax number as a Party may, from time to time advise the other Party by notice in writing given in accordance with the foregoing.

19.2 The date of receipt of any such notice will be deemed to be the date of delivery thereof, if delivered by hand, and on the day of faxing and receipt of a successful transmission confirmation statement, if faxed, provided such day is a business day and if not, on the first business day thereafter.

Version 4:

ARTICLE 20– GENERAL PROVISIONS

20.1 The provisions of this Agreement and the Schedules to this Agreement, collectively, represent the entire Agreement between the Parties.

Version 4:

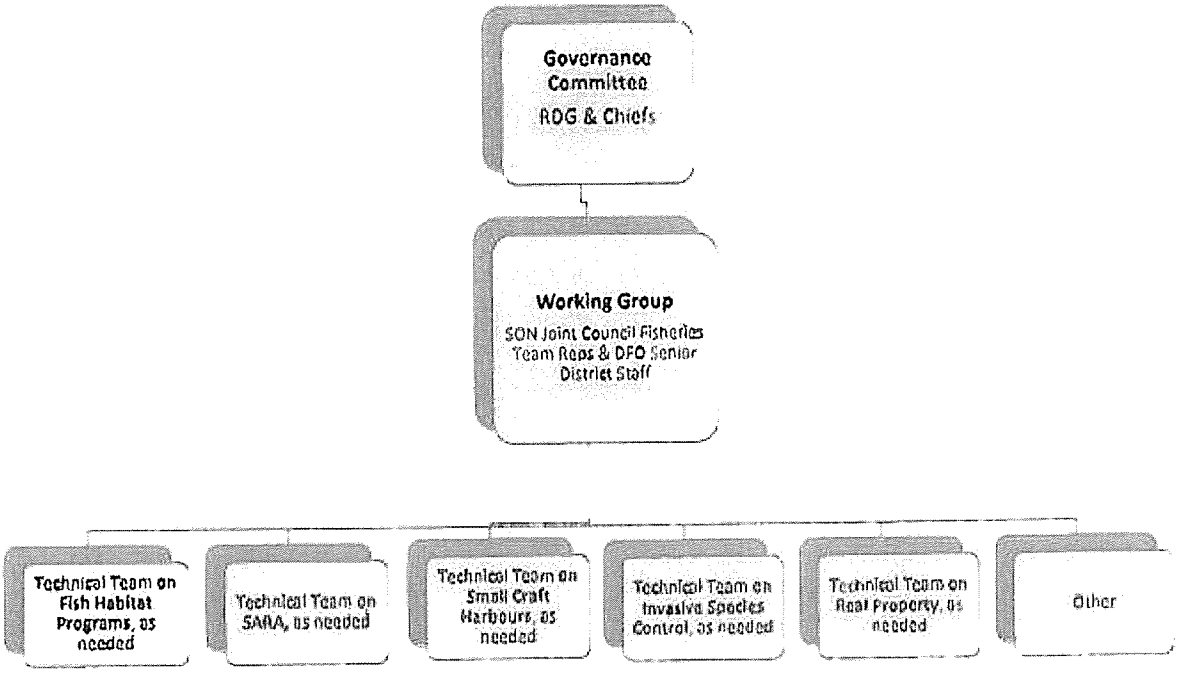
Schedule 1: May 2012 Memorandum of Understanding

Version 4:

Schedule 2: SON Traditional Territory Map

Version 4:

Schedule 3: Governance Structure



Version 4:

Schedule 4 : Template for Technical Teams' Terms of Reference

Engagement specifics will be defined by the Technical Teams directly. Technical Teams will be charged with the responsibility of defining the engagement specifics by program, for approval by the Governance Committee. The following template will be used to develop these engagement specifics. A separate template will be developed for each of the following five areas, and others as needed :

- Habitat
- Species At Risk
- Invasive Species
- Small Craft Harbour
- Real Property

Program Area : _____

What is the nature/focus of this program?	
What is the impact on SON?	
What are the needs of SON vis-à-vis this program interest?	**What are the needs of DFO vis-à-vis this program interest?**
What are the existing engagement triggers?	
What are the problems we are trying to fix?	**What new engagement triggers (areas of mutuality) are needed?**
What is DFO's commitment to SON?	**What is SON's commitment to DFO?**

Version 4:

Schedule "C"

Relationship Agreement

RELATIONSHIP AGREEMENT

BETWEEN

Fisheries and Oceans Canada Central and Arctic Region

AND

The Chippewas of Nawash First Nation

AND

Saugeen First Nation

(referred to as the "Saugeen Ojibway Nation" or "SON")

(collectively, the "Parties")

1. PARTICIPANTS

Fisheries and Oceans Canada, as represented by the Regional Director General (RDG), Central and Arctic Region, Fisheries and Oceans Canada (hereinafter referred to as "DFO) AND the Chippewas of Nawash First Nation and Saugeen First Nation (collectively, the "Saugeen Ojibway Nation", or "SON")

WHEREAS:

The Parties, in entering into this agreement, wish to build an effective and cooperative relationship, based on mutual respect and understanding;

The Parties are both seeking to facilitate and encourage communication, engagement and consultation between DFO and SON consistent with the terms of this Agreement; and

The Parties are both aware of each other's respective roles and responsibilities.

THEREFORE THE PARTIES AGREE AS FOLLOWS:

2. PURPOSE

The purpose of this Agreement is to facilitate and encourage communication, engagement and consultation between SON and DFO on the following matters when they may have a direct linkage to the SON's interests:

a) Fisheries Protection;
b) Small Craft Harbours;
c) Species At Risk;
d) Aquatic Invasive Species management;
e) Real Property issues associated with Fisheries and Oceans Canada; and,
f) Any other matters that the Parties may agree upon that are found within Fisheries and Oceans Canada's mandate.

3. AGREEMENT PRINCIPLES

The Parties agree that the following basic principles of this Agreement will include:

a) a mutual trust, respect and understanding for each other;

b) building a relationship to achieve effective and constructive communication between the Parties for the future; and

c) recognition that this Agreement is made without prejudice to the mandate and positions taken by either Party with respect to Aboriginal or treaty rights.

4. ROLES AND RESPONSIBILITIES

The Parties agree that their roles and responsibilities under this Agreement will be as follows:

4.1 That communication, engagement and other consultation between the Parties

a) will occur at the earliest opportunity and be timely.

b) is a two-way process and is reciprocal.

c) will be ongoing and meaningful.

d) will recognize both DFO and SON's decision-making processes.

4.2 That the Parties will:

a) Convene an annual face-to-face meeting between the Regional Director General, DFO-Central and Arctic Region, and the SON Chiefs to discuss the ongoing implementation of this Agreement and other issues of mutual interest.

b) Establish a Working Group of equal representation from each Party that will:

i. Within one (1) year of entering into this Agreement, develop communication, engagement, and consultation protocols for each of the DFO programs listed in Section 2.0.

ii. Convene regular face-to-face meetings to discuss the ongoing implementation of this Agreement.

iii. Jointly report annually to the SON Chiefs and the Regional Director General, DFO-Central and Arctic Region, regarding the implementation of this Agreement and issues of mutual interest.

5. DISPUTE RESOLUTION

The Parties will endeavour to resolve issues regarding the implementation of this Agreement in a timely manner using mechanisms available at the staff level. Where an issue remains unresolved, the SON Chiefs and the Regional Director General, DFO-Central and Arctic Region, will meet at their earliest convenience and attempt to resolve the dispute.

6. REVIEW

The Parties agree to initiate, as directed by the SON Chiefs and Regional Director General, DFO-Central and Arctic Region, a review of this Agreement within two (2) years from its effective date.

7. AMENDMENT

The Parties may amend this Agreement at any time by mutual agreement and in writing.

8. FUNDING

Unless otherwise agreed to by the Parties, this Agreement will not impose any financial responsibilities or expectation of an exchange of funds between the Parties. Each Party will be responsible for the staff and funding costs it incurs in its own interest, related to the support of the Agreement unless alternate arrangements have been agreed upon.

9. DURATION AND TERMINATION

The Parties agree that the term of this Agreement will be a period of five (5) years, and may be renewed thereafter on such additional terms or conditions and for such additional period as agreed to by the Parties.

9.1 The Agreement may be terminated by either Party with ninety (90) days' notice in writing given to the other Party.

10. LEGAL DISCLAIMER

This Agreement is an expression of the mutual intentions of the Parties and is not legally binding on them or enforceable against them.

10.1 This Agreement is not a land claims agreement or treaty within the meaning of Section 35 of *Constitution Act, 1982.*

11. CONTACTS

The Saugeen First Nation
The Chief of the Augean First Nation
R.R. #1
Southampton, Ontario N0H 2L0
Fax: (519) 797-2978

The Chippewas of Nawash First Nation
The Chief of the Chippewas of Nawash
R.R. #5
Wiarton, Ontario N0H 2T0
Fax : (519) 534-2130

Fisheries and Oceans Canada
Central and Arctic Region
Regional Director General
520 Exmouth St.
Sarnia, Ontario N7T 8B1
Fax: (519) 464-5128

This agreement is valid as of the day it is signed.

_____
Fisheries and Oceans

_____
Name

_____
Date

_____
Saugeen First Nation

_____
Name

_____
Date

_____
Chippewas of Nawash

_____
Name

_____
Date

EXHIBIT “K”

This is Exhibit ..K.. referred to in the
affidavit of ..Paul Jones..
sworn before me, this ..15th..
day of ..August.. 20..13..
A COMMISSIONER FOR TAKING AFFIDAVITS

AGREEMENT
TO ESTABLISH A JOINT REVIEW PANEL
FOR THE NEW NUCLEAR POWER PLANT PROJECT BY BRUCE POWER
WITHIN THE MUNICIPALITY OF KINCARDINE, ONTARIO

BETWEEN

THE MINISTER OF THE ENVIRONMENT
-And-
THE CANADIAN NUCLEAR SAFETY COMMISSION

PREAMBLE

WHEREAS the Minister of the Environment has statutory responsibilities pursuant to the *Canadian Environmental Assessment Act*;

WHEREAS the Commission has statutory responsibilities pursuant to the *Nuclear Safety and Control Act* and to the *Canadian Environmental Assessment Act*;

WHEREAS Bruce Power has applied to the Commission to seek approval to prepare a site for the construction and operation of nuclear power reactors;

WHEREAS the Project would be carried out within the area that the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation (collectively referred to as the SON) identify as Anishnaabekiing, the specified territory they identify that they have traditionally used and occupied;

WHEREAS the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation have expressed concerns that the Project might adversely affect potential or established Aboriginal rights, title or Treaty rights they assert in that area;

WHEREAS the Minister and the Commission acknowledge that a duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal rights, title or Treaty rights, and contemplates conduct that might adversely affect it;

WHEREAS an environmental review of the Project by a Joint Review Panel is an important source of information about effects the Project may have on the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation's potential or established Aboriginal rights, title or Treaty rights, and would therefore support ongoing consultations between the Crown and Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation related to the Project;

WHEREAS the Project is within the jurisdiction of the Commission under the *Nuclear Safety and Control Act* and requires an environmental assessment pursuant to the *Canadian Environmental Assessment Act*;

WHEREAS the Commission, Fisheries and Oceans Canada, and Transport Canada are the responsible authorities for the Project pursuant to the *Canadian Environmental Assessment Act*;

WHEREAS the Project requires a licence pursuant to the *Nuclear Safety and Control Act*;

WHEREAS the Commission has recommended, in accordance with section 25 of the *Canadian Environmental Assessment Act*, that the Minister of the Environment refer the Project to a review panel;

WHEREAS the Minister of the Environment has referred the Project to a review panel in accordance with section 29 of the *Canadian Environmental Assessment Act*;

WHEREAS the Parties to this Agreement have determined that a review of the Project by a joint review panel will ensure that the Project is reviewed in a manner that will provide for an effective and efficient environmental assessment and regulatory process;

AND WHEREAS the Minister of the Environment has determined that a joint review panel should be established pursuant to subsection 40(2) of the *Canadian Environmental Assessment Act* to consider the Project;

NOW THEREFORE, the Parties hereby establish a Joint Review Panel for the Project in accordance with the provisions of this Agreement and the Terms of Reference attached as an Appendix to this Agreement.

1. DEFINITIONS

In this Agreement:

"**Aboriginal group**" means a community of Indian, Inuit or Métis people that holds or may hold Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*;

"Agency" means the Canadian Environmental Assessment Agency;

"CEAA" means the *Canadian Environmental Assessment Act*;

"Commission" means the Canadian Nuclear Safety Commission;

"Environment" has the same meaning as set out in section 2 of the CEAA;

"Environmental Effect" has the same meaning as set out in section 2 of the CEAA;

"Environmental Impact Statement" means the document that the proponent has prepared in accordance with the Environmental Impact Statement Guidelines issued by the Parties pursuant to Part II of the Appendix to this Agreement.

"Federal Authority" has the same meaning as set out in section 2 of the CEAA;

"Follow-up program" has the same meaning as set out in section 2 of the CEAA;

"Intervenor", means a person appearing at a Joint Review Panel Hearing pursuant to rule 18 of the *Canadian Nuclear Safety Commission Rules of Procedure*, a person participating as an intervenor in a Joint Review Panel Hearing pursuant to rule 19 of the *Canadian Nuclear Safety Commission Rules of Procedure* or a person who establishes an interest to participate in the Joint Review Panel Hearings by way of a written submission and/or an oral presentation;

"Joint Review Panel" means a Joint Review Panel (JRP) established through this Agreement;

"Joint Review Panel Agreement" means this Agreement to Establish a Joint Review Panel for the New Nuclear Power Plant Project by Bruce Power within the Municipality of Kincardine, Ontario and the attached Appendix;

"Joint Review Panel Hearing" means the public hearing process followed by the Joint Review Panel to hear information and evidence required for the Review;

"Joint Review Panel Report" means a report which sets out the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and a summary of any comments received from the public in the course of the Joint Review Panel Hearings;

"Jurisdiction" has the same meaning as set out in subsection 40(1) of the CEAA;

"Licence Application" means the documentation filed by the Proponent under the NSCA for a Licence to Prepare Site prior to the construction of the Project;

"NSCA" means the *Nuclear Safety and Control Act*;

"Parties" mean the signatories to this Agreement;

"Project" means the preparation of a site for, and the construction, operation, decommissioning and abandonment of, up to four new nuclear power reactors on the existing Bruce Nuclear Site within the Municipality of Kincardine, Ontario described in Part I of the Appendix to this Agreement;

"Proponent" means Bruce Power;

"Public Registry" means the Canadian Environmental Assessment Registry established under section 55 of the CEAA, to facilitate public access to records relating to the environmental assessment of the Project;

"Responsible Authority" has the same meaning as set out in section 2 of the CEAA and includes for this Project the Commission, Fisheries and Oceans Canada and Transport Canada;

"Review" means the assessment by the Joint Review Panel of the environmental effects of the Project to be conducted pursuant to the CEAA and the consideration of the Licence Application under the NSCA to determine whether the Project will pose an unreasonable risk to the health and safety of persons, the environment and national security; and,

"SON" means the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation who collectively identify themselves as the Saugeen Ojibway Nation, who have asserted claims in the area as represented by the Chiefs of the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation.

2. ESTABLISHMENT OF THE JOINT REVIEW PANEL (JRP)

2.1 A process is hereby established to create a Joint Review Panel (JRP) that will:

a) Constitute a review panel pursuant to sections 40, 41 and 42 of the CEAA for the purposes of carrying out an environmental assessment of the Project; and

b) Constitute a panel of the Commission, created pursuant to section 22 of the NSCA, for the purposes of the review of the Licence Application pursuant to section 24 of the NSCA.

2.2 Nothing in this JRP Agreement shall be construed as limiting the ability of the JRP to have regard to all considerations that appear to be relevant pursuant to section 24 of the NSCA and to include a consideration of the factors set out in sections 16 and 16.1 of the CEAA.

3. CONSTITUTION OF THE JOINT REVIEW PANEL

3.1 The JRP will consist of three members. Two members will be appointed by the President of the Commission with the approval of the Minister of the Environment.

3.2 The Minister of the Environment will propose to the President of the Commission a candidate as a third member of the JRP who may also serve as a temporary member of the Commission.

3.3 Upon approval by the President of the Commission of a candidate as a third member of the JRP who may also serve as a temporary member of the Commission,

the President of the Commission will recommend to the Minister of Natural Resources that the Minister of Natural Resources recommend the proposed candidate to the Governor in Council for the appointment of that proposed candidate as a temporary member of Commission.

3.4 If appointed by the Governor in Council as a temporary member of Commission, the selected candidate will then be appointed by the Minister of the Environment as a member of the JRP.

3.5 The members of the JRP are to be unbiased and free of any conflict of interest in relation to the Project and are to have knowledge or experience relevant to the anticipated environmental effects of the Project.

4. CONDUCT OF THE REVIEW

4.1 The JRP shall conduct the Review in accordance with the Terms of Reference attached as an Appendix to this JRP Agreement in a manner that:

a) Discharges the requirements set out in the CEAA;
b) Permits it to obtain the information and evidence required for it to consider the Licence Application under the NSCA; and,
c) Permits it to obtain information and evidence about the adverse effects the project may have on potential or established Aboriginal rights, title or treaty rights as identified to the JRP by the SON and enables it to bring any such information and evidence to the attention of the Minister of the Environment and the Responsible Authorities for the Project in support of consultation between the Crown and the SON.

4.2 The JRP shall have all the powers and duties of a review panel described in section 35 of the CEAA.

4.3 As a panel of the Commission, the JRP shall also have the powers and duties of the Commission described in section 20 of the NSCA.

5. SECRETARIAT

5.1 A Secretariat will be formed consisting of professional, scientific, technical or other Agency and Commission personnel necessary for the purposes of the Review.

5.2 The Secretariat will provide information to the JRP orally and in writing during the JRP Hearings.

5.3 The personnel who comprise the Secretariat shall not be considered to be Intervenors.

5.4 The Commission will provide its offices for the conduct of the activities of the JRP and the Secretariat.

5.5 The Secretary of the Commission, or his designate, will act as Secretary to the JRP and as co-manager of the Secretariat.

5.6 The Agency shall appoint a panel manager as co-manager of the Secretariat.

6. RECORD OF THE REVIEW

6.1 Subject to section 55 and subsections 35(4), and 35(4.1) of the CEAA, the Public Registry will include all submissions, correspondence, hearing transcripts, exhibits and other information received by the JRP and all public information produced by the JRP relating to the Review.

6.2 The internet site component of the Public Registry will be maintained by the Secretariat during the course of the Review in a manner that provides for convenient public access, and for the purposes of compliance with sections 55 to 55.5 of the CEAA.

6.3 A project file will be maintained by the Secretariat during the course of the Review in a manner that provides for convenient public access, and for the purposes of compliance with sections 55 and 55.4 of the CEAA. This project file will be located in the offices of the Secretariat.

7. JOINT REVIEW PANEL REPORT

7.1 On completion of the assessment of the Project, the JRP Panel will prepare a JRP Report.

7.2 The JRP will convey the JRP Report in writing in both official languages to the Minister of the Environment who will then publish the report.

7.3 Responsible Authorities will take a course of action with respect to section 37 of the CEAA and the JRP, as a panel of the Commission, may also make a decision with respect to the Licence Application pursuant to section 24 of the NSCA.

8. OTHER FEDERAL DEPARTMENTS AND JURISDICTIONS

8.1 At the request of the JRP, federal authorities having specialist information or knowledge with respect to the Project shall make available that information or knowledge in a manner acceptable to the JRP.

8.2 Subject to article 8.1, nothing in this JRP Agreement shall restrict the participation of a Jurisdiction by way of submission to the JRP.

9. PARTICIPANT FUNDING

9.1 Participant funding for the Review will be provided and administered by the Agency pursuant to the Participant Funding Program.

10. AMENDING THIS JOINT REVIEW PANEL AGREEMENT

10.1 The terms and provisions of this JRP Agreement may be amended by written memorandum executed by both the Minister of the Environment and the President of the Commission.

10.2 Subject to section 27 of the CEAA, upon completion of the Review, this JRP Agreement may be terminated at any time by an exchange of letters signed by both Parties.

The Honourable John Baird
Minister of the Environment

Michael Binder
President, Canadian Nuclear Safety Commission

APPENDIX

Terms of Reference for the Review

Part I - Project Description

Pursuant to paragraphs 15(1)(b) and 15(3)(b) of the CEAA, the Minister of the Environment is proposing that the scope of the project include the site preparation, construction, operation, decommissioning and abandonment of the project components and activities proposed by Bruce Power as described in *Bruce Power New Build Project Environmental Assessment – Project Description.*

The principal project is comprised of the following physical works:

- The power block, consisting of the buildings housing the nuclear reactors and all associated facilities and equipment, including two sets of the following structures:
  - Reactor Building – containing the nuclear steam supply system;
  - Turbine Building – holding the turbine and electrical generator;
  - Annex and Auxiliary Buildings – holding laydown areas, purification systems, used fuel handling system, used fuel bay, water treatment plant, heavy water upgrading plant, pump houses for service water, heavy handling equipment, low and intermediate level waste handing facilities, and internal maintenance areas; and
  - Other support facilities, including chemical storage facilities, emergency back-up diesel generators, and their associated storage tanks.
- The shared facilities between two-reactor modules including:
  - Condenser Cooling Water Systems, including the cooling towers or the once-through cooling system with all of its associated submerged intake, forebay and discharge systems;
  - Administrative buildings and offices;
  - Laboratories;
  - External maintenance structures (boiler chemical clean tanker laydown area); and
  - Maintenance facilities and workshops.
- The plant's main switchyard, including buses, lines, circuit breakers and towers.

The physical works for the project also include shoreline and underwater structures including:

- Lakefill and pilings in the area infilled from Lake Huron (McPherson Bay);
- A docking facility to receive large reactor components; and
- Underwater tunnels/pipes into Lake Huron.

Other physical works, accessory to the principal project, considered as part of the scope of project include site infrastructure needed to support the above-mentioned physical works, including power, sanitary sewer and potable water systems; storm water and subsurface drainage systems, construction laydown areas, dedicated roadways into the

construction site and installation of a fence to create a physical barrier between the project construction site and the existing nuclear facilities which will continue to operate.

Plans for the long-term management of low and intermediate level radioactive waste are the responsibility of the waste producer. The development of a facility for the long-term management of used nuclear fuel falls under the mandate of the Nuclear Waste Management Organization. Therefore, the physical works within the scope of this project are facilities that the proponent may construct to provide interim or long-term storage and monitoring for low and intermediate level radioactive waste and for interim storage of used nuclear fuel on the Bruce site.

The undertakings in relation to the physical works to be considered for the purposes of this assessment are site preparation, construction, operation, decommissioning and abandonment phases of the project. The following describes activities expected to be undertaken for each of these undertakings and include:

Site Preparation:

Clearing of vegetation; grubbing; stripping of top soil; grading; drilling and blasting to create sampling/monitoring wells or additional geophysical borings[1]; infilling of McPherson Bay (Lake Huron) involving installation of coffer dams, dewatering, excavation and blasting; construction of a docking facility; building roads for heavy equipment; trenching for the installation service pipelines (sewer, water); installation of temporary construction support facilities (e.g., warehouses, concrete mixing plants); installation of site services including fencing, exterior lighting and security systems, construction roadways, parking lots; development of on-site facilities for the storage and management of construction waste; and, management of hazardous substances and hazardous waste.

Construction:

Blasting/dredging and offshore lake dumping activities associated with the intake/discharge tunnels; installation of pilings; construction of the switchyard; installation of towers and transmission lines between the power block and the switchyard and between the switchyard and the provincial grid system and of other associated switchyard gear; installation of plant internal components (e.g., reactor components, steam generators, steam supply piping, turbines, electrical power systems, fire protection system, water piping, sewage handling and treatment equipment, lighting); continued installation of site services including plant security, fencing and security systems; and, post-construction rehabilitation of the site.

[1] Drilling to create sampling/monitoring wells and/or additional geophysical borings on site for EIS technical studies are not considered part of the site preparation for the new NPP until the licence to prepare site has been issued

Operation and Maintenance:

This phase consists of the 60-year timeframe over which the nuclear power station is expected to generate electricity.

Commissioning a new nuclear power plant consists of the following general activities: verification and qualification of systems, pressure testing of vessels, fuelling of reactor; pressure testing of containment building, approach to criticality, approach to full power; testing of the reactor core physics, verification of control systems, connection to the grid, operational testing and full power operation. Some commissioning activities, specifically those that take place without fuel in the reactor core, may be authorized during the construction phase.

Following commissioning, the activities to be undertaken include the operation and maintenance of the plant systems including: nuclear steam supply systems; turbine generator, condenser cooling water and feedwater systems; electrical power systems; nuclear safety systems; ancillary systems; systems for maintaining facility security; activities associated with the maintenance program; materials handling systems; solid and liquid waste handling systems; and administration and support systems.

Operation and maintenance activities can be categorized as follows: operation of equipment for production of electricity; verification, sampling, testing and maintenance during operation at power; maintenance, repairs, cleaning, and decontamination during planned shutdowns and outages; on-site transportation and handling of fuel, including defuelling and refuelling of the reactor; management of low and intermediate waste and spent fuel waste within the reactor building, and the transfer of wastes for interim or long-term storage; management of hazardous substances and hazardous waste; and activities relating to environmental protection and radiation protection programs.

Refurbishment

The assessment will consider the effects associated with mid-life refurbishment for CANDU-type reactors, as well as effects relating to outages to refuel or refurbish light water reactors.

Decommissioning

Decommissioning activities can be conceptually summarized as followings: removal of fuel from reactor and transfer of fuel and associated wastes to interim or long-term licensed storage facilities; decontamination of plant; flush purging of equipment and systems; removal of surface contamination from facilities or equipment; dismantling and removal of equipment and systems; demolition of building; and, site restoration.

Abandonment

A few activities are expected to be carried out for this phase of the project, including monitoring of radiation. Once the site's radiation levels and environmental quality are

demonstrated to meet all regulatory requirements, the site may be made available for re-use.

Waste Management and Used Fuel Storage

Waste management and used fuel storage is not a separate phase of the project; physical activities related to waste management and used fuel storage occur throughout the project lifecycle, from site preparation through abandonment.

Specific physical activities related to the proponent's management of low and intermediate level radioactive wastes and the storage of used fuel at the Bruce Site includes: preparing the site for, and the construction of, new or additional waste management or used fuel storage facilities; the transfer of wastes and used fuel from the power block or shared facilities to the on-site waste management and fuel storage facilities; the operation of these facilities; and, their decommissioning and abandonment as appropriate.

Part II - Components of the Review

1. Within 30 days of the close of the public comment period regarding the draft Environmental Impact Statement Guidelines, the Minister of the Environment shall, following consultation with the President of the Commission and after taking into account the comments received by the public, the SON and other Aboriginal groups, issue the Environmental Impact Statement Guidelines.
2. The Parties shall require the Proponent to prepare the Environmental Impact Statement (EIS) in accordance with the Environmental Impact Statement Guidelines issued by the Minister.
3. Upon receiving the Environmental Impact Statement (EIS), and provided that the Joint Review Panel (JRP) has been struck and that participant funding pursuant to s. 58(1.1) of CEAA has been awarded, the JRP will have a period of up to 14 days to announce the commencement of the EIS public review and comment period and to issue instructions and a timetable for the review that will include opportunities for public comment.
4. A maximum six (6) month period is provided for review and analysis of the EIS followed by a one (1) month period for the JRP's consideration of the comments received on the sufficiency of the EIS to proceed to the JRP Hearing phase. This seven (7) month time period is in addition to any time required by the proponent to respond to any information requests from the JRP.
5. At any time following submission of the EIS to the JRP, during the EIS public comment and review period, or in considering of any comments received during or following the public comment period, the JRP may request any additional information it deems necessary from the Proponent.
6. The JRP shall schedule and announce the start of the JRP Hearings once it is satisfied that the proponent's EIS and any additional information has adequately responded to the EIS Guidelines.

7. The JRP shall provide public notice of the JRP public hearings 90 days prior to the start of the Hearings.
8. Written comments obtained pursuant to the EIS public review and comment period shall be made public on the Public Registry.
9. At the request of the JRP, the Secretariat shall provide written and oral professional, scientific, technical or other assessment to the JRP.
10. The JRP may secure the services of additional independent experts to provide information on and help interpret technical and scientific issues and issues relative to community knowledge and Aboriginal traditional knowledge.
11. The JRP shall hold the Hearings within the Municipality of Kincardine and elsewhere as it deems appropriate.
12. The JRP shall deliver its Report to the Minister of the Environment within 90 days following the close of the Hearings. Paper and electronic copies of the report will be provided upon request. Copies will also be available on the Internet.

Part III – Procedure

1. The JRP will issue directions on procedures in accordance with the CEAA, NSCA and the provisions of the JRP Agreement. The directions on procedures will include the JRP's procedures for the review process including the conduct of the EIS review, communication with the JRP, hearing procedures and/or any other matter the JRP deems appropriate. The JRP may issue separate public hearing procedures prior to the hearings.
2. The JRP may consult with the public prior to finalizing its directions on procedures.
3. The JRP Hearings will be conducted in accordance with the CEAA, NSCA and this Agreement and will ensure that opportunities are provided for timely and meaningful participation by the public, the SON, and other Aboriginal groups; that technical sessions are scheduled for specific matters of concern; and, that Aboriginal and traditional knowledge is appropriately considered.
4. For the purposes of CEAA or the NSCA, the JRP Hearings shall be public unless the JRP is satisfied after representations made by a witness that specific, direct and substantial harm would be caused to the witness or specific harm to the environment by the disclosure of the evidence, documents or other things that the witness is ordered to give or produce, or that information to be presented involves national or nuclear security; the information is confidential information of a financial, commercial, scientific, technical, personal or other nature that is treated consistently as confidential and the person affected has not consented to the disclosure; or the disclosure of the information is likely to endanger the life, liberty or security of a person.
5. The JRP public hearing procedures will establish timelines for presentations to the JRP. Each presentation may be followed by a question and answer period led by the JRP, followed by questions from other Intervenors.

6. Questions will be directed through the JRP Chair who may subsequently allow a participant to put questions directly to the presenter. Where a person does not adhere to the procedures and the direction of the JRP Chair, the JRP Chair will have the authority to refuse to permit further questioning from that person.
7. The JRP Chair may limit or exclude questions or comments that fall outside the mandate of the Joint Review Panel, are repetitive, irrelevant, or immaterial.
8. The JRP Chair may limit discussion that exceeds the time limits established by the JRP procedures.

Part IV – Scope of the Environmental Assessment and Factors to be Considered in the Review

1. The Review will include a consideration of the following factors listed in paragraphs16(1)(a) to (d) and in subsection 16(2) of the CEAA:
   a) The environmental effects of the Project, including the environmental effects of malfunctions, accidents or malevolent acts that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
   b) The significance of the effects referred to in (a);
   c) Comments that are received during the Review;
   d) Measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
   e) Purpose of the Project;
   f) Need for the Project;
   g) Alternatives to the Project;
   h) Alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
   i) Measure to enhance any beneficial environmental effects;
   j) The requirements of a follow-up program in respect of the Project;
   k) The capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and
   l) Consideration of community knowledge and Aboriginal traditional knowledge.

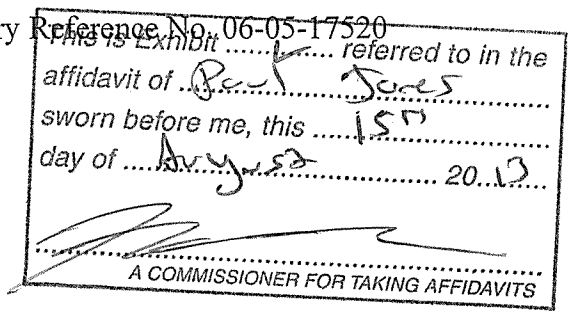
Part V – Scope of Assessment of the Application for Licence to Prepare Site

Pursuant to section 24 of the NSCA and its regulations, the JRP process will include consideration of:

- Whether the applicant is qualified to perform the activity to be licensed; and,
- Whether in carrying on that activity the applicant will make adequate provisions for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

EXHIBIT "L"

CEAA Registry Reference No. 06-05-17520



Saugeen Ojibway Nations' Application for a Determination on the Scope of Review of OPG's DGR Project and the Inclusion of a Project for the Long-Term Management of High Level Nuclear Wastes

August 9, 2012
Toronto, Ontario

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I. OVERVIEW

1. The environmental impact statement ("EIS")[1] submitted by the Proponent Ontario Power Generation Inc. ("OPG") with respect to the proposed deep geologic repository ("DGR") for low and intermediate level radioactive waste (the "DGR Project") fails to consider a project for the disposal of used nuclear fuel within the Study Area as a cumulative effects project and is therefore fundamentally deficient.

2. The governing law,[2] the EIS Guidelines for the DGR Project[3] and this Joint Review Panel's own terms of reference[4] all require that a full "cumulative effects analysis" be undertaken as part of the environmental assessment of the DGR Project. It was incumbent on OPG to ensure that all projects—certain, reasonably foreseeable and, where appropriate, hypothetical—that could result in cumulative environmental impacts when combined with the DGR Project were included in the EIS and thus could be assessed by the Joint Review Panel ("JRP" or the "Panel).

3. In its analysis of potential cumulative effects in the EIS, OPG failed to include any discussion or analysis of a deep geological repository for used nuclear fuel (also referred to as high-level waste ("HLW")) or other project for the disposal of used nuclear fuel ("HLW DGR Project"). Yet an HLW DGR Project is a

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1 *OPG's Deep Geologic Repository Project for Low & Intermediate Level Waste: Environmental Impact Statement* (dated March 2011, filed April 2011) ("EIS").

2 The relevant statutory provision is Section 19(1)(a) of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (the "*Act*"). Under recent revisions to the *Act*, the section that addresses the need for an analysis of cumulative effects has been renumbered as Section 19(1)(a) from the previous Section 16(1)(a). The revised *Act* contains no substantive changes with respect to how a cumulative effects analysis is to be undertaken.

3 *Guidelines for the Preparation of the Environmental Impact Statement for the Deep Geologic Repository for Low- and Intermediate-Level Radioactive Wastes* (January 2009) ("EIS Guidelines").

4 Terms of Reference to the *Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. Within the Municipality of Kincardine, Ontario Between the Minister of the Environment and the Canadian Nuclear Safety Commission* (January 26, 2009, as amended August 3, 2012) ("JRP Terms of Reference").

"reasonably foreseeable" future project and as such its inclusion in the cumulative effects analysis is mandated by the *Act*, by relevant Canadian Environmental Assessment Agency ("CEAA") policy and practice directives, by the EIS Guidelines for this DGR Project and by the JRP's own terms of reference.

4. There is ample evidence to demonstrate that the construction and operation of an HLW DGR Project at the Bruce Nuclear site, or within the Study Area, is a reasonably foreseeable project. Accordingly, OPG's failure to include consideration of an HLW DGR Project in the cumulative effects analysis constitutes a fundamental deficiency in the EIS, materially comprises the review and precludes the Panel from fulfilling its mandate.

5. This is a preliminary matter that must be addressed prior to any further steps in this review being taken and prior to the close of the technical review period. OPG must be given specific direction to amend its EIS to include consideration of an HLW DGR Project and provide full consequential data and analysis.

6. The Panel may wish to order other procedural steps as may be required in order to permit OPG to amend its EIS and to allow the Panel, intervenors, government reviewers and agencies to consider the amended EIS and resume this review.

II. FACTS AND BACKGROUND

7. The Nuclear Waste Management Organization ("NWMO") is mandated under the *Nuclear Fuel Waste Act* ("*NFWA*") to develop, propose to government and implement a long-term project for the management of nuclear fuel wastes currently stored in interim storage facilities throughout Canada.[5]

8. The *NFWA* was a legislative initiative recommended as a result of the federal environmental assessment of a "Concept for Disposal of Canada's Nuclear Fuel

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5 *Nuclear Fuel Waste Act*, S.C. 2002, c.23, section 6.

Waste" proposed by Atomic Energy of Canada Limited ("AECL"). In February 1998, the Panel for that review issued its *Report of the Nuclear Fuel Waste Management And Disposal Concept Environmental Assessment*, commonly referred to as the Seaborn Panel Report.[6] The Report made a number of key findings and recommendations, including:

a. The concept proposed by AECL, deep geological disposal in the plutonic rock of the Canadian Shield, while technically feasible, had not been demonstrated to be safe from a social perspective, and had not been demonstrated to have public support.

b. A robust approach would need to be developed for building and demonstrating public support for the concept, and demonstrating safety from a social perspective.

9. Under the *NFWA,* NWMO was required to submit an approach, among others, based on the recommendations of the Seaborn Panel Report. Section 12(2)(a) of the *NFWA* requires the development of an approach based on:

> [D]eep geological disposal in the Canadian Shield, based on the concept described by Atomic Energy of Canada Limited in the Environmental Impact Statement on the Concept for Disposal of Canada's Nuclear Fuel Waste and taking into account the views of the environmental assessment panel set out in the Report for the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment Panel dated February 1998.[7]

10. In 2005, NWMO recommended an approach of Adaptive Phased Management leading to "centralized containment and isolation of the used fuel in a deep geological repository in a suitable rock formation, such as the crystalline rock of

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6 *Report of the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment Panel*, Nuclear Fuel Waste Disposal Concept Environmental Assessment Panel (February 1998) (the "Seaborn Panel Report).

7 *NFWA*, *supra* note 5 at s.12(2)(a).

the Canadian Shield or Ordovician sedimentary rock."[8] The Government of Canada accepted this recommendation on June 14, 2007.[9]

11. In May 2010, NWMO issued its process for the identification of a site for a deep geological repository for used nuclear fuel, entitled "Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel" (the "Site Selection process"). That document sets out the key aspects of NWMO's Site Selection process, including: (1) seeking an informed and willing host community; (2) focus on nuclear provinces; and (3) that the siting process must be led by interested communities. On this last criteria, the NWMO states specifically that "the steps in the siting process must be driven or triggered by communities expressing interest in exploring their potential suitability as host."[10] In May 2010, NWMO announced that it had begun implementation of its Site Selection process.

B. The Proposed DGR Project

12. OPG has submitted an EIS for the review of a proposal to prepare a site for, construct and operate a deep geological repository at the Bruce Nuclear site on the shore of Lake Huron, Ontario. The DGR Project is intended to be a repository for low and intermediate level radioactive wastes that are currently stored in an interim facility, the Western Waste Management Facility, at the Bruce Nuclear site. The DGR Project will also be the repository for similar wastes that will be produced from the continued operation of the OPG-owned nuclear generating stations at Bruce, Pickering and Darlington.

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8 *Choosing a Way Forward: The Future of Management of Canada's Used Nuclear Fuel, Final Study*, Nuclear Waste Management Organization (November 2005) at 44.

9 *Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel*, Nuclear Waste Management Organization (May 2010) ("Moving Forward Together") at 5 (attached as Exhibit A).

10 *Id.* at 18.

13. OPG's proposal, as described in the EIS, includes the site preparation, construction, operation, decommissioning and abandonment of above-ground and below-ground facilities. Planned operations include activities required to operate and maintain the DGR facility, including the transfer of waste from the existing interim storage facility and the receipt of waste at the DGR, the emplacement of wastes in rooms within the DGR and the closure of these rooms.

14. Although not included in OPG's EIS, the proposal requires the continued transportation of radioactive wastes from OPG-owned generating facilities at Pickering and Darlington to the interim Western Waste Management Facility at the Bruce Nuclear site, as well as the continued processing of these wastes at that facility prior to transfer to the DGR.[11]

15. The Bruce Nuclear site currently houses two operating nuclear stations, Bruce A and Bruce B, comprised of eight nuclear reactors and associated facilities. The site also houses the Western Waste Management Facility, the Western Used Fuel Dry Storage Facility, the Douglas Point nuclear reactor and related radioactive waste storage site, an on-site landfill, two Heavy Water Production plants (currently being decommissioned) and various water supply and processing facilities, as well as numerous administrative and support buildings.[12]

C. This Joint Panel Review and OPG's EIS

16. In December 2008, the Minister of the Environment and the Commissioner of the Canadian Nuclear Safety Commission entered into an Agreement to Establish a Joint Review Panel.[13] Joint Panel Agreement requires that a thorough analysis of

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11 EIS, *supra* note 1 at s. 1.2.3.

12 *Id.* at s. 10.4.1.

13 *Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. Within the Municipality of Kincardine, Ontario Between the Minister of the Environment and the Canadian Nuclear Safety Commission* (dated January 26, 2009, amended August 3, 2012).

cumulative environmental effects is completed as part of the environmental assessment of the DGR Project. The Terms of Reference appended to the Joint Review Panel Agreement, at Part IV(a), state that "[t]he Review will include a consideration of . . . any cumulative environmental effects that are likely to result from the Project in combination with other projects that have been or will be carried out."

17. In addition to providing the terms of reference for the Panel, the Joint Panel Agreement, at Section 4(1)(c) instructed that "[t]he JRP shall conduct the Review in accordance with the Terms of Reference . . . in a manner that permits it to obtain information and evidence about the adverse effects the project may have on potential or established Aboriginal rights, title or treaty rights as identified to the JRP by the [Saugeen Ojibway Nations ("SON")] and enables it to bring any such information and evidence to the attention of the Minister of the Environment and the Responsible Authorities for the Project in support of consultation between the Crown and the SON."[14]

18. In January 2009, CEAA and the Canadian Nuclear Safety Commission ("CNSC") issued EIS guidelines to OPG to guide the preparation of its EIS for the DGR Project. As discussed further in paragraphs 65-66, *infra*, Section 14 of the EIS Guidelines requires OPG to identify and assess the cumulative adverse and beneficial environmental effects of the DGR Project in combination with other past, present or reasonably foreseeable projects and/or activities within the study area, as required by the *Act*.[15]

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[14] *Id.* On August 3, 2012 a notification was posted on the CEAA Registry that the JRP Agreement had been amended to reflect recent legislative changes to the *Act*. Changes include (1) modification to the acceptance and approval structure of the Panel's final report, and (2) fixed time periods for the completion of the Panel's final report and Minister's approval. Changes to the Agreement included modifications to s. 4(1)(c) respecting the Panel's mandate in the current review were not required as a result of amendments to the *Act* and were made without any prior consultation with or communication to SON.

[15] EIS Guidelines, *supra* note 3 at s. 14.

19. In April 2011 (although dated March 2011), OPG submitted its EIS for the DGR Project for consideration by the Joint Review Panel. Section 10 of the EIS addresses cumulative effects and identifies those projects for which OPG has undertaken a cumulative effects analysis in relation to the DGR Project. OPG included in its cumulative effects analysis a number of projects that are either "certain/planned" or "reasonably foreseeable" (Table 10.4-1):[16]

    a. The decommissioning of Bruce A and Bruce B nuclear stations
    b. Refurbishment of the Bruce B nuclear station
    c. Transfer of radioactive wastes from the RWOS1 facility to the Western Waste Management Facility ("WWMF facility")
    d. Upgrades to the WWMF facility
    e. Expansion of the Western Used-Fuel Dry Storage Facility
    f. Transfer of fuel to a Long Term Repository
    g. Construction of a DGR for Decommissioning Waste
    h. Various smaller infrastructure projects on site

20. Regarding the DGR for Decommissioning Waste at the Bruce Nuclear Site, OPG states in the EIS that:

> The decommissioning waste from OPG-owned or operated reactors will, at some point in the future, be relocated to a suitable long-term management site. The long-term management of decommissioning waste is not expected to start before 2050. Although no site has been identified, the DGR Hosting Agreement includes provision for decommissioning waste to be placed in the DGR Project and the EIS guidelines stipulate that consideration of placing decommissioning wastes in the DGR be included in the cumulative effects assessments."[17] OPG confirms that the DGR project site could be extended to double its capacity with no further site clearing required.[18]

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16 EIS, *supra* note 1 at s. 10, table 10.4-1.

17 EIS, *supra* note 1 at 10-18, Table 10.4.3.

18 *Id.*

21. OPG has included in its EIS cumulative effects analysis, as a reasonably foreseeable project, the removal of used fuel currently stored at the Western Used-Fuel Dry Storage Facility and transfer to a suitable long-term storage site.[19] OPG notes that NWMO is mandated to seek an informed willing host community for the long-term management site, that no such location has been yet determined and that used fuel transfer is not expected until 2035 or later.[20] Despite this, OPG, for the purposes of its cumulative effects analysis, supposes that the used nuclear fuel will be removed from the Study Area and concludes that, as a result of this removal, there will be a resulting net reduction of radioactivity at the site:

> At some point in the future, used fuel and decommissioning wastes will be transferred to a long-term repository. The DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site. Any dose will be solely from the transport of used fuel, and as the used fuel is transferred off-site, will result in net reduction of dose.[21]

22. OPG has not included as part of its cumulative effects analysis a project for the long-term storage of used nuclear fuel at the Bruce Nuclear site or within the Study Area. OPG provides no explanation or justification for this omission except for its statement that "the DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site."

D. An HLW DGR Project at the Bruce Nuclear Site

23. As discussed in Part III, *infra*, it is a legal requirement under Canadian environmental assessment law and policy that the cumulative effects of any project that is "reasonably foreseeable" be considered during the review of a proposed project. The evidence demonstrates that a project for the long-term management of used fuel wastes at the Bruce Nuclear site or otherwise within the Study Area, *i.e.*, an HLW DGR Project, is a reasonably foreseeable project.

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19 *Id.*

20 *Id.*

21 *Id.* at 10-37, s.10.6.4.

24. The reasonable foreseeability of an HLW DGR Project is demonstrated by the following facts:

    a. The conditions at the Bruce Nuclear site that OPG and NWMO have argued make it suitable, and operationally ideal, for the development of the DGR Project are identical to those NWMO will consider for an HLW DGR Project, are fully consistent with NWMO's Adaptive Phased Management Approach. Further, Development of the DGR Project will significantly increase the likelihood of the Bruce Nuclear site being developed as a location for an HLW DGR Project.

    b. NWMO has already commenced its consideration and screening of locations within the Study Area as a site for an HLW DGR Project through its engagement with all five municipalities within the Study Area and CNSC's consultations with those same municipalities are already under way;

    c. NWMO and OPG have steadfastly refused to provide assurances that the Bruce Nuclear site, or another site within the Study Area, would not be considered for an HLW DGR Project;

i. Bruce Nuclear Site is a Suitable Location for an HLW Project and is Consistent with NWMO's Adaptive Phased Management Approach for an HLW DGR Project

25. As part of its project justification and needs analysis for the DGR Project, OPG has set out a number of criteria that it argues makes the Bruce Nuclear site a suitable, and operationally ideal, location for the DGR Project. Section 3 of the EIS lists various factors that led OPG to propose the Bruce Nuclear site for the DGR Project. OPG argues that:[22]

    a. The geology at the Bruce Nuclear site is highly suitable from a technical perspective, offering multiple natural barriers to safely isolate and contain the waste for tens of thousands of years;[23]

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22 *Id.* at s. 3.

23 *Id.* at 3-1.

b. The management facility could be safely constructed and operated at the site;[24]

c. The majority of the waste to be managed in the DGR Project is already stored on site at the WWMF;[25]

d. Reduced need for off-site transportation of nuclear waste;[26]

e. Location has already been a nuclear facility for 40 years;[27]

f. The land is owned and managed by OPG; [28] and

g. Local community support, as demonstrated by the Hosting Agreement with Kincardine.[29]

26. These same characteristics are equally applicable to the development of an HLW DGR Project and are consistent with, and virtually identical to, the screening criteria for an HLW DGR Project as set out in NWMO's Site Selection process and are fully consistent with NWMO's Adaptive Phased Management Approach.[30]

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24 *Id.*, at 3-1.

25 *Id.* at 3-21.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 3-7.

30 The screening criteria set out by NWMO in its Site Selection process document include acceptability criteria for an HLW DGR Project that are functionally identical to those currently being promoted by OPG to demonstrate the suitability of its DGR Project including *Moving Forward Together*, *supra* note 9 at 30-35: (a) availability of land to accommodate surface and underground facilities; (b) location outside of heritage sites and protected areas; (c) meets key safety related questions: (i) are characteristics of the rock at the site appropriate to ensuring the long-term containment and isolation of used nuclear fuel from humans, the environment and surface disturbances caused by human activities and natural events? (ii) is the rock formation at site geologically stable and likely to remain stable over the very long term in a manner that will ensure the repository will not be substantially affected by geological and climate change processes such as earthquakes and glacial cycles? (iii) are conditions at the site suitable for the safe construction, operation and closure of the repository? (iv) is human intrusion at the site unlikely, for instance through future exploration or mining? (iv) can the geological conditions at the site be practically studied and described on dimensions that are important for demonstrating long-term safety? (vi) can a transportation route be identified or developed by which used nuclear fuel can safely and securely be transported to the site from the locations at which it is stored?

27. OPG's assessment of the technical suitability of the Bruce Nuclear site geology is not specific to a repository for low and intermediate level nuclear wastes. Rather, OPG's analysis is generalized to its suitability for deep geological repository construction and radioactive containment. There is no indication in the EIS that there are unique characteristics of used nuclear fuel that would make the site unsuitable for an HLW DGR Project.[31] The Panel, in its Information Requests issued to OPG on July 23, 2012, identified this issue and asked OPG to clarify whether there are technical factors that would prevent the DGR Project from being transformed into a DGR for HLW.[32]

28. OPG has concluded, and seeks to demonstrate through its EIS, that the various facilities required to be constructed as part of the DGR Project could be safely constructed at the Bruce Nuclear site.[33] There is no indication that facilities for an HLW DGR Project would present unique challenges that would make the Bruce Nuclear site technically unsuitable from OPG and NWMO's perspective. As noted above, this is a key safety characteristic identified by the NWMO in its Site Selection process document.[34]

29. OPG has relied on the fact that the majority of nuclear waste intended for the DGR Project is already on site at the WWMF in support of its preferred location at the Bruce Nuclear site.[35] With respect to used nuclear fuel waste, NWMO states that as of June 30, 2011, nearly one million bundles of used nuclear fuel are housed at the Bruce Nuclear site, comprising approximately 42% of all used fuel in Canada.[36] NWMO states that as part of its assessment criteria, it will consider

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31 EIS, *supra* note 1 at s. 4.5.

32 Information Request Package #4 From the Deep Geologic Repository Joint Review Panel (July 23, 2012) IR# EIS 04-99.

33 EIS, *supra* note 1 at s. 3.3.5.2. More generally, see EIS s. 4.7.

34 *Moving Forward Together*, *supra* note 9 at 30-35.

35 EIS, *supra* note 1 at 3-21.

36 *Learning More Together: Annual Report 2011*, Nuclear Waste Management Organization (2012) at 11 (attached as Exhibit B).

factors that have the "potential to avoid or minimize effects of the transportation of used nuclear fuel from existing storage facilities to the repository site."[37] In public statements, the mayors of communities already engaged with NWMO under the Site Selection process have specifically noted as a key factor in their decision to get involved that 40% of all used fuel is already at the Bruce Nuclear site.[38]

30. OPG has not included as part of its EIS consideration of issues relating to the transportation of nuclear wastes from other OPG-owned nuclear facilities for eventual disposal in the DGR Project. OPG assumes and relies, however, upon the continued operation of the WWMF for the feasibility of its DGR Project,[39] including the existence of transportation routes and protocols that have been established for the delivery of nuclear wastes to the Bruce Nuclear site from other OPG-owned nuclear facilities in Ontario.

31. The OPG-owned nuclear facilities at Darlington and Pickering, together with the Bruce Nuclear facility, currently produce and store approximately 88% of all used nuclear fuel in Canada.[40] The WWMF is the only facility in Canada for the centralized storage of nuclear wastes. It is the only facility and location for which transportation routes have been developed and, from the perspective of a proponent, could be demonstrated to be "safe and secure"—a key requirement of

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37 *Moving Forward Together*, *supra* note 9 at 37.

38 Mayor Mike Smith of Saugeen Shores states: "We have the biggest nuclear power site here in Canada in Bruce County very close to our home and about 40% of the fuel is there", Owen Sound Sun Times, December 7, 2011 (attached as Exhibit C). Vice Deputy Mayor of Saugeen Shores, Doug Gowanlock is quoted as saying "40 per cent of Canada's high level waste is already stored here on the Bruce Power site", "Repository in Saugeen Shores?", Bayshore Broadcasting, December 6, 2011 (attached as Exhibit D). Arran-Elderslie Mayor Paul Eagleson is quoted as "fully supporting" Saugeen Shores involvement in the Site Selection process and noting "40% of the nuclear waste from Ontario nuclear plants is already being stored above ground at the Bruce County site", "More local communities to look at nuclear waste", The Sun Times, December 7, 2011 (attached as Exhibit E).

39 EIS, *supra* note 1 at s. 3.1.

40 *Learning More Together: Annual Report 2011*, *supra* note 36 at 11.

the HLW DGR Project site selection process under the Adaptive Phased Management approach.[41]

32. OPG has used the fact that it currently owns the site identified for the DGR Project as a factor that supports its application.[42] OPG has confirmed in its EIS that the current site could be expanded to double the capacity of the DGR to accommodate a DGR for other types of nuclear waste, using a DGR for decommissioning waste as an example.[43] While OPG has consistently stated that it will not accept used nuclear fuel waste in the DGR Project, it is clear from the EIS that the current project site could accommodate the development of a new repository project in the future.

33. A critical factor that OPG has used in support of its current application is the "community support" for the DGR Project as demonstrated by its Hosting Agreement with the municipality of Kincardine.[44] OPG has held out that such an agreement with a municipality is sufficient to demonstrate wide community support and "an informed and willing host community."[45] As discussed in paragraphs 40 to 49, *infra*, NWMO has now engaged with all five Municipalities whose borders comprise the Study Area as part of the process to identify "an informed and willing host community" for the HLW DGR Project, a core requirement of the Adaptive Phased Management approach.[46]

34. As discussed more fully below, if the DGR Project proceeds, another key criteria of the Adaptive Phased Management approach—the requirement for long-term

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41 *Moving Forward Together*, *supra* note 9 at 30-35.

42 EIS, *supra* note 1 at 3-21.

43 *Id.* at 10-18, Table 10.4-3.

44 *Id.* at s. 3.2.

45 *Id.* at 3-1. It must be noted that there was no legal or regulatory requirement on OPG to demonstrate, or even use the language of, a "willing host community" when developing the DGR Project—that requirement exists only for an HLW DGR Project.

46 *Moving Forward Together*, *supra* note 9 at 16-17.

study[47]—could best be demonstrated at the Bruce Nuclear site. The requirement for practical long-term study will best be satisfied at a site where there is extensive, site-specific and practical experience with nuclear waste storage and management and with the operation of a deep geologic repository. The development, construction and operation of the DGR Project at the Bruce Nuclear site will provide NWMO many years of research and data. NWMO will not gain a comparable level of study or site-specific knowledge for any other site in Canada demonstrating the suitability of the site for an HLW DGR Project.

35. In its 2005 report to government, the NWMO recommended as the preferred approach for the long-term management of used nuclear fuel the concept of Adaptive Phased Management leading to "centralized containment and isolation of the used fuel in a deep geological repository in a suitable rock formation, such as the crystalline rock of the Canadian Shield or Ordovician sedimentary rock" (emphasis added). This language was a deviation from the AECL concept considered by the Seaborn Panel, as well as a deviation from numerous historical reports which all concluded that the preferred location for a deep geological repository for used nuclear fuel would be the plutonic rock of the Canadian Shield.[48] These include: (1) a 1974 report of a committee formed by AECL, Ontario Hydro and Hydro-Quebec;[49] (2) the 1977 Hare Report;[50] and (3) the 1978 Ontario Royal Commission on Electrical Power Planning (the Porter Commission).[51]

36. The recommendation to include "Ordovician sedimentary rock" proposed by the NWMO also differs from the language of the *NFWA*, which in section 12(2)(a) specifically requires development of an approach based on: "deep geological

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47 *Id.*, at 31. *See also*, *Choosing a Way Forward, supra* note 8 at 44, s. 13.2, Chapter 15.

48 Seaborn Panel Report, *supra* note 6 at s.1.1.2.

49 *Id.*

50 *Id.*

51 *Id.*

disposal in the Canadian Shield, based on the concept described by Atomic Energy of Canada Limited in the Environmental Impact Statement on the Concept for Disposal of Canada's Nuclear Fuel Waste and taking into account the views of the environmental assessment panel set out in the Report for the Nuclear Fuel Waste Management and Disposal concept Environmental Assessment Panel dated February 1998."[52]

37. The Bruce Nuclear site is not situated within the Canadian Shield. Rather, the geological formation of the area includes the Ordovician rock formation. OPG proposes to construct its DGR Project within those Ordovician layers.[53] The NWMO, by recommending a modification of the historical approach adopted by Canada to specifically include consideration of these Ordovician layers, has opened the door for the consideration of the Bruce Nuclear site for a HLW DGR Project. This change removed the only significant obstacle that could foreclose the Bruce Nuclear site becoming the site for an HLW DGR Project.

38. Additionally, if the DGR Project is approved and constructed, it will greatly increase the likelihood that the HLW DGR Project will be constructed at the Bruce Nuclear site, or elsewhere within the Study Area:

    a. As indicated above in paragraph 34, a requirement of the Site Selection process, and the Adaptive Phased Management more generally, is the development of site specific data for a potential site. There is an additional requirement that the HLW DGR Project be built in a staged and incremental way, with continuous learning and site specific knowledge development. The development and operation of the DGR Project will act to satisfy these requirements for a potential HLW DGR Project site at or proximate to the Bruce Nuclear site, and within the Study Area.[54]

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52 *NFWA*, *supra* note 5 at s.12(2)(a) (emphasis added).

53 EIS, *supra* note 1 at Figure 6.2.6-3.

54 It should be noted that the NWMO has no mandate to participate in the development of the DGR Project, and does so only by contract for the management of the Project. Under the *NFWA*, the NWMO only has a mandate to develop and implement a strategy for the disposal of used nuclear fuel. According to

b. Successful development and operation of the DGR Project will allow the NWMO to argue that it has demonstrated, with a very high degree of certainty, the technical suitability of the site and the ability to build and construct DGR facilities on site.

c. Successful development and operation of the DGR Project will permit the development and demonstration of key operational processes and favourable conditions, including:

   i. Transportation of wastes from Ontario nuclear facilities to site;

   ii. Processing of accepted nuclear wastes at site and internment in repository facilities; and

   iii. Local community acceptance.

39. The approval, construction and operation of the DGR Project will provide a near perfect test case for the development of an HLW DGR Project at the Bruce Nuclear site or within the Study Area, making the construction of an HLW DGR Project here not merely reasonably foreseeable, but nearly certain.

ii. NWMO has Already Begun its Formal Consideration of Sites within the Study Area

40. A key feature of NWMO's Site Selection process, emanating from the recommendations of the Seaborn Report, is that the identification of a site for an HLW DGR Project would need to be "community driven" and could only be sited where there was an "informed and willing host community."[55] As stated above, NWMO commenced its Site Selection process in May 2010.

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its own documentation, the NWMO is managing the DGR Project to build experience in the development of a deep geological repository project.

55 *Moving Forward Together*, *supra* note 9 at 18.

41. Since at least November 2011, the NWMO has engaged with municipalities within the Bruce region for the purpose of considering that area for an HLW DGR Project. Saugeen Shores, Brockton, Huron-Kinloss, South Bruce and Arran-Elderslie have all engaged with the NWMO and all are within the Study Area as defined in the EIS. More precisely, and as is explained further below, the boundaries of these five municipalities define the boundary of the Study Area chosen by OPG for its DGR Project.[56]

42. These five municipalities have all authorized and requested a screening of the potential suitability of their communities for the HLW DGR Project. In addition, media reports indicate that NWMO is actively pursuing consultations and information campaigns with these communities and CNSC officials have now begun similar consultation relating to the siting of an HLW DGR Project.

43. In or about December 2011, various media outlets began reporting that a number of municipalities in the Bruce and Grey regions, those surrounding the Bruce Nuclear site, had passed resolutions to be considered as "host communities" for the HLW DGR Project, formally entering into NWMO's Site Selection process.[57] These municipalities were reported to include Brockton, Saugeen Shores and Huron-Kinloss.

44. On December 7, 2011, the Owen Sound Sun Times reported that other nearby municipalities were considering entering into the Site Selection process. That report included a quote from Dave Inglis, Warden of Bruce County and Mayor of Brockton, stating: "I expect a number of the municipalities in Bruce County will

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56 *See* EIS, *supra* note 1 at map included as Figure 2.2.1-1.

57 *See*, "Saugeen Shores opens door to nuke waste", Owen Sound Sun Times, December 7, 2011, *supra* note 38. "Repository in Saugeen Shores?"; Bayshore Broadcasting, December 6, 2011, *supra* note 38; "More local communities to look at nuclear waste", The Sun Times, December 7, 2011, *supra* note 38; Toronto Star, "Nuclear waste storage depot attracts southern Ontario towns", February 20, 2012 (attached as Exhibit F); "Tourist town bids to host 48,000 tonnes of nuclear waste", the National Post, December 11, 2011 (attached as Exhibit G); "Nuclear waste dump idea sparks unease in Ontario", Canadian Press, December 11, 2011 (attached as Exhibit H).

be doing the same. It's just gathering information that they are going through to select a site. I think the county should be involved as we go along. If it's going to be in Bruce County we should all be involved."[58] Explaining his Town's decision to get involved, Mayor Inglis is also quoted as stating: "We thought: Other communities are doing it in our area, and if its going to be in our backyard, we want to know all we can about it. If it is in Bruce County, its going to affect the whole county for infrastructure and jobs".[59]

45. Included in these media reports was a suggestion that the engagement between NWMO and the municipalities had predated the decision by the respective councils to enter into the Site Selection process. On December 11, 2011, the Canadian Press reported that Councilor Thead Seaman of Saugeen Shores stated "it was the waste organization [NWMO] that approached Saugeen Shores . . . looking for an invitation into the community."[60]

46. A report in the Owen Sound Sun Times on December 7, 2011 stated that NWMO took Saugeen Shores officials on a tour of the WWMF site and provided "a fairly extensive briefing" on the project to Saugeen Shores politicians and staff, according to its Mayor Mike Smith.[61] Another article in the Owen Sound Sun Times, dated December 7, 2011, quotes Huron Kinloss Mayor Mitch Twolan as stating in relation to the nuclear fuel wastes: "It's here already. The safest place is to be buried underground. What I hear is the geology here in Bruce County is second to none."[62]

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58 "More local communities to look at nuclear waste", The Sun Times, December 7, 2011, *supra* note 38.

59 "Nuclear waste storage depot attracts southern Ontario towns", Toronto Star, February 20, 2012, *supra* note 57.

60 "Nuclear waste dump idea sparks unease in Ontario", Canadian Press, December 11, 2011, *supra* note 57.

61 "Council opens door to nuke waste", Owen Sound Sun Times, December 7, 2011, *supra* note 38.

62 "More local communities to look at nuclear waste", The Sun Times, December 7, 2011, *supra* note 38.

47. On May 14, 2012, the town of Saugeen Shores passed a resolution to move to the second phase of NWMO's site selection process, including a request for a preliminary screening for the suitability of the area for an HLW Project. This resolution was passed in the face of public protest from residents of Saugeen Shores, including written and oral submissions made by a grass-roots community group opposed to the possibility of an HLW Project in their community.[63]

48. On July 9, 2012, a staff report was prepared by Larry Allison, Chief Administrative Officer for Saugeen Shores, to the Saugeen Shores Council.[64] This report indicated that a meeting was being arranged for members of the Saugeen Shores Council to travel to Ottawa on August 23, 2012 to receive a briefing on the HLW DGR Project by CNSC staff. The report lists by name ten CNSC staff members who would be attending the meeting(s). The report also states that a number of Saugeen Shores councilors were interested in participating and that all expenses will be covered by NWMO. An agenda for the meeting was attached and it included regulatory background sessions as well as a as session on the "Technical Safety of Deep Geological Repositories – Safety Assessment/Safety Case."[65]

49. In a letter dated July 19, 2012 from NWMO to the Chiefs of SON, Chief Scott Lee of the Chippewas of Nawash Unceded First Nation and Chief Randall Kahgee of the Chippewas of Saugeen First Nation, NWMO confirmed that five communities in Bruce and Grey Counties had now passed resolutions to formally enter into the Site Selection process for the HLW DGR Project – Saugeen Shores, Brockton, Huron-Kinloss, Arran-Elderslie and South Bruce.[66] The letter indicates

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63 *See, e.g.*, the website of the community advocacy group Save our Saugeen Shores, http://www.saveoursaugeenshores.org.

64 Larry Allison, CAO, the Corporation of the Town of Saugeen Shores, Staff Report, July 9, 2012. (attached as Exhibit I).

65 *Id.*

66 In a NWMO Newsletter dated March 2012, the NWMO announced that it was suspending "expressions of interest for new communities wishing to engage in the site selection process for Canada's Used Nuclear Fuel Repository and Centre of Expertise" on September 30, 2012.

that these communities had also requested an initial screening of the potential suitability of their communities.[67]

iii. NWMO and OPG Have Repeatedly Refused to Exclude Sites within the Study Area from Consideration

50. SON has been engaged with OPG over the last several years with the aim of understanding the DGR Project and seeking resolution of its concerns respecting that Project. Throughout this time, and as recognized by OPG in its report on this engagement contained in the EIS,[68] SON has raised the issue of the connection between the DGR Project and a potential project for the disposal of used-fuel wastes. It has been SON's concern that the DGR Project would lead to the development of the HLW DGR Project within its Traditional Territory, which encompasses the Bruce Nuclear site and Study Area.[69]

51. In or around November 2011, SON representatives first became aware that NWMO and various municipalities in the Grey and Bruce regions were engaging in discussions regarding a HLW DGR Project in the area. On November 18, 2011, SON sent a letter to NWMO expressing concern about these developments, in light of the fact that SON had repeatedly and consistently been given assurances that the DGR Project would not "pave the way for a used fuel repository within [SON] territory."[70] SON's letter sought confirmation that NWMO would not proceed to develop an HLW Project at the Bruce Nuclear site, or otherwise within the SON Traditional Territory, over the objections of SON. The letter also raised concern that NWMO had begun to consider the area for a used fuel repository during, and concurrent with, the JRP process for the DGR

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67 Letter from Kathrine Shaver, APM Site Selection and Engagement, NMWO, dated July 19, 2012 (attached as Exhibit J).

68 EIS, *supra* note 1 at Table 2.3.4-1.

69 *See* attached map of SON Traditional Territory (attached as Exhibit K).

70 Letter from Chief Scott Lee and Chief Randall Kahgee to Ken Nash, dated November 18, 2011 (attached as Exhibit L).

Project. The letter asks specifically that NWMO provide clear assurances that NWMO is not willing to engage in any consideration of siting an HLW DGR Project in the area.

52. NWMO responded by letter dated November 25, 2011.[71] That letter confirms that NWMO and Saugeen Shores are engaged under the Site Selection process for an HLW DGR Project. The letter fails to provide the assurance sought by SON that NWMO would not consider the area for an HLW Project

53. On February 23, 2012, SON sent another letter to NWMO, reiterating its request for confirmation that NWMO would not move ahead with the development of an HLW DGR Project in SON Territory if SON were opposed to the plan.[72] That letter also corrected a mischaracterization of SON concerns that NWMO had made in its letter of November 25, 2011. SON wrote:

> [Y]ou stated that neither the NWMO nor OPG has ever stated that communities in Bruce County would be excluded from consideration for a used nuclear fuel repository. You continued to say that NWMO will not seek to put used nuclear fuel in the proposed DGR for low and intermediate level wastes, which you must know has never been our concern. With these words, we are left with the feeling that our engagement with OPG and NWMO over the past years has been based on only half the story, and that OPG and NWMO have always planned to keep options open to build repositories for all of Canada's nuclear wastes, including used fuel, in our Territory.[73]

54. On May 3, 2012, NWMO provided a response.[74] That letter again failed to provide the assurances sought by SON in its letters of November 18, 2011 and February 23, 2012.

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71 Letter from Ken Nash, President, NWMO to Chief R Kahgee and Chief S Lee, dated November 25, 2011 (attached as Exhibit M).

72 Letter from Chief Scott Lee and Chief Randall Kahgee to Ken Nash, dated February 23, 2012 (attached as Exhibit N).

73 *Id.*

74 Letter from Ken Nash, President, NWMO to Chief R Kahgee and Chief S Lee, dated May 3, 2012 (attached as Exhibit O).

55. In addition to letters sent by SON to NWMO seeking assurance respecting the siting of an HLW DGR Project within SON Territory, SON has sought similar assurances from OPG directly. Over the last several years, SON and OPG have been engaged in discussions in an attempt to address SON concerns respecting the development of the DGR Project. One of the key concerns raised by SON during this process has been the connection of the DGR Project to a possible future HLW DGR Project. By letters of November 1, 2011,[75] and March 10, 2012,[76] SON asked OPG to confirm that it will not support the development of an HLW Project within SON Traditional Territory if SON opposes such a development. To date, OPG has failed to respond substantively to the request and has not provided any commitments in this regard.

56. The NWMO, under its Site Selection process, has included consideration criteria that would permit it "screen out" potential sites within the Bruce area—for example, it has stated that Aboriginal Traditional Knowledge considerations would need to be respected.[77] It has also indicated that Aboriginal Traditional Knowledge would guide its evaluation of sites to ensure "potential to avoid ecologically sensitive areas and locally significant features".[78]

57. Most importantly, the cornerstone of Adaptive Phased Management approach is that NWMO will not develop an HLW DGR Project without the support of the local community.[79] The area in which NWMO has engaged the five municipalities, and whose borders comprise the Study Area for the DGR Project, is the heart of the SON Traditional Territory. They are the lands and waters

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75 Letter from Chief Scott Lee and Chief Randall Kahgee to Albert Sweetnam, Exec. VP, OPG, dated Novemer 1, 2011 (attached as Exhibit P).

76 Letter from Chief Scott Lee and Chief Randall Kahgee to Albert Sweetnam, Exec. VP, OPG, dated March 9, 2012 (attached as Exhibit Q).

77 *Moving Forward Together*, *supra* note 9 at 37-38.

78 *Id.* at 37.

79 *See, e.g.*, *Choosing a Way Forward*, *supra* note 8 at 40.

throughout which the SON and their ancestors have exercised their Aboriginal and treaty rights since time immemorial. NWMO has given no indication that it will respect the wishes of the SON that it does not want the HLW DGR Project within its territory.[80]

58. Given the NWMO's persistent refusal to give SON assurances that it will not consider Bruce area sites for a HLW DGR Project, and its refusal to give assurances that it would not develop an HLW DGR within SON Traditional Territory over SON's objections, it should be concluded that the NWMO will resolutely continue down its path of developing relationships with the Study Area municipalities for the purposes of considering the area for the siting of its HLW DGR Project.

III. PROPER REVIEW OF DGR PROJECT REQUIRES CONSIDERATION OF AN HLW DGR PROJECT

A. Governing Law and CEAA Policy Regarding Cumulative Effects Analysis

59. When undertaking the environmental assessment of a project, such as this Panel's review of the DGR Project, it is incumbent on the reviewing authority to assess not merely the environmental impacts of the proposed project itself, but also the cumulative environmental impacts that may or will result from the interactions among the proposed project and other existing, planned, reasonably foreseeable and, in some cases, hypothetical projects.[81] As demonstrated in Part II, *supra*, an

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[80] It is notable that, SON is in closer proximity to the Bruce Nuclear site than many of the communities within the Study Area (including communities within the municipalities that have expressed interest in "hosting" an HLW DGR Project. For example, while the Saugeen First Nation Communal Lands are approximately 30 KM from the Bruce Nuclear site but fall outside the boundaries of the study area, Mildmay (50 KM away), Teeswater (43 KM away), Hanover (49 KM away) and Tara Siding (40 KM away) are all deemed to be within the Study Area.

[81] *See, e.g., A Reference Guide for the Canadian Environmental Assessment Act: Addressing Cumulative Environmental Effects*, Prepared by the Federal Environmental Assessment Review Office (November 1994) at 135 (explaining that it is necessary that consideration be given not only to the effects of the project itself, but also to "cumulative environmental effects resulting from the interaction among the environmental effects of the proposed project with those of future projects and activities.").

HLW DGR Project being constructed at the Bruce Nuclear site or otherwise in the Study Area is reasonably foreseeable.

60. Undertaking a proper cumulative effects assessment is not merely sound practice, it is a legal obligation imposed by governing law. Sections 19(1)(a)-(b) of the *Act* instruct that "assessment by a review panel shall include a consideration of . . . the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out . . . [and] the significance of the effects referred to [above]."

61. The specifics of how a cumulative effects analysis should be undertaken have been further developed by policy statements and other materials issued by CEAA as guidance to proponents, practitioners and review panels. Among these materials is CEAA's Operational Policy Statement on cumulative effects analysis, the purpose of which is to provide "clarification to responsible authorities on how cumulative environmental effects should be considered in environmental assessments conducted under [the *Act*]."[82] The Operational Policy Statement makes clear the broad scope of the cumulative effects analysis required by the *Act*, explaining that an assessment of "cumulative environmental effects" is not limited to "biophysical effects . . . [but] can extend to the effects of changes on health and socio-economic conditions, physical and cultural heritage, and other matters."[83]

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82 *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* (dated 1999, updated November 2007) (the "Operational Policy Statement").

83 *Id.*

62. CEAA has explained that it is incorrect for a cumulative effects analysis to consider only "projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval."[84] Such a narrow approach to determining what projects are included in the cumulative effects analysis risks "limit[ing] the ability of cumulative environmental effects assessment to contribute to informed environmental planning and decision making in the future of the project area."[85] Instead, both best practices and CEAA guidance require that a cumulative effects analysis "include 'certain' and 'reasonably foreseeable' projects and, where appropriate those projects that are 'hypothetical.'"[86] The Operational Policy Statement explains that "reasonably foreseeable" means that "[t]he action may proceed, but there is some uncertainty about this conclusion."[87]

63. When a potential future project will have similar effects to the project under review, those similar effects militate strongly in favour of including that potential future project in the cumulative effects analysis. As the Cumulative Effects Practitioners Guide that was developed for CEAA explains "[a] major criterion for selecting other actions is whether the action causes similar effects on the same [valued environment components ("VECs")] as the action under assessment. Focusing on actions with similar effects is a good first step, and will ensure that the most appropriate actions are included in the assessment (*i.e.*, those with the greatest likelihood of causing effects that interact)."[88] The failure to include

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84 Operational Policy Statement, *supra* note 82. Despite this clear direction from CEAA, in the EIS, OPG states that the only "reasonably foreseeable projects and activities" that it has considered are those "projects that have started in the approval process and are on the path to obtaining approval." EIS Guidelines at 10.1. When considered in light of the Operational Policy Statement, it is clear that this approach is unduly narrow, inconsistent with statutory and regulatory guidance and, as discussed at length in this submission, serves to distort the cumulative effects analysis and exclude projects, such as the HLW DGR Project, that should properly be included.

85 *Id.*

86 *Id.*

87 *Id.*

88 Cumulative Effects Assessment Practitioners Guide, Prepared For: Canadian Environmental Assessment Agency; Prepared By: The Cumulative Effects Assessment Working Group (Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker) and AXYS Environmental Consulting Ltd., February 1999 ("Practitioners Guide") at 20.

reasonably foreseeable projects "is increasingly becoming unacceptable to many stakeholders if there is reason to believe that . . . [those] reasonably foreseeable projects could have a significant cumulative effect with the project under review."[89] An HLW DGR Project will have similar, and exponentially greater, effects on the same categories of VECs as a will the DGR Project currently being reviewed.

B. The Importance of Cumulative Effects Analysis in the EIS Guidelines and the Joint Review Panel Agreement for the DGR Project

64. The importance of undertaking a thorough cumulative effects analysis in the review of the DGR Project was recognized by CEAA in the EIS Guidelines for this project.[90] Section 4.2 of the EIS Guidelines instruct OPG that "in order to adequately understand and assess the potential adverse effects of the project . . . any cumulative effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out" must be considered and assessed.[91]

65. Section 14 of the EIS Guidelines discusses the issue of cumulative effects at some length. It requires that "[t]he proponent must identify and assess the cumulative adverse and beneficial environmental effects of the project in combination with other past, present or reasonably foreseeable projects and/or activities within the study area."[92] The "management of decommissioning waste" is included as an example of the type of project that should be included.[93] The EIS Guidelines elsewhere explain that "[i]n assessing cumulative environmental effects within the study area, the proponent must consider the effects of the project in combination

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89 *Id.* at 19.

90 *Guideline for the Preparation of the Environmental Impact Statement for the Deep Geologic Repository for Low- and Intermediate-Level Radioactive Wastes* (January 2009) (the "EIS Guidelines").

91 *Id.* at 14.

92 *Id.* at 48.

93 *Id.*

with other past, present and future projects that are either 'certain' or 'reasonably foreseeable' as defined in [the Operational Policy Statement]."[94] The EIS guidelines also require that the proponent "provide a rationale for inclusion or exclusion" of potential future projects in the cumulative effects analysis.[95]

66. OPG has failed to properly observe the direction in the EIS Guidelines with respect to the inclusion of future projects in the cumulative effects analysis. It has, instead, included a range of speculative or contingent future activities in its cumulative effects analysis, and omitted analysis of the HLW DGR Project – a reasonably foreseeable project that stands to have profound and complex cumulative effects in conjunction with the DGR Project. OPG has done this contrary to the direction of the EIS guidelines and without providing any rationale for its exclusion.

67. Similarly, the Joint Panel Agreement requires a full analysis of cumulative effects be undertaken as part of this Panel's review of the DGR Project. The Terms of Reference appended to the Joint Review Panel Agreement, at Part IV(a), instruct that "[t]he Review will include a consideration of . . . any cumulative environmental effects that are likely to result from the Project in combination with other projects that have been or will be carried out." This language, which tracks the language of Section 19(1)(a) of the *Act*, expressly incorporates into this Panel's mandate the cumulative effects analysis that is required by the governing law.

68. This Joint Panel Agreement, at Section 4.1(c), further makes clear that:

> The JRP shall conduct the review in accordance with the Terms of Reference . . . in a manner that . . . [p]ermits it to obtain information and evidence about the adverse effects the project may have on potential or established Aboriginal rights, title or treaty rights as identified to the JRP by the SON and other Aboriginal groups and

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94 *Id.* at 27.

95 *Id.* at 49.

> enables it to bring any such information and evidence to the attention of the Minister of the Environment and the Responsible Authorities Authority for the Project in support of consultation between the Crown and the SON and other Aboriginal groups.

69. As the excerpt from Joint Review Panel Agreement above recognizes, the DGR Project stands to have significant impact on SON Aboriginal and Treaty Rights and interests, as well as impacts on other legal rights and way of life. It is for this reason that SON engaged in consultations with the federal Crown as represented by CNSC and CEAA to ensure that the JRP Agreement and the Panel's terms of reference would result in a robust and credible review capable of identifying impacts on SON Rights and interests, including impacts arising from cumulative effects. The development of an HLW DGR Project within the SON traditional territory, in conjunction with the development of the DGR Project, will significantly magnify potential impact on SON rights, interests and way of life. It will not be possible to understand the potential impacts from the DGR Project on SON if this environmental assessment fails to include consideration of all reasonably foreseeable future projects, including the most significant of these, the HLW DGR Project. Failing to include the HLW DGR Project in the cumulative effects analysis prevents the Panel from undertaking a proper review of the project and prevents the Panel from assessing—as the Joint Review Panel Agreement requires—the potential adverse effects on SON's Aboriginal and treaty rights.

C. *Failure to Include an HLW DGR Project in the Cumulative Effects Analysis Renders OPG's Application Fundamentally Deficient*

70. The law, best practice and CEAA policy makes clear that when a future project is "an important future development" and "may cause significant cumulative effects with the action under assessment," it is important to include that project in the regulatory review of the cumulative effects analysis, even if questions about the

future activity's likelihood cause it to fall "beyond statutory requirement[s]."[96] CEAA guidance explains that "[a] major criterion for selecting other actions is whether the action causes similar effects on the same VECs as the action under assessment . . . [focusing on these future projects] will ensure the most appropriate actions are included in the assessment (*i.e.*, those with the greatest likelihood of causing effects that interact."[97] The HLW DGR Project implicates, and adversely affects, many—if not all—of the same VECs that are implicated by the DGR Project under review.

71. The DGR Project itself is a first-of-kind project that poses unique and untested challenges. These challenges are compounded, and significantly magnified, if the DGR Project is colocated with an HLW DGR Project. The inclusion of an HLW DGR Project as a cumulative effect project will have a material and pervasive effect on the current review of the DGR Project, and will require significant new data, study and analysis, including (i) assessment of radiation effects from normal operations, transportation and accidents and malfunctions, (ii) accidents and malfunctions probability scenarios, effects and response; (iii) operations aspects for the projects resulting from increased intensification and demand on resources; (iv) socio-economic effects, including public perception, stigma effects and social acceptance; (v) transportation issues relating to increased intensification and unique issues regarding transportation of fuel wastes; and (vi) technical feasibility considerations relating to co-location. The failure to include an HLW DGR Project undermines the core conclusions of OPG's EIS and can only be remedied through a fundamental reassessment of a wide range of potential environmental impacts flowing from the DGR Project.

72. The development of the DGR Project will significantly increase the intensification of the Bruce Nuclear site, creating the World's largest nuclear site. The prospect of colocating this Project with a HLW DGR Project, along with continued

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96 Practitioners Guide, *supra* note 88 at 19.

97 *Id.* at 20.

operation of the WWMF, raises issues of the most serious and complex kind. These issues must be addressed in a clear and thorough manner. The recent experience at the Fukushima Dai-ichi Nuclear Facility in Okuma, Japan stands as a stark example of the complexity of the colocation analysis for the purposes of determining impacts relating to accidents and malfunctions and emergency response.

73. The NWMO has consistently identified transportation issues as a critical consideration in the Adaptive Phased Management approach.[98] A proper cumulative effects analysis here must consider the combined environmental impact of the transportation of fuel wastes along routes that are already used for the transportation of non-fuel nuclear wastes. The necessity and significance of this analysis is heightened by OPG's omission from its EIS of any consideration of transportation issues and by the fact that used nuclear fuel is not currently transported in Canada and would again be a first-of-kind undertaking.

74. Social safety, public perception and confidence, and broad public support are foundational considerations for decisions respecting the long-term management of Canada's used nuclear fuel. It has been consistently affirmed by our governments, regulatory agencies, scientific and policy commentators as well as the Canadian public, that social safety and acceptance of an HLW DGR Project are as important as technical safety considerations.[99] The evidence here shows that there is a connection between OPG's DGR Project and an HLW DGR Project. In these circumstances, it is incumbent upon the proponent and a review panel to ensure a full and transparent review of the projects to facilitate public information, participation and confidence. A failure to do so risks eroding public confidence in the institutions responsible for implementing and regulating Canada's nuclear industry.

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98 *Moving Forward Together*, *supra* note 9 at 37.

99 *See* Seaborn Panel Report, *supra* note 6.

75. OPG has acknowledged in Section 10 of the EIS that a project for the disposal of used nuclear fuel waste is a reasonably foreseeable project that needs to be considered in the cumulative effects analysis. OPG confirms this by including in its cumulative effects analysis the removal of used nuclear fuel waste from the Bruce Nuclear site. OPG has failed to include the equally or more likely project of constructing and operating an HLW DGR Project at the Bruce Nuclear site, or otherwise within the Study Area. This inconsistency is unexplained and, in the opinion of SON, cannot be explained or justified.[100]

76. Instead of acknowledging the reasonable foreseeability of an HLW DGR Project, and including a discussion of that project in its cumulative effects analysis, OPG does just the opposite, reframing the issue in a way that serves only to distort the cumulative effects analysis that this Panel must undertake. In Section 10-37 of the EIS, OPG states that "[a]t some time in the future, used fuel and decommissioning wastes will be transferred to a long term repository. The DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site. Any dose will be solely from the transport of used fuel, and as the used fuel is transferred off-site, will result in a net reduction of dose." OPG offers no explanation for its assertion that "the repository will be located off-site," nor does it explain what "off-site" means in this context.

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[100] This Panel has recognized that the cumulative effects analysis undertaken by OPG, and OPG's failure to address a possible HLW DGR Project, is a cause for concern. The Panel, in information request number EIS 04-99, asked OPG to "[d]iscuss the technical and regulatory factors that would prevent the transformation and use of the DGR for high-level waste disposal." While the transformation of the proposed DGR into a facility for high-level waste disposal is not the only issue—the possibility of construction of a new, nearby facility for high-level waste disposal appears equally, if not more, foreseeable—the Panel's request makes clear that the issue of HLW disposal cannot simply be ignored or brushed aside in the context of this review. Further, the Panel, in information request number EIS 04-110, recognized the apparent inadequacies of OPG's cumulative effects analysis. The Panel requested that OPG "[c]larify why 'the DGR for decommission Bruce Power waste' is 'not a planned activity, but is included to meet guideline requirements" and further, requested why a series of "other operations and potential projects were not included in the cumulative effects assessment."

77. The exclusion of an HLW DGR Project from the cumulative effects assessment of the DGR Project materially skews the analysis and renders the cumulative effects analysis in OPG's EIS all fundamentally inadequate. OPG, by the inclusion in the EIS of less proximate projects such as the removal of used nuclear fuel, coupled with the exclusion from the EIS of an HLW DGR Project, has promoted a scenario whereby the DGR Project, when considered cumulatively with other "reasonably foreseeable" projects, will have the net effect of diminishing negative environmental effects.

78. OPG claims this specifically for its predicted effect of a long-term reduction in radioactive dose at site. More importantly, by suggesting the removal of used nuclear fuel from site as a likely future scenario, OPG implies a reduction in all other possible adverse cumulative effects that could result from colocation of a DGR Project with existing stored nuclear fuel waste on site. Further, OPG avoids consideration of the cumulative effects that would result from the colocation of the DGR Project and a HLW DGR Project at or near the site, resulting ultimately in the disposal of all of Canada's nuclear wastes within the Study Area.

79. An HLW DGR Project is a reasonably foreseeable project. OPG's current EIS fundamentally fails to characterize the adverse cumulative effects of the DGR Project, and in fact inverts those effects, finding a reduction in adverse environmental cumulative impacts. in radiation when the exact opposite could be presumed would occur. To continue the review of the DGR Project on this basis will undermine the integrity and credibility of the Panel's work.

D. Issues Respecting the Scope of the Cumulative Effects Analysis Are Reviewable

80. The Federal Court of Canada has previously held that the failure of a JRP to properly consider all reasonably foreseeable projects as part of a cumulative effects analysis is a reviewable—and reversible—error of law.[101] The factors "set

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101 *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.*, [1999] 3 F.C. 425.

out in subsection 16(1) . . . are mandatory. The use of the word 'shall' in paragraph 16(1)(a) indicates 'that some consideration must be given to each factor.'"[102]

81. The Court in *Alberta Wilderness* explained that failure to properly consider all projects that should have been included in a cumulative effects analysis under Section 16 of the *Act* is a breach of a panel's duty and constitutes a failure of the panel to satisfy it statutory obligations. An "environmental assessment carried out by the Joint Review Panel in accordance with [the *Act*] is a pre-condition to [authorization of the project] . . . the assessment must be conducted in accordance with [the *Act*], including the requirements of section 16; and a 'proper' assessment is one conducted in accordance with [the *Act*] . . . an assessment which is not conducted in accordance with [the *Act*] is one conducted in error of law."[103]

82. A panel may commit reversible error when, if after being put on notice of certain activities that should be included in a cumulative effects analysis, it fails to do so. The court *Alberta Wilderness* explained that "the Joint Review Panel breached its duty to obtain all available information about likely . . . activities in the vicinity of the project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel's report."[104]

83. In light of the significant deficiencies in the EIS submitted by OPG, any review of the DGR Project on the basis of that EIS would be fatally compromised. In order to ensure the Panel is able to effectively fulfill its duty to do a full cumulative

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102 *West Vancouver (District)* v. *British Columbia (Ministry of Transportation)*, [2005] F.C.J. No. 727 at para. 50 (quoting *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)*, [2000] 2 F.C. 461 (C.A.)) (emphasis in original).

103 *Alberta Wilderness Association*, *supra* note 101 at para. 22.

104 *Id.* para. 69, 76.

effects analysis, as demanded by the governing law and the Joint Panel Agreement, the review of the application must be halted until such time as the EIS is revised and Panel has a complete application before it.

IV. RELIEF REQUESTED

SON respectfully requests the following relief:

That the Panel direct OPG to revise and resubmit its EIS to include a proper cumulative effects analysis that includes an analysis of the cumulative effects arising from an HLW DGR Project within or proximate to the Study Area.

That the Panel take necessary steps to ensure that the Panel, government reviewers and agencies, and all interveners, have sufficient time to review the amended EIS.

Any other relief or procedural orders that the Panel deems appropriate.

Dated: August 9, 2012

THIS APPLICATION IS BY:

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ON NOTICE TO:

CANADIAN NUCLEAR SAFETY COMMISSION

CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY

ONTARIO POWER GENERATION

NUCLEAR WASTE MANAGEMENT ORGANIZATION

REGISTERED INTERVENORS IN CEAA REGISTRY 06-05-17520

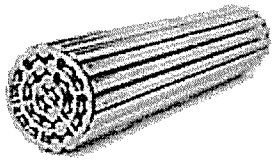
EXHIBIT A

nwmo

NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

MARCH 2012

Moving Forward Together:
Canada's Plan for the Long-Term Management of Used Nuclear Fuel



The NWMO announces date for suspension of expressions of interest for new communities wishing to engage in the site selection process for Canada's Used Nuclear Fuel Repository and Centre of Expertise

In May 2010, the NWMO initiated a site selection process for Canada's Used Nuclear Fuel Repository and Centre of Expertise for the long-term management of Canada's used nuclear fuel in an informed and willing host community. The nine-step process to select a site will take 10 years or more to complete, and begins with a community expressing interest in learning more about the project, the NWMO and the site selection process. Interested communities are the focus of a progressively more detailed set of scientific, technical and community well-being studies, and phases of learning to assess the suitability of the community for the project. Communities may leave the site selection process at any time up until the signing of a final agreement, which is still many years in the future. An expression of interest by a community triggers a process of broad outreach and discussion of the project with neighbouring communities and potentially affected Aboriginal peoples.

To date, a number of communities have expressed interest in learning more about the project, the NWMO and the site selection process. At this time, 15 communities are actively engaged in the site selection process, including several that have asked the NWMO to begin more detailed preliminary assessment studies (Step 3). As well, a number of other communities have requested information and briefings and are considering participating in the site selection process.

The NWMO is planning to suspend the expressions of interest phase of the site selection process on September 30, 2012. New expressions of interest will not be considered after this date. This will allow the NWMO to focus its efforts on conducting the detailed studies required in communities that have expressed an interest to date, or that express interest on or before the closing date. It will also help the NWMO plan for and fully support the engagement of surrounding communities and potentially affected Aboriginal peoples, which is initiated with the entrance of a new community to the siting process. Expressions of interest by new communities must be supported by a resolution of Council, or equivalent, and may take the following forms: request for an NWMO briefing to learn about the project and the site selection process; or request for an initial screening of the potential suitability of the community for the project.

The suspension of the expressions of interest phase of the site selection process is intended to help ensure that the best knowledge and expertise are brought to each of the studies that are conducted. It is also intended to ensure that the communities involved in the site selection process continue to be fully supported by the NWMO in their exploration of the project and are informed, as early as possible, whether they are among the short list of strong candidates for the project. The suspension of the expressions of interest phase will also help the NWMO plan for and fully support the involvement of surrounding communities. It will be important for the NWMO to engage potentially affected Aboriginal peoples to understand and fully respect their Aboriginal and Treaty rights and how Aboriginal Traditional Knowledge can be applied.

The NWMO is optimistic that the studies that have been initiated, or that will be initiated with communities that express interest on or before September 30, 2012, will identify viable options for implementing this project. However, until this work has been completed, the outcome of these studies is uncertain, and it may be necessary to study other communities and sites as potential hosts for this project in the future. The NWMO, therefore, reserves the option of reopening the process to expressions of interest by new communities in the future.

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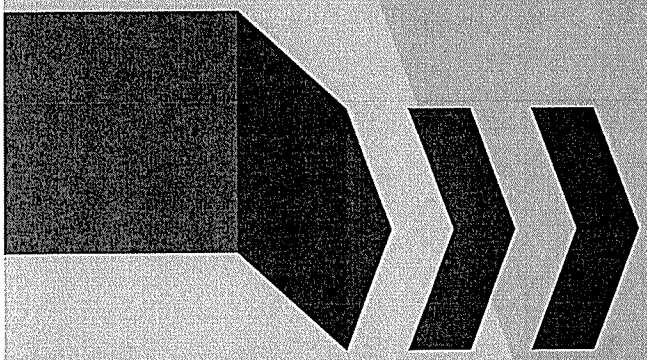
EXHIBIT B



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NUCLEAR WASTE MANAGEMENT ORGANIZATION

SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

Total Bundles			2,273,873
Owner	**Location**	**Number of Bundles**	**Current Status**
OPG	Bruce A[2]	421,494	2 units operational, 2 units under refurbishment (expected 2012 return to service)
	Bruce B[2]	544,251	4 units operational
	Darlington	399,723	4 units operational
	Pickering A & B	633,491	A – 2 units operational, 2 units permanently shut down B – 4 units operational
AECL	Douglas Point	22,256	Permanently shut down
	Gentilly-1	3,213	Permanently shut down
	AECL Whiteshell	2,268	Permanently shut down (see note 1)
	AECL Chalk River	4,886	Mostly fuel from NPD (permanently shut down) and with small amounts from other CANDU reactors (see note 3)
HQ	Gentilly-2	120,533	Operational (expected to be shut down for refurbishment in 2012)
NBPN	Point Lepreau	121,758	Currently undergoing refurbishment (expected 2012 return to service)

Total of:
- 17 units in operation
- 3 units under refurbishment
- 6 units permanently shut down

(1) 360 bundles of Whiteshell fuel are standard CANDU bundles. The remaining bundles are various research, prototype and test fuel bundles, similar in size and shape to standard CANDU bundles.
(2) Bruce reactors are leased to Bruce Power for operation.
(3) In addition to the totals shown in Table 1, AECL also has some 22,000 components of research and development fuels, such as fuel elements, fuel pellets and fuel debris, in storage at Chalk River. While the total mass of these components is small compared to the overall quantity of CANDU fuel, their varied storage form, dimensions, etc. require special consideration for future handling.

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NEWS LOCAL

Saugeen Shores opens door to nuke waste

By Scott Dunn, Sun Times, Owen Sound
Wednesday, December 7, 2011 7:38:10 EST AM

Saugeen Shores wants to explore the possibility of storing Canada's used nuclear fuel for centuries to come, 500 metres below ground.

Council passed a resolution Monday requesting "an initial screening be undertaken to determine whether the municipality is a candidate" for the site to store used nuclear fuel.

The project is separate from a similar plan to store low and intermediate level radioactive waste at a facility by nearby Kincardine at the Bruce nuclear site. That Ontario Power Generation deep repository proposal along the Lake Huron shoreline is undergoing a process of regulatory review. It is assisted by Nuclear Waste Management Organization, which is also responsible for leading the high-level nuclear waste project.

Asked why the municipality is pursuing the possibility of storing high-level nuclear waste, Saugeen Shores Mayor Mike Smith took a long view.

"We have the biggest nuclear power site here in Canada in Bruce County very close to our home and about 40% of the fuel is there," Smith said in an interview Tuesday. "So any long-term, where ever it goes, it's going to involve the county and our community.

"Why? I don't know. From my perspective I think we just need to learn more about it, about the final solution for it, or the ultimate solution for it."

Smith also said he wanted to "find out about it, because if you're going to truck it halfway across the country you're going to be going through a lot of communities."

The NWMO gave Saugeen Shores officials a tour of the existing Western Waste Management Facility on the Bruce Power site. Operated by Ontario Power Generation, it accepts low- and intermediate-level nuclear waste from OPG's 20 nuclear reactors, plus Bruce Power's reactors. Used fuel bundles from the Bruce site are stored there at the site now, although such storage has never been considered a long-term option.

Nuclear waste has been stored at the Bruce site, some 24 kilometres from Saugeen Shores, for years, Smith noted.

NWMO also provided "a fairly extensive briefing" on the project to Saugeen Shores politicians and staff.

Saugeen Shores is one of 10 communities to have indicated interest in the long-term storage project. Saugeen Shores' expression of interest is the only southern Ontario community on the list. Three are in Saskatchewan, six are in northern Ontario and a seventh in Northern Ontario didn't make it past initial screening.

But Smith stressed the municipality's interest is preliminary. "We haven't said we're interested in hosting it. We've simply said could we even be considered as a host," adding "I'm not sure where council would go."

Smith said that if after initial screening the municipality proves to be a potential site, it "would be up to council to decide do we engage the community and see if there's interest in the community to move this along to the next step?"

There would be economic benefits, Smith said. "Obviously that's one of the considerations, for sure. Not the only consideration."

The project would cost $16 billion to $20 billion, he said.

A big question which must first be answered is "can we do it safely?" he said.

Nuclear Waste Management Organization is responsible to find a willing community for this national project, spokesman Mike Krizanc said in an interview.

The NWMO estimates if everything runs smoothly, the earliest the deep geological repository could be open would be 2035.

The nine-step process to select a site would take seven to 10 years, he said.

It would take 10 years to construct, involving 500 to 600 direct construction jobs and 300 to 400 jobs to operate the facility. But more is proposed than a fortified vault for nuclear waste.

Krizanc said the project would be "transformative" for whichever community is selected.

The project would be a demonstration facility and there would be an "associated centre of expertise that will be a hub for national and international scientific collaboration."

"Without doubt, when we do site the project, it will attract scientists and people with expertise and interest in this kind of technology to the site," Krizanc said.

"The centre of expertise may be more of a scientific-based kind of thing, it may be partially a tourist-based kind of thing. It will depend on what the aspiration of the community are to a large extent. But there will be a lot of science conducted there."

First it needs an "informed, willing community" to host the facility.

"The important thing is this will not be imposed on any community. It will be a decision that they make with all of the information that they need so they will be fully informed," Krizanc.

The community would have to "demonstrate their willingness in a compelling way," chosen by the community, he said. A referendum or a series of public meetings would do, he said.

Step 1 in a nine-step process is an expression of interest in learning more. Step 2 takes two or three months and identifies "obvious reasons" why the community would not qualify.

"Would the 250 surface acres needed impinge on parks, areas of natural resources, Native interests, or be hindered by groundwater issues? There are five high-level criteria in all, Krizanc.

If Saugeen Shores cleared that step, the community must decide whether to proceed to Step 3, to request a one- to two-year feasibility study. Step 4 takes four or five years of more intensive study of one or two community sites, costing more than $100 million.

During steps 3 and 4 economic and social factors are examined "in partnership with the community" to see how the project could "enhance the well being" of the host and surrounding communities.

It would take "another several years" to obtain a licence to construct the facility, Krizanc said.

Smith said Bruce Power didn't make any request of Saugeen Shores to express interest in being a host for the used nuclear fuel storage facility. Neither did the NWMO, Krizanc said.

Prior to Monday's Saugeen Shores council resolution, council on Oct. 11 passed a resolution in open session "indicating a desire to further investigate the opportunity" to be host to a "deep geological repository for the long term management of Canada's used nuclear fuel."

A Sept. 28 letter tabled at that meeting from that organization thanked the mayor for stopping by at its exhibit at the Association of Municipalities of Ontario conference in London.

In the 40 years Canada has been generating nuclear energy, enough used fuel bundles have been created that if piled up would fill six hockey rinks to the top of the boards, NWMO says. About 85,000 fireplace log-sized used nuclear fuel bundles are created each year. More than two million of them are stored in licensed facilities now.

EXHIBIT D

Tuesday, December 6, 2011

Repository in Saugeen Shores?

Saugeen Shores
by John Divinski

Saugeen Shores Council has approved letting its name stand, at this point, as a possible site for storing used nuclear fuel.

The Nuclear Waste Management Organization will be advised that council is requesting an initial screening be undertaken to determine whether the municipality is a candidate for storing high level nuclear waste in a Deep Geological Repository.

Vice Deputy Mayor Doug Gowanlock says 40 per cent of Canada's high level waste is already stored here on the Bruce Power site.

Mayor Mike Smith wants it made clear that any future decision on this matter will be made by the citizens of Saugeen Shores, not the council.

Smith says there are some benefits to having a repository located here and there are some drawbacks and talks are just getting underway.

He says it's very preliminary and Saugeen Shores may not even be chosen.

Smith says eight or nine other communities have also expressed an interest.

The Mayor doesn't expect anything to come to fruition for another 15 years or so but now's the time to start the dialogue in the community.

The high-level waste project is distinct and completely separate from the ongoing work in Kincardine by Ontario Power Generation which wants to construct a facility for management of low and intermediate level nuclear waste at the Bruce Power site.

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EXHIBIT E

NEWS LOCAL

More local communities to look at nuclear waste

Don Crosby
Sunday, December 11, 2011 8:11:49 EST PM

Saugeen Shores isn't the only Bruce County municipality with an interest in hosting Canada's used high level nuclear waste, said Bruce County warden Dave Inglis.

"I expect a number of the municipalities in Bruce County will be doing the same. It's just gathering information that they are going through to select a site. I think the county should be involved as we go along. If it's going to be in Bruce County we should all be involved," Inglis said during an interview last week. The warden said this is the information gathering stage and at this point there's no commitment.

"Anyway you look at it Bruce County municipalities and probably Grey County as well will be impacted whether the facility stays here or if it's somewhere else there will be waste shipped out of Bruce County and Grey County," said Huron Kinloss Mayor Mitch Twolan. "So we might as well learn about the whole process. You're probably going to see other (Bruce County) municipalities come out.

He doesn't rule out the possibility of some community in neighbouring Grey County showing an interest.

Huron-Kinloss council has had a couple of brief discussions but has yet to make a decision on whether it will take the step toward seeking information about the process .

Twolan rationalizes that spent fuel from the nuclear industry has been stored in above ground facilities since Canada's nuclear generator at Douglas Point first came online in September 1968.

"It's here already. The safest place is to be buried underground. What I hear is this is the geology here in Bruce County is second to none, " said Twolan.

At one time Twolan worked at the Douglas Point plant when it was operated by Ontario Hydro and he remembers how he stood within a metre of the above ground heavy water storage facilities that hold the spent fuel bundles without protective clothing and without being affected by radiation.

Twolan is confident that new technology in future will make it possible for new uses to be found for the so-called spent fuel.

"Obviously I'm pro nuclear and everybody is entitled to their own opinion but at the end of the day how many people get treatment for cancer using nuclear medicine. I don't even like to call it nuclear waste. I think we have to let technology get there," he said.

Northern Bruce Peninsula Mayor Milt McIver supports Saugeen Shores decision to look into what is involved in hosting the waste from Canada's nuclear generators.

"It's to investigate further and that's entirely up to them. There's high level waste in our community already. If that's the direction that community wants to head I can support that," said McIver who is aware of the safety implications of hosting a longterm waste repository.

"I recognize the safety aspect now but there's nuclear waste in our community now . . . the fact that the high level waste is here already, finding a longterm solution is a good thing," he said.

On Dec. 5, Saugeen Shores council passed a motion requesting, "an initial screening be undertaken to determine whether the municipality is a candidate," for the site to store used nuclear fuel.

The project is separate from a similar plan to store low and intermediate level radioactive waste at a facility in nearby Kincardine at Douglas Point.

The Ontario Power Generation deep repository proposal along Lake Huron shoreline is undergoing a process of regulatory review. It is being assisted by Nuclear Waste Management Organization, which is also responsible for leading the search for a permanent high- level nuclear waste storage site.

Arran-Elderslie Mayor Paul Eagleson fully supports Saugeen Shores. He notes that 40% of the nuclear waste from Ontario nuclear plants is already being stored above ground at the Bruce County site.

"I was under the understanding that this was exploratory at this stage and to go to that stage is definitely good sense," he said.

All of the mayors interviewed said the topic of compensation is still a long way off but it could involve some formula that would benefit neighbouring communities as well as the host community.

"For a project like this the whole community and when I say community I mean Bruce County would have to be involved," said Inglis.

Saugeen Shores is one of 10 communities to have indicated an interest in the longterm storage project. There are three in Saskatchewan, six in northern Ontario and a seventh in northern Ontario that didn't make it past the initial screening.

The initial screening is the first in a nine-step process that would take seven to 10 years. The project requires 250 acres and would cost $16 billion to $20 billion. It would take 10 years to construct involving up to 600 construction jobs and 300-400 jobs to operate the facility.

In the 43 years that Canada has been generating nuclear energy enough used fuel bundles have been created to fill six hockey arenas up to the top of the boards. NWMO says about 85,000 fireplace log-sized nuclear bundles are created each year. More than two million of them are now stored in licensed temporary above ground facilities.

With files by Scott Dunn.

EXHIBIT F

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Nuclear waste storage depot attracts southern Ontario towns

Published On Mon Feb 20 2012

John Spears
Business Reporter

Recommend 17

You can call it a repository for used nuclear fuel in an adaptive phased management program.

You can call it a nuclear waste site.

Either way, a surprising cluster of municipalities in south-western Ontario's rural heartland are saying they might want to be the place where Canada's spent nuclear fuel is stored for thousands of years.

No final decisions on a waste site have been made – or will be for several years, under the multi-step process put in place by the Nuclear Waste Management Organization.

And the western Ontario municipalities who are showing interest will be judged against sites proposed by other communities scattered across Canada.

But it's a surprising show of interest for a region of the country best known for green fields, blue water and Alice Munro.

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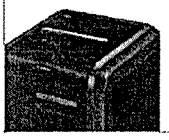

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Of course, it's also the home of the Bruce nuclear station, north of Kincardine on the shore of Lake Huron – and that's the touchstone for the interest in the waste site.

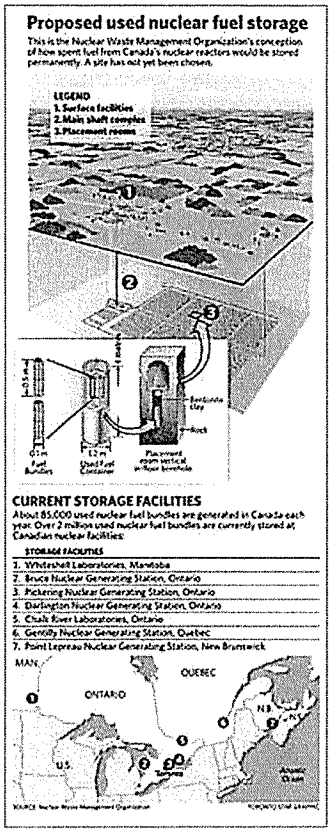
The Bruce nuclear operation already keeps its own waste in surface storage areas.

For some, it doesn't seem a big leap to take waste from nuclear power stations in Pickering, Darlington, Gentilly, Que. and Point Lepreau, N.B., and from research centres in Whiteshell, Man. and Chalk River.

Mayor Bill Goetz, mayor of South Bruce, puts it succinctly, as he notes that Highway 9 runs straight through his rural municipality on the way to the Bruce plant:

"It's going to come through here coming or going, so we thought we might as well be in the mix."

So far, South Bruce and its near neighbours Huron-Kinloss, Brockton and Saugeen Shores have done little more than ask for more information. They've taken a tour of the Bruce plant, or are scheduled to do so.



It's still a long way of making a commitment to host the site. The Nuclear Waste Management Organization, charged with the project, has designed a nine-step process for site selection

and all communities are still in the earliest stages. It's likely to take seven to 10 years to narrow the field down to one site.

The proposed site will then undergo a detailed environmental assessment before construction starts. The earliest date a storage facility could open, it figures, 2035.

And any or all may be ruled out by geology. The storage site will be buried at least 500 metres deep, and must be placed in stable, solid rock that doesn't permit water to flow through.

Still, interest is percolating, and in some ways feeds on itself.

David Inglis, mayor of Brockton and Warden of Bruce County, explains:

"We thought: Other communities are doing it in our area, and if it's going to be in our backyard, we want to know all we can about it. If it is in Bruce County, it's going to affect the whole county for infrastructure and jobs."

The interest discourages some residents who are suspicious of the long term impact of storing tonnes of highly radioactive waste, for millennia to come.

"I think it's the money that's speaking to them," says Ruth MacLean, a minister who lives in Kincardine, and on Bruce Beach in Huron-Kinloss.

"I just think this is a company town – everybody knows what side their bread is buttered on."

A fuel storage site in the area is also likely to draw scrutiny in the U.S. A string of Detroit-

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area municipalities have already protested construction of a low and mid-level nuclear waste storage area now under way at the Bruce site.

It won't hold used fuel, but more mundane objects such as clothing and mops used in radioactive areas.

Local Ontario politicians don't deny the lure of the money.

"We're strictly a farming community and we haven't got much industry," says Goetz in South Bruce. "We're struggling to keep going."

Excavating and building the storage area will employ up to 2,000 workers at a time on a project costing billions.

"They estimated anywhere from $18 to $24 billion," says Goetz. "And in the end they figure there would be 200 permanent employees. That's the part that would really help us."

(In fact, the NWMO says the lifetime cost of the site will be $16 to $24 billion. That's equivalent to $6 to $8 billion cash in hand today.)

Even some who are apprehensive about bidding for the project want to get more information.

Ruth Dalton, who runs a pottery business in Ripley – part of Huron-Kinloss – is nervous but wants to get solid information.

"I definitely want to find out more about it, before everybody goes ahead with this crazy notion," says Dalton.

"Where the truth lies you don't know, and I'm not sure anybody does know."

Given that much waste already exists, she says, storing it "might be the lesser of many evils."

But Ruth MacLean says she's not sure how impartial the information will be. The nuclear industry will marshal its arguments, she knows.

The question is: Will there be qualified experts to challenge their point of view?

The mayors note that their people have lived near the Bruce nuclear facility since the first reactor was built there in the 1960s.

"Our residents are quite familiar, and I'd like to say comfortable with the nuclear industry as a whole," says Mitch Twolan of Huron-Kinloss.

Wind turbines are a much hotter issue in the community than nuclear waste, says Twolan.

"Something has to be done with this spent fuel. As a politician, the easiest thing to do is pass it on to the next generation. I think what you're hearing from councils around Bruce County is that because we are familiar and comfortable with it, let's do something now rather than later."

As for the argument that a waste storage site would damage the agriculture and tourist industries, Twolan – a real estate agent – sees no evidence that the nuclear industry can't co-exist peacefully with farmers and cottagers.

"The nuclear facility has been up there for years, and the prices at Bruce Beach are not going down," Twolan says.

But all the mayors agree that their communities need to be on board with whatever decision is taken.

Saugeen Shores – the former communities of Port Elgin and Southampton, north of the Bruce station – has delayed taking further steps toward seeking the waste site until May, to allow more time for its residents to get informed.

Mayor Mike Smith says he hopes the Nuclear Waste Management Organization will help send a mailing to every household in the community.

But there's residual sympathy for the nuclear industry, he says, since about one in three workers at the Bruce Station lives in Saugeen Shores.

Note: This article has been edited from a previous version that incorrectly said that Bill Goetz is the mayor of the Municipality of South Huron

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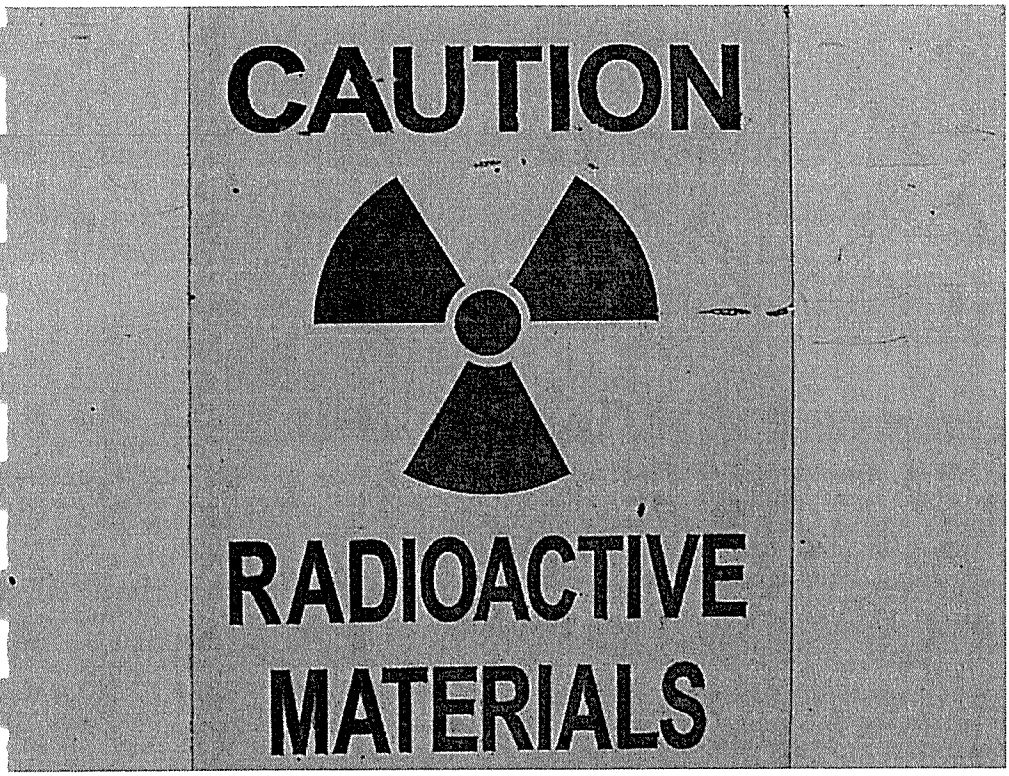

GETTY IMAGES/THINKSTOCK

The picturesque community of Saugeen Shores, Ont., has announced it is entering the running to become the permanent home for 3,000 tonnes of Canadian nuclear waste.

Last week, the Southern Ontario community's town council voted "to determine whether the municipality is a candidate" for an ambitious federal project to permanently store all of Canada's nuclear waste in a sprawling underground bunker.

"We haven't said we're interested in hosting it. We've simply said could we even be considered as a host," Saugeen Shores Mayor Mike Smith told the Owen Sound Sun Times last week, adding that the council is particularly interested in finding out whether they could "do it safely."

The tourist-friendly Ontario community is the ninth Canadian municipality to express interest in becoming the home for depleted Canadian nuclear fuel, but it is the first in Southern Canada. All the other contenders are isolated northern communities such as Wawinehouse, Sask., and Hornepayne, Ont.

Related

U.S. frustrated with Canada over nuclear watchdog funding, leaked cables show

ounting nine bed and breakfasts and at least 14 hotels and motels, Saugeen Shores (known for its "amazing sunsets") is easily among the most touristy of the contenders.

i comments last week, Mr. Smith argued that the nuclear facility was a natural fit for the 12,000-person community, which is only a 30-minute drive from the Bruce Nuclear Generating Station, North America's largest nuclear power plant — and the region's largest employer.

nce Canada's first nuclear power plant went online in 1962, reactors in Ontario, New Brunswick and Quebec have generated more than two million bundles of spent nuclear fuel. "If the entire current inventory could be stacked like cordwood, they could fit into a ace the size of six hockey rinks from the ice surface to the top of the boards," reads the website of the Nuclear Waste Management rganization (NWMO), an arm's length federal body set up in 2002 to manage Canada's used nuclear fuel.

Currently, all this waste is stored at Canadian reactor sites in temporary vaults and silos. A facility at Bruce Power, for instance, ready holds nearly 40% of the Canadian total.

The proposed repository would be a 375 hectare bunker located half-a-kilometre underground. With the facility's final price tag coming in as high as $24 billion, the project promises "thousands of jobs in the host region and potentially hundreds of jobs in a host mmunity for many decades," according to the NWMO.

Of course, from now until the NWMO picks a final spot, Saugeen Shores will have to prove its worth against the eight other candidate wns. "Ultimately, there will have to be a compelling demonstration of willingness expressed by the citizens of any interested mmunity," according to a mid-November press release by Saugeen Shores.

The community's flirtation with storing radioactive waste comes amid another a fierce dispute over a 76-meter-tall wind turbine oised to take shape at the Canadian Auto Workers Family Education Centre in the southwest corner of Saugeen Shores. "We're cared for our health and our property values," resident Paul Krane told Postmedia in November.

On Nov. 14, Saugeen Shores town council unanimously passed a resolution calling for the Ministry of Environment to "review, uspend or revoke" approval for the project. So far, their appeals have yielded nothing.

National Post

opper@nationalpost.com

Posted in: Canada, News Tags: Nuclear Waste, Saugeen Shores

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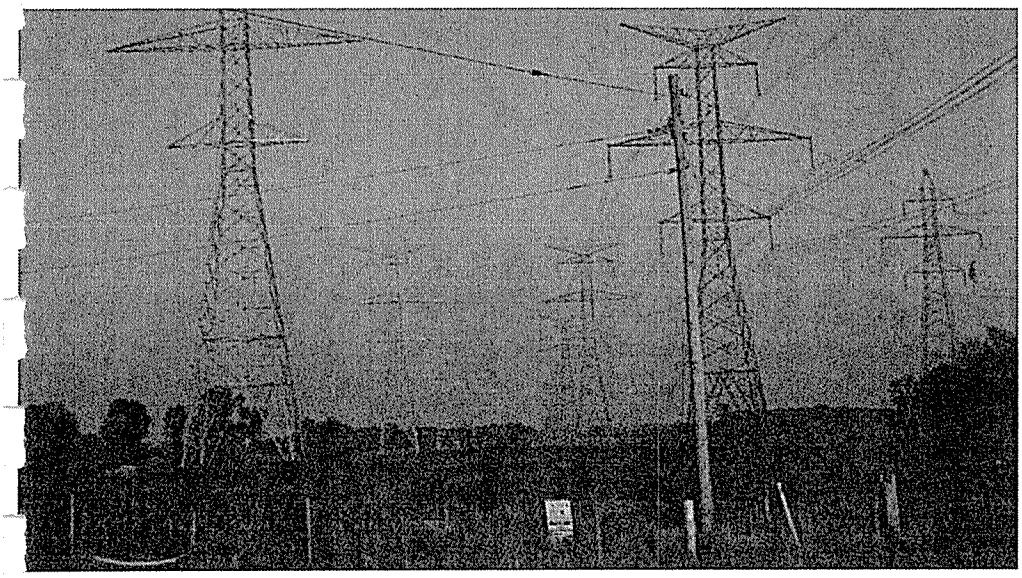
Nuclear waste dump idea sparks unease in Ontario



Transmission lines that run from the Bruce nuclear power plant on Lake Huron to Milton, Ont., are seen on Tuesday, Aug. 16, 2011 just orth of Hanover, Ont. The still-under construction third transmission corridor can be seen on the left.

Text:

he Canadian Press
ublished Sunday, Dec. 11, 2011 8:11AM EST

TORONTO - A community on the shores of Lake Huron has cracked pen the door to southern Ontario's becoming the permanent storage site or Canada's spent, but still dangerously radioactive, nuclear fuel.

MORE DETAILS

McGuinty gov't criticized over energy billing

Ont. drivers pay most for car insurance in Canada

Mississauga gas plant construction finally stopped

Until now, only nine communities in remote areas of northern askatchewan and northern Ontario were in the running to host the $24-billion project for a mammoth underground acility.

Now, to the consternation of some, one of southern Ontario's premier tourist destinations is on the radar, although ow it got there is already the subject of dispute.

he municipality of Saugeen Shores, which includes the picturesque lakeside towns of Port Elgin and Southampton about three hours west of Toronto, is showing interest in becoming home to the waste site.

eighbouring Brockton is also looking to get on board as part of an initiative to involve the entire county, which is already home to the Bruce nuclear power plant in nearby Kincardine.

t's a radical departure from what conventional wisdom has been for years: that (the waste) would go in the anadian Shield," said Chris Peabody, a Brockton councillor from Walkerton, Ont.

"Councils up here are freaking out about wind energy, but they're inviting a nuclear waste dump into their town."

he region is attractive as a waste site because 40 per cent of used nuclear fuel in Canada is already housed above ground at the Bruce generating plant.

he plant is a major employer in the region, has stored spent fuel for years, and community acceptance of a ermanent low-level waste facility was high.

Jamie Robinson, spokesman for the Nuclear Waste Management Organization, denied the federal agency has been ushing for expressions of interest from the county.

"We're not targeting any communities," Robinson said.

We're not targeting any communities," Robinson said.

"It's not us that's thinking about southern Ontario. Our process is open to any community in Canada. It's a community driven process."

The project involves finding a willing and suitable host for a six square kilometre bunker built half a kilometre below a square kilometre of field.

The facility would warehouse millions of high-level nuclear-fuel rods that remain dangerous indefinitely.

In return, the waste agency is dangling a huge economic-development carrot, promising the creation of hundreds of jobs for the community and thousands more for the region over many decades.

The downside, Robinson said, would be the huge stress such a project would have on existing infrastructure.

"There'll be significant positive benefits as well as potentially negative benefits," said Robinson.

"We encourage potential host communities to consider whether this project is consistent with the long-term vision that they've got for their community."

Coun. Thead Seaman said it was the waste organization that approached Saugeen Shores ("The Sun's Favourite Destination") looking for an invitation into the community.

The agency took councillors on a tour of the temporary storage at the Bruce plant last month.

With Mayor Mike Smith on board, a committee agreed to ask the agency for more information but Seaman said councillors will likely doom the idea soon.

"The public doesn't want us to even receive more information," Seaman said. "So, we'll just shoot it dead in the water and that will be the end of it."

Still, the idea continues to bubble that the entire county could act as host region with benefits shared across the area.

The suggestion gained little traction in the municipality of South Bruce earlier this year but nearby Brockton, which includes Walkerton, appears more enthusiastic.

Its councillors also toured the temporary storage site earlier this month.

Brockton Mayor Dave Inglis said the county has long-standing experience with nuclear power, and council would likely make a decision on the issue "shortly."

But Peabody said Walkerton's tainted water tragedy a decade ago should be reason enough to stay out of the radioactive-waste business.

"Taking a town like Walkerton, which has that legacy of E. coli, and inviting a nuclear waste dump in -- I have trouble with that," Peabody said.

"I would (also) question the wisdom of putting all of Canada's nuclear waste beside or close to Lake Huron under some of Canada's best farm land."

Either way, nailing down a site will likely take as long as another decade, and then at least that long to build the repository.

To date, three communities in Saskatchewan -- English River First Nation; Pine House and Creighton -- and six northern Ontario communities -- Ear Falls, Ignace, Nipigon, Schreiber, Hornepayne and Wawa -- have been through initial screening.

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Bell Media Television

EXHIBIT I

THE CORPORATION OF THE TOWN OF
SAUGEEN SHORES

STAFF REPORT

Prepared By: Larry Allison, CAO

Date: July 9th 2012

Subject: DGR Briefing Session with CNSC – August 23rd, 2012

RECOMMENDATION

That the briefing session with the Canadian Nuclear Safety Commission scheduled for August 23rd 2012 include _____from Council and _____from the Community.

BACKGROUND

As part of learning more about the national process to regulate approvals for a Deep Geological Repository for used nuclear fuel, the Canadian Nuclear Safety Commission will conduct a preliminary briefing session for interested communities. Such sessions are typically held at Stage 2 of the site selection process and are designed to provide further understanding about the role of the Agency in oversight.

Such a session has been tentatively arranged for Thursday August 23rd in Ottawa. The date proposed is the day following the conclusion of the AMO Conference which is also being held in Ottawa this year. As there are a few councilors expressing interest in attending AMO there would be some economies derived from making a single trip. The CNSC does not travel to interested communities, they are required to attend at their office.

A draft agenda for the session is attached. The CNSC can accommodate up to 10 participants and those attending are to be determined locally. The NWMO itself is not involved in the session what so ever. A cross-section of both elected representatives and community members with varying views on the DGR issue are encouraged to attend the briefing session. Staff understands that other communities who have participated in similar sessions recently have found them to be educational and worthwhile.

Depending on the level of interest from Council members themselves there may be opportunity to request a number of community groups or organizations nominate an individual to attend. Staff are seeking direction of Committee of the Whole as to participation in this regard in order to make final arrangements with the CNSC.

FINANCIAL IMPACT: Nil - The expenses incurred by Town and any community representatives attending the session are reimbursed by NWMO.

Government of Canada / Gouvernement du Canada

NOTICE OF MEETING -- *AVIS DE RÉUNION*

File / Dossier: 2.05.01
CNSC E-doc: 3958253

TO *À*	**Visitors:** Larry to fill in once known	**CNSC Members:** Mike Rinker — Don Howard Andrew Stewart — Andrée Mongeon Kim Mann — Trudy Chapman Raj Garg — Richard Tennant Andrew Elliot — Brian Torrie
SUBJECT *OBJET*	**CNSC's Early Role in the Adaptive Phased Management Project – Outreach meeting with Town of Saugeen Shores**	
AGENDA OR REMARKS *ORDRE DU JOUR OU REMARQUES*	10:00 –10:10 Introductions (all) 10:10 – 10:45 Overview of CNSC's Regulatory Framework and licensing process 10:45 – 11:00 Environmental Assessment 11:00 – 11:15 Public Hearing Process 11:15 – 11:30 Public Information Programs 11:30 – 11:45 Aboriginal Consultation 11:45 – 12:00 Participant Funding Program 12:15 – 12:45 **Working Lunch (to be provided by the CNSC)** Technical Safety of Deep Geological Repositories – Safety Assessment/ Safety Case (12:00 – 12:30) 12:45 – 13:00 Packaging and transportation of nuclear substances and emergency preparedness 13:15 – 13:30 Security 13:30 – 14:00 Closing remarks (additional time if needed)	
LOCATION OF MEETING *ENDROIT DE LA RÉUNION*	**Room 12-050, 280 Slater St, Ottawa, ON** Visitors please go to the CNSC reception desk, located on the ground floor of 280 Slater Street. CNSC staff contact Nicole Kearns (613-992-5544), if unavailable contact Valerie Leclerc-Vigeant (613-947-4346).	
	Date: **August 23, 2012**	
	Time / *Heure:* **010:00 – 14:00**	Duration / *Durée:* **4 hours**
ARRANGED BY *ORGANISÉ PAR*	Name / *Nom:* Julie Mecke	Tel / Tél: (613) 996-7314

EXHIBIT J

nwmo
NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

RECEIVED
JUL 30 2012
Chief, Council
SON-Jake

July 19, 2012

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR #1
Southampton, ON N0H 2L0

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR #5
Wiarton, ON N0H 2T0

Dear Chief Kahgee and Chief Lee:

I am writing to you pursuant to our undertaking to ensure you are kept informed about our work in your area. As you may already know the communities of Saugeen Shores, Huron-Kinloss, Arran-Elderslie and South Bruce have each publicly acknowledged that they are interested in receiving information on our process to find a willing host community for a safe site for Canada's used nuclear fuel. Each community has recently passed a resolution requesting information about the NWMO, the project and the process to select a site. As part of this process of learning more about the project, they have also requested an initial screening of the potential suitability of their community.

As we have indicated to you before in our letters regarding Saugeen Shores and Brockton we remain committed to ensuring you have the most up to date information on this process and project. We are interested in meeting with you to discuss the project and begin to explore issues such as partnerships and decision making. As a company the NWMO acknowledges, respects and honours that Aboriginal peoples have unique status and rights as recognized and affirmed in s.35 of the Constitution Act (1982) and is committed to respecting the Aboriginal rights and treaties of Aboriginal peoples in Canada . The NWMO also recognizes and honours that First Nation people have a special relationship with Mother Earth and the associated unique stewardship responsibilities flowing from that relationship.

We mean no disrespect to your community by accepting the request of your neighbours to learn about our project and participate in our process. It is open to any community in Canada, including yours, to make a request to learn about our project. Such a request does not represent any commitment on the part of the requestor, nor does it represent any commitment by the NWMO as to where the project may end up. The focus of this very initial stage of the site selection process is to share information with all communities which express an interest in learning about Canada's plan and the project. Because we are only at the information sharing and gathering stage we are not screening out potential host communities unless we have determined that they are unlikely to have geologically suitable land available for a safe site based on our initial desktop studies.

Tel 416.934.9814
Fax 416.934.9526
Toll Free 1.866.249.6966
22 St.Clair Avenue East 6th Floor
Toronto Ontario Canada M4T 2S3
www.nwmo.ca

We are still several years from determining a suitable site for the safe storage of used nuclear fuel. We do not know which province we will be operating in, and as such we have not been delegated any aspects of the Crown's duty to consult. We do however believe in the importance of sharing information and attempting to address concerns as they become known to us.

As we work toward identifying a suitable site for our project, we will do so on a basis that respects Aboriginal rights and we will implement the project in a manner that benefits the communities in the vicinity of the project, wherever it ends up being located.

I am hopeful that we can find a suitable time to meet in the near future.

Yours Truly,

Kathryn Shaver
Vice President, APM Site Selection and Engagement

EXHIBIT K

Traditional Territories of the Saugeen Ojibway Nations
Geewaedinoong
Ae-pungishimook
Waubunoong
Zhauwunoong
CANADA
U.S.A
Georgian Bay
Lake Huron
Chippewas of Nawash Unceded First Nation
Chief'sPoint
Chippewas of Saugeen First Nation
Meaford
Collingwood
Sydenham River
Saugeen River
Nottawasaga River
Maitland River
Arthur
Goderich
FOR ILLUSTRATIVE PURPOSES ONLY
Aboriginal Title claim area
Treaty 45 1/2 (1836) area
The islands around the Peninsula were subject to various treaties but many small islands on the Lake Huron side were returned to the First Nations in 1980
Treaty 67 (1851) area
Treaty 72 (1854) area
Treaty 82 (1857) area
Treaty 93 (1861) area
First Nations' lands 2004

EXHIBIT L

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

Chippewas of Saugeen, RR 1, Southampton ON N0H 2L0 519-797-2781
Chippewas of Nawash, RR 5, Wiarton ON N0H 2T0 519-534-1689

K. E. Nash
President
Nuclear Waste Management Organization
22 St. Clair Avenue East, 6th Floor
Toronto ON M4T 2S3

BY FAX: 416 934 9526

November 18, 2011

Dear Mr Nash,

RE: NWMO Consideration of Saugeen Ojibway Territory for a Used Nuclear Fuel Repository

It has recently come to our attention that the Council of Saugeen Shores intends to formally enter into the site selection process with NWMO to consider Saugeen Shores as a site for a used nuclear fuel repository. As you know, Saugeen Shores is within the Saugeen Ojibway Nation traditional territory and is directly adjacent to the Saugeen First Nation communal lands.

We are deeply troubled by this development. As you well know, SON has been engaged with Ontario Power Generation Inc. (OPG) and the NWMO for many years to consider OPG's plan for a Deep Geological Repository for Low and Intermediate Level Nuclear Wastes at the Bruce site. You have been personally involved in these meetings, initially as a representative of OPG, and later as head of the NWMO. From our very first meetings, SON has consistently expressed its concern that the DGR for low and intermediate level wastes would pave the way for a used fuel repository within our territory. We have been given constant assurance, by NWMO and OPG both, that there was no plan or intention to build a used nuclear fuel repository in SON territory and that the DGR project would not be the basis for developing a used fuel repository in SON territory.

It would be completely illegitimate for NWMO to now begin a process to consider Saugeen Shores, or any other location within the SON territory, for a used nuclear fuel repository. It is contrary to the assurances repeatedly given to SON.

Further, for NWMO to now begin consideration of the Bruce site, or another proximate area, for a used fuel repository, on the eve of the Joint Review Panel consideration of OPG's DGR project for low and intermediate level wastes, is an affront to the JRP process and will act to undermine the legitimacy of its review.

SON must now receive clear assurances from you on behalf of NWMO, and from the most senior levels at OPG and government, that in the present circumstances, NWMO and OPG are not willing to engage in any consideration of siting a used fuel repository in SON territory. We expect that this position will be made clear to Saugeen Shores and other communities in the area who may seek to enter into NWMO's site selection process.

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. The Honourable Chris Bentley, Minister of Energy
Mike Smith, Mayor of Saugeen Shores, Warden of Bruce County
Albert Sweetnam, Ontario Power Generation Inc.

EXHIBIT M

nwmo

NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIETE DE GESTION DES DECHETS NUCLEAIRES

Ken Nash
PRESIDENT

tel 647.259.3010
email knash@nwmo.ca

November 25, 2011

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR#5
Wiarton, ON N0H 2T0

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR#1
Southampton, ON N0H 2L0

Dear Chief Lee and Chief Kahgee:

Thank you for your letter of November 18 regarding the possibility of the Town of Saugeen Shores deciding to enter the learn more phase of Adaptive Phased Management (APM). I would like to arrange to discuss the matters you raised at your earliest convenience. Meanwhile, I would like to offer the following explanation of where NWMO is positioned in implementing our mandate under the Nuclear Fuel Waste Act.

APM was developed over a period of three years during which time, we engaged with more than 18,000 Canadians, including 2500 Aboriginal people, across Canada and received advice from 500 experts. NWMO was consistently advised by Canadians that safety and security is a top priority and this generation must take action on the long-term management of the wastes that we have created.

NWMO's mandate for APM was approved by the Government of Canada in 2007. We are now responsible for implementing a national infrastructure project to safely isolate Canada's used nuclear fuel in a suitable geological formation where it will be monitored and it can be retrieved if necessary. This mandate requires an open and transparent process to locate the facility in an informed and willing host community.

The site selection process developed by NWMO is a result of a continuing dialogue with Canadians over a period of three years and is fundamentally community driven. It was initiated in 2010 with NWMO creating awareness and is now in the initial stages of what will eventually be a nine-step process spanning many years. The multi-year process of site selection is designed to provide the time required to assess the primary objective of safety, and explore the potential for the project to enhance long-term well-being of the host community and surrounding areas.

So far ten communities in Ontario and Saskatchewan have stepped forward with an interest to learn more. One community has been screened out because of unfavourable geological conditions.

With reference to the interest of Saugeen Shores, it is important to note that the APM site selection process is open to all communities in Canada. I should also clarify that no one in NWMO or, to my knowledge, anyone in OPG, has stated that NWMO would exclude communities in Bruce County, or anywhere in Canada for that matter, in advance of the learn more stage that forms the first step in our process. That would be inconsistent with our agreement with Canadians that we would implement the process we designed in collaboration with Canadians and that the process would be followed faithfully to determine the ultimate site for the APM DGR.

We note that the Hosting Agreement between OPG and Kincardine for an OPG DGR on the Bruce Nuclear site is only for Low & Intermediate Level Waste and clearly excludes used nuclear fuel. NWMO has consistently said that we would not be looking at the OPG DGR for used fuel. That will not change. NWMO is mandated by the Nuclear Fuel Waste Act to develop an NWMO deep geologic repository for all of Canada's used nuclear fuel.

Once a community passes a resolution to enter the learn more phase, the process requires NWMO to involve local Aboriginal communities and other communities in the region. We are pleased that Saugeen Shores has chosen to contact SON prior to any decision by Council to enter the learn more part of the process. NWMO looks forward to building a strong, mutually respectful relationship with SON and would be pleased to meet with SON to describe APM and the site selection process and the matters raised in your letter.

Sincerely,

K.E. Nash

K.E. Nash
President

cc: The Honourable Chris Bentley, Minister of Energy
Mike Smith, Mayor of Saugeen Shores, Warden of Bruce County
Albert Sweetnam, Ontario Power Generation

EXHIBIT N

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

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K. E. Nash
President
Nuclear Waste Management Organization
22 St. Clair Avenue East, 6th Floor
Toronto ON M4T 2S3

BY FAX: 416 934 9526

February 23, 2012

Dear Mr Nash,

RE: NWMO Consideration of Saugeen Ojibway Territory for a Used Nuclear Fuel Repository

We write to further to our letter of November 18, 2012 and in response to an NWMO letter of January 25, 2012. The subject of both of those letters is NWMO's consideration of SON Territory as a site for a used nuclear fuel repository.

We must be perfectly clear – SON strongly opposes the consideration of our Territory as a site for a used fuel waste repository.

In our November 18 letter we explained that SON had learned of Saugeen Shores Council's decision to enter into NWMO's site selection process for the used nuclear fuel repository. As you know, Saugeen Shores is adjacent to our communal lands and in the heart of our Territory. We explained that SON has been given constant assurances that the OPG's DGR for low and intermediate level nuclear wastes would not pave the way for a used nuclear fuel repository. We asked for your assurance that our Territory would not be considered for a used fuel repository.

In your response letter of November 25, 2011, you gave no such assurance. In fact, you stated that neither NWMO nor OPG has ever stated that communities in Bruce County would be excluded from consideration for a used nuclear fuel repository. You continued to say that NWMO will not seek to put used nuclear fuel in the proposed DGR for low and intermediate level wastes, which you must know has never been our concern. With these words, we are left feeling that our engagement with OPG and NWMO over the past years has been based on only half the story, and that OPG and NWMO have always planned to keep options open to build repositories for all of Canada's nuclear wastes, including used fuel, in our Territory.

In NWMO's letter of January 25, you inform SON that the Municipality of Brockton, again in the heart of our Territory, has also entered into the site selection process with NWMO. It must be noted that this is a form letter - it makes no reference to our earlier correspondence, it does not address the specific issues raised by SON in our letter of November 18, and it completely ignores the long history between SON, OPG and NWMO in these matters. Instead, you indicate that there will be "broad engagement" with potential host communities, surrounding communities and "Aboriginal people potentially affected". To receive such a letter is deeply offensive.

SON is not an "Aboriginal people potentially affected". These are our Treaty lands and our Traditional Territory. Our communal lands are closer to the Bruce site than many of the municipalities you purport to engage as "hosts". This is where we live and exercise our Rights, and where we must continue to do so forever. Our ancestors are buried on the Bruce site. No decision could be made to site a used fuel repository in our Territory without acknowledging SON as a host community, and engaging SON on this basis. This means that no decision could be made to build a used nuclear fuel repository in our Territory unless SON was informed and willing.

SON is not a willing host for this project. At this time, and in light of the Environmental Assessment and planning of the OPG's DGR project, SON is not prepared to even have our Territory considered for the used nuclear fuel repository. For this reason, SON will oppose any continuing work by NWMO in this regard.

We ask that you now, on behalf of the NWMO, confirm that NWMO would not develop and build a used nuclear fuel repository in SON Territory if SON was opposed to the plan.

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. Shawn Atleo, National Chief, AFN
Ed John, North American Representative to UN Permanent Forum on Indigenous Issues
The Honourable Chris Bentley, Minister of Energy
Regional Chief Angus Toulouse, Chiefs of Ontario
Mike Smith, Mayor of Saugeen Shores, Warden of Bruce County
David Ingles, Mayor, Municipality of Brockton
Albert Sweetnam, Executive Vice President, Nuclear, Ontario Power Generation Inc.

EXHIBIT O

nwmo
NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

Ken Nash
PRESIDENT

Tel 647.259.3010
Email knash@nwmo.ca

May 3, 2012

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR#5
Wiarton, ON N0H 2T0

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR#1
Southampton, ON N0H 2L0

Dear Chief Lee and Chief Kahgee:

Thank you for your letter of February 23 further explaining SON's position with respect to a DGR for used nuclear fuel on SON Treaty Lands and Traditional Territory.

There are a couple matters I will address in this letter, however, because of the importance of these issues, I continue to believe that it is important that we meet face to face and, therefore, reiterate my request for a meeting.

To be clear, the OPG DGR has not paved the way for a used nuclear fuel repository. The DGR for a used nuclear fuel is guided by our federally approved Adaptive Phased Management process This process, as you point out, is based on a willing host community. Seventeen communities in Saskatchewan and Ontario have indicated their interest in Learning More about our project. The NWMO has not made any commitment to any community, region or First Nation that they will be the host for this project. In fact, that decision is still 7-10 years away.

In your letter you refer to the "Bruce Site" and I want to assure you that with respect to the NWMO DGR for used nuclear fuel, there is no proposed Bruce site. In fact, there is no specifically identified site anywhere. It is just too early in our process to do so.

Our process recognizes the importance of working with Aboriginal peoples in whose traditional territories we are proposing to work and the need to ensure there is on-going involvement and participation in decisions that affect them. I wish to assure you that the NWMO will work with Aboriginal communities in a shared decision-making process leading to strong and lasting partnerships. In all of our work the health and safety of the environment and of people is the first priority.

Elders whom we work with have advised us to explore the possibility of working together with Aboriginal communities to assess the possible environmental effects of the project on Mother Earth through the application of Traditional Knowledge. They have also advised us to work closely with potentially affected Aboriginal communities in order to ensure that these communities benefit from this project should it be built in their territory. This could include matters such as, assessing the suitability of a particular site for the project and identifying the terms and conditions on which the project might proceed. The process could also include agreements with Aboriginal communities to ensure that they benefit from the economic opportunities, employment, education and capacity building a project this size will bring. Building a project of this size will generate thousands of jobs in the host region and potentially hundreds of jobs in a host community for many decades

The NWMO's work with Aboriginal peoples is guided by a few key principles:

- We acknowledge, respect and honour that Aboriginal peoples have unique status and rights as recognized and affirmed in s. 35 of the Constitution Act (1982.)
- We respect Aboriginal and Treaty rights.
  We recognize the unique circumstances of the Aboriginal peoples we will be working with and therefore our need to have an open mind on process.
- We believe that collaboration is key to a project of this size and therefore seek to make strong and lasting partnerships and relationships
- We believe that Aboriginal Traditional Knowledge will make our processes and our project better and therefore will seek to engage Traditional Knowledge holders in all aspects of our work and to interweave this knowledge with our work as appropriate and as agreed with the owners of this Knowledge

I believe in the value of having a good working relationship with you. You pose several ideas regarding our process and project which in the spirit of being "adaptive" should be explored. I do hope we can set up a process to do so.

Yours Truly,

K E Nash

Ken Nash
President

EXHIBIT P

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

Chippewas of Saugeen, RR 1, Southampton ON N0H 2L0 519-797-2781
Chippewas of Nawash, RR 5, Wiarton ON N0H 2T0 519-534-1689

Albert Sweetnam
Executive Vice President
Ontario Power Generation
700 University Avenue
Toronto ON M5G 1X6
EMAIL: albert.sweetnam@opg.com

November 1, 2011

Dear Mr Sweetnam,

RE: Discussions between SON and OPG regarding foundational issues respecting OPG's Operations within the Territory

As you know, representatives of SON and OPG have been meeting over the last month in an attempt to resolve key issues SON has raised respecting OPG's operations within SON Territory, and specifically, concerns respecting OPG's proposed Deep Geological Repository project.

At these and earlier meetings, we have made clear that SON's fundamental goal is to protect the safety of its communities, the integrity of its Traditional territory, and its Rights and interests within that Territory. Our objective now is to resolve the very serious and growing nuclear waste problem in our Territory.

With respect to OPG's proposed DGR project, SON could not support any such project that was not part of a comprehensive strategy to address the nuclear waste issues in our Territory and give our communities comfort and certainty that our Territory, people, Rights and interests will be protected. As we have said, such a strategy must include commitments that:

- OPG will not support the development of a used-fuel repository within SON Traditional Territory if SON opposes such a development.

- OPG will reconsider the inclusion of long-lived intermediate level nuclear wastes as part of any project for the management of low and intermediate level nuclear wastes.

- OPG will not plan for or develop additional nuclear waste management projects within SON Territory without the support of SON.

- OPG, with SON, will identify legacy issues arising from its past and current operations within SON Territory and develop a plan to resolve those issues.

- OPG will not proceed to construct the DGR without the support of SON as evidenced by a ratification vote by its communities.

We have conveyed this position to OPG in our last number of meetings. Although we believe we have had good discussions, we do not feel that OPG has fully understood us or is prepared to adequately respond to our position. At our last meeting on October 14th, OPG shared its response to SON's positions and conveyed what OPG was willing to commit to in this regard. OPG's proposal fell far short of what SON requires at this time.

We remain hopeful that these issues can be resolved between SON and OPG through ongoing discussions. However, we believe that no progress will be made unless there is a meeting between the leaders of SON and OPG. For this reason, we ask that you be in attendance at our next meeting, and that you consider whether your President should also attend.

While we try and resolve these matters, it has become clear that SON must continue its review of the current DGR project to prepare for its participation in the upcoming federal review of the project. We will ask our Environmental Office to be in contact with Donna Pawlowski to address administrative and budgeting matters under our Protocol Agreement to allow this work to proceed.

Lastly, SON is of the view that given the seriousness of these matters and their significance for the relationship between SON and Ontario, it is appropriate that SON meet with our new Minister of Energy to brief him on SON's concerns and positions. Out of respect for our process, we want to ensure that we have had the opportunity to meet with you again on these issues prior to our meeting with the Minister.

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. Donna Pawlowski, OPG

EXHIBIT Q

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

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Albert Sweetnam
Executive Vice President
Ontario Power Generation
700 University Avenue
Toronto ON M5G 1X6
EMAIL: albert.sweetnam@opg.com

March 9, 2012

Dear Mr Sweetnam,

RE: Discussions between SON and OPG regarding foundational issues respecting OPG's Operations within the Territory

We write to follow-up on both our letter to you of November 1, 2011 as well as our meeting of December 20, 2011. As you know, we raised and discussed many critical issues relating to the ongoing engagement between SON and OPG respecting OPG's operations within SON Territory, including your proposal for the DGR project.

It was our understanding coming out of our December meeting that OPG would provide us with response to the issues we have raised. Could you please confirm whether OPG intends to provide such response and when we might expect to receive it?

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. Donna Pawlowski, OPG

March 27, 2013

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR 5, Wiarton, ON N0H 2T0

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR 1, Southampton, ON N0H 2L0

Mr. Wayne Robbins
Chief Nuclear Officer
Ontario Power Generation
889 Brock Road, 6th Floor
Pickering, ON L1W 3J2

Subject: Deep Geologic Repository Joint Review Panel – decision on request to include the Adaptive Phase Management (APM) siting process in the cumulative effects analysis for the Deep Geologic Repository for Low and Intermediate Level Radioactive Waste project review

Dear Chief Lee, Chief Kahgee and Mr. Robbins:

The Joint Review Panel (Panel) for the Deep Geologic Repository for Low and Intermediate Level Radioactive Waste project (DGR) received a request from the Saugeen Ojibway Nations (SON) that the Panel should direct Ontario Power Generation (OPG) to revise and resubmit its Environmental Impact Statement (EIS) to include "a project for the disposal of used nuclear fuel" in the cumulative effects assessment for the DGR review.

On February 1, 2013, the Panel issued a letter[1] to the SON and to OPG directing them to file their submissions as to whether or not the cumulative effects analysis of the DGR should include the consideration of the cumulative effects of the DGR in combination with the APM siting process. The submissions received by the Panel have been posted on the registry CEARIS # 898 (SON's submission) and CEARIS # 899 (OPG's submission). The SON's previous submissions and request on this issue are also posted on the registry CEARIS # 687 and CEARIS # 845.

The Panel has reviewed and carefully considered all submissions.

[1] CEARIS# 877

Mandate of the Panel-

The Panel is an administrative tribunal and as such, whatever powers or authority the Panel might want to exercise must be expressly conferred or expressly implicit in the governing authority. The Panel cannot on its own volition or without amendments to its mandate expand its powers to areas or considerations for which the authority has not been assigned or cannot be derived.

The Panel was established to conduct the review of the DGR Project in accordance with the *Terms of Reference for the Review* (ToR). The Minister of the Environment and the President of the Canadian Nuclear Safety Commission entered into an agreement[2] defining the Panel's mandate and authority, the scope of the project and the factors to be considered, the applicable regulatory framework together with the details as to how the review shall be conducted. Of particular importance with regard to the specific issue being considered by the Panel is the specific mention in the agreement that the Panel shall conduct the review in a manner that "discharges the requirements set out in the CEAA." [now CEAA 2012]

With regard to the consideration of the cumulative effects, Part IV, *Scope of the Environmental Assessment and Factors to be Considered in the Review*, of the ToR, provides that the review will include the consideration of the "environmental effects of the Project, including the environmental effects of malfunctions, accidents or malevolent acts that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project **in combination with other projects that have been or will be carried out:"**[3] (emphasis added)

Further, the *Guidelines for the Preparation of the Environmental Impact Statement for the Deep Geologic Repository for Low and Intermediate-Level Radioactive Wastes* (Guidelines), which were approved by the Minister of the Environment as required by the CEAA 2012, following a public consultation process provide further direction as to the information that OPG must submit for the review. More particularly, as stated in section 1.1 of the Guidelines, the purpose of the document is to identify to OPG the nature, scope and extent of the information that must be addressed in the EIS. Section 14 specifically directs the proponent to identify the "cumulative adverse and beneficial environmental effects of the project in combination with other past, present or **reasonably foreseeable** projects and/or activities within the study area." With regard to the cumulative effects assessment, the Guidelines further stipulate that a "reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included.

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[2] *Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. within the Municipality of Kincardine, Ontario,* Final Agreement signed December 2008

[3] The wording in the ToR reflects what the requirement was under 16(1)(a) of CEAA (now repealed) which requirement is materially the same in the new paragraph 19(1)(a) of the *Canadian environmental Assessment Act, 2012.*[3] (CEAA 2012)

Projects that are conceptual in nature or limited as to available information may be insufficiently developed to contribute to this assessment in a meaningful manner."

Decision-

The Panel has concluded that APM siting process does not meet the definition of project or physical activities to be included in the cumulative effects assessment under its ToR for the DGR Panel Agreement. The Panel has also concluded that the APM process is not a "reasonably foreseeable" project as set out in the Guidelines for the preparation of the Environmental Impact Statement for the DGR Project.

The reasons for this decision are presented below.

(1) Terms of Reference of the DGR Joint Review Panel Agreement.

The ToR stipulates that the Panel review will consider "....any cumulative environmental effects that are likely to result from the Project in combination with other projects that **have been or will be carried out**"

The Panel has concluded that the APM siting process does not meet the definition of a project that "will be carried out" for the following reasons:

- The APM siting process is a process which may ultimately result in a project for a used fuel repository but it is not yet a project under the ToR or under the CEAA 2012;
- The 21 communities that have expressed interest to enter the siting process have made no commitments to the NWMO and can exit the process at any time;
- Community acceptance is a prerequisite before a community can be selected and the APM process can move to the project phase. In the absence of community engagement or acceptance, there is no project to "be carried out";
    - The APM process is only in Step 2 (where communities learn more and an initial screening is conducted) and is far from Step 5 where communities identified as having technically suitable sites determine whether they are willing to accept the project and propose the terms and conditions on which they would have the project proceed[4]; and
- The technical and scientific screening evaluations of the suitability of one or more potential sites have not been completed, let alone any feasibility studies (Steps 3 to 6) required in support of a project being proposed to "be carried out." The

[4] Nuclear Waste Management Organization 2010. Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel.

> Nuclear Waste Management Organization estimates site evaluation to take 10 years or more[5];

The mandate for the DGR review as expressed in the ToR speaks of "cumulative effects" in terms of projects "**that have been or will be carried out.**" The term or expression "will be carried out" is not defined in the CEAA 2012 nor in the ToR. In previous instances where Courts were asked to interpret the exact same wording, Courts have determined that, despite the fact that the Canadian Environmental Assessment Agency's guide suggested that "it would be prudent to consider projects or activities that are in a government approval process as well", the Courts have concluded that uncertain projects need not be considered:

> Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered.[6]

Where the Courts have expanded the duty to include cumulative effects consideration beyond the legislative requirements of "have been or will be carried out" to include likely activities or other projects in the vicinity of a project, is where the terms of reference for that particular project had been modified and amplified to include cumulative effects. For example, in that particular instance, the mandate for that project with regard to the consideration of cumulative effects stated "in combination with other projects or activities that have been or **are likely to be carried out.**"[7] (emphasis added)

The requirements regarding cumulative assessment were not amplified in the Agreement that established the mandate of the Panel for the DGR review. The DGR Panel's ToR speaks in terms of projects "that have been or will be carried out." This language is consistent with what was in the CEAA and what is now in the CEAA 2012 and the DGR review requirements.

Recently, Parliament adopted the CEAA 2012. In the new Act, the legislator made many changes to the environmental assessment regime and had the opportunity to consider expanding or modifying the cumulative effects analysis requirements, but the requirements for the activities to be considered as part of the cumulative effects assessment remained unchanged: "other projects **that have been or will be carried out**."

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[5] Nuclear Waste Management Organization 2010. Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel.

[6] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage),*[2001] 2 FC 461, par. 41

[7] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.,* [1999] 3 FC 425, where the Court, considering the "amplified" language of the Terms of Reference concluded that the panel had breached its duty to obtain all available information with respect to cumulative environmental effects.

The Panel is of the opinion that it is not within its mandate, nor within the Panel's authority, to amplify its mandate to consider projects or activities that are "likely" to be carried out.

For the above reasons, the Panel reiterates its conclusion that the APM siting process is not a project or activity, nor is it a project or activity that "will be carried out" under its ToR or under the CEAA 2012.

(2) Guidelines for Preparation of the EIS

The Guidelines direct the proponent to identify and assess the cumulative effects of the project in combination with "reasonably foreseeable projects." However, a "reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included."

The Panel has concluded that the APM is not a "reasonably foreseeable" project as determined under the EIS Guidelines and, therefore, the APM process does not have to be considered as part of the cumulative environmental effects assessment of the DGR for the following reasons:

- The APM siting process is a process, not a project;
- Any of the 21 communities now in the siting process can withdraw from the process at any time;
- Technical and scientific evaluations of the suitability of potential sites have not been done;;
- A credible cumulative effects assessment of any of the five communities now in Step 2 of the APM process and which are located in the Regional Study Area for the DGR Project is not possible because the technical and scientific evaluations that will be required, if and when the APM process moves from the siting process phase to a project phase have not been done;
- The Panel disagrees that Step 2 of the APM process translates into a "reasonably foreseeable" APM project within the Regional Study Area of the DGR Project; and,
- Kincardine is not one of the 21 communities that have expressed interest and the deadline for communities to register their expression of interest closed September 30, 2012
    - Therefore the, Municipality of Kincardine, the Bruce Nuclear Site and the Local Study Area of the DGR Project cannot be considered as a potential location of an APM project.

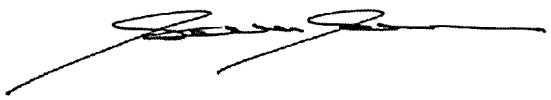
As mentioned above, the Municipality of Kincardine has not entered the siting process. As such, an APM project cannot be considered within the Municipality of Kincardine, nor can it be considered at the Bruce Nuclear Site. For that specific reason, the Panel is of the opinion that OPG, as part of the DGR environmental assessment, must consider the effects of the removal of the nuclear fuel wastes outside of the Bruce Nuclear Site and outside of the Study Area. The Panel disagrees that the inclusion of that consideration in the DGR review translates into the approval of the construction of an APM project.

Final Disposition-

For all the above-noted reasons, the Panel has determined that it does not need to consider the APM process in the cumulative effects assessment of the DGR and, as such, rejects the SON's request to direct OPG to amend the EIS.

In addition, if and when an application for an APM project is submitted, at that time the project will undergo a full environmental assessment that will incorporate the consideration of any cumulative effects associated with that project in combination with other activities, such as the effects associated with a DGR.

Sincerely,



Stella Swanson
Chair, Deep Geologic Repository Joint Review Panel

c.c.: James F. Archibald, Joint Review Panel Member
Gunter Muecke, Joint Review Panel Member

CEAA Registry Reference No. 06-05-17520

Saugeen Ojibway Nations' Application for a Determination on the Scope of Review of OPG's DGR Project and the Inclusion of a Project for the Long-Term Management of High Level Nuclear Wastes

SUPPLEMENTARY SUBMISSION

February 25, 2013
Toronto, Ontario

I. OVERVIEW

1. On August 9, 2012, the Saugeen Ojibway Nations ("SON") made a submission to this Panel (the "August 9 submission"). That submission argued that Ontario Power Generation Inc. ("OPG") must include a project for the disposal of used nuclear fuel (a "HLW Project") within the Study Area in its cumulative effects assessment for the DGR Project under review. The failure to do so renders the OPG's Environmental Impact Statement ("EIS")—and thus the assessment being undertaken by the Panel—fundamentally flawed.

2. The question of whether the HLW Project should be considered as part of the cumulative effects assessment of the DGR Project is not in dispute. OPG expressly acknowledges in the EIS that a HLW Project is a reasonably foreseeable project. OPG, in fact, includes such a project in its assessment of cumulative effects. OPG distorts the analysis, however, by considering only the possibility of a HLW Project located outside the Study Area, ignoring the more likely possibility that a HLW Project will be located inside the Study Area.

3. Further, by considering only that used nuclear fuel will be removed from the Study Area, OPG claims the benefit of an ameliorative cumulative effect in the Study Area—a net reduction in radiation and radioactivity—without ever addressing the numerous significant adverse environmental effects that would result from the co-location of the DGR Project and a HLW Project within the Study Area.

4. Having taken the position in its EIS that a project for the disposal of used nuclear fuel is a reasonably foreseeable project, OPG cannot now argue that the siting and construction of a such a project is too contingent or hypothetical to be consider as part of the cumulative effects assessment of the DGR Project. Thus, the only question facing the Panel is whether it is appropriate for this environmental assessment to consider only the possibility that the HLW Project will be developed outside the Study Area, as OPG contends (albeit without justification, rationale or

evidence), or whether it is necessary to also consider the possibility that a HLW Project will be developed within the Study Area.

5. In its August 9 submission, SON explained that the preponderance of available evidence demonstrates that is more likely that a HLW Project will be developed within the Study Area than outside it. Since SON made its submissions in August 2012, further evidence has come to light that makes it increasingly clear that a HLW Project is a reasonably foreseeable future project within the Study Area, as detailed in SON's submission of December 21, 2012.

6. It would critically undermine the legitimacy of this environmental assessment to consider only the possibility that a HLW Project will be developed outside the Study Area, as OPG urges in its EIS and in its responses to recent information requests. A review on this basis would be materially skewed and fundamentally flawed. OPG must be given specific direction to amend its EIS to include full consideration, data and analysis of the possibility that the HLW Project will be developed within the Study Area.

II. THE NEED TO CONSIDER THE POSSIBILITY OF THE HLW PROJECT WITHIN THE STUDY AREA

7. SON will make specific submissions on: (i) requirements of law and environmental assessment best practices for the inclusion of reasonably foreseeable projects such as a HLW Project in the Study Area in this review; (ii) OPG's recognition of the need to include the HLW Project in its cumulative effects assessment and its decision to include only the possibility that it will be developed outside the Study Area; (iii) available evidence that demonstrates it is as likely, or more likely, that a HLW Project will be developed inside, rather than outside, the Study Area; and (iv) how a cumulative effects assessment—and thus this environmental assessment—on this basis would be materially skewed and fundamentally flawed. SON will also make brief submissions on the Panel's concern that there remains confusion between the two DGR projects. SON will submit that there is no confusion, rather concern about

the connection between the two projects and that this must be addressed in a transparent way as part of this review, not managed by willfully excluding the HLW Project from consideration.

A. Law and Environmental Assessment Best Practices Require Inclusion of HLW Project in Cumulative Effects Assessment

8. A proper cumulative effects assessment is a condition precedent for any environmental assessment under the *Canadian Environmental Assessment Act*. As this Panel noted in its letter of February 1, 2013, "paragraph 19(a) of CEAA 2012 states 'that the environmental assessment of a designated project must take into account . . . any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out.'"

9. The Joint Panel Agreement that constituted the JRP for this review requires "a consideration of . . . [t]he environmental effects of the Project, including the environmental effects of . . . any cumulative effects that are likely to result from the Project in combination with other projects that have been or will be carried out."[1] Similarly, the EIS Guidelines require that OPG "must identify and assess the cumulative adverse and beneficial environmental effects of the project in combination with other past, present or reasonably foreseeable projects and/or activities within the study area."[2] The EIS Guidelines make clear that "it is the responsibility of the proponent to provide sufficient data and analysis on any potential environmental effects to permit proper evaluation by a joint review panel, the public, and technical and regulatory agencies."[3]

10. The direction to the proponent in the EIS Guidelines is consistent with best practices for undertaking cumulative effects assessment under Canadian environmental

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1 JRP Agreement Terms of Reference at Part IV, paragraph 1(a).

2 EIS Guidelines at section 14.

3 EIS Guidelines at section 1.1

assessment law and policy. The *Cumulative Effects Practitioner's Guide* is clear that a cumulative effects assessment should consider "[o]ther actions that have occurred, exist, or may yet occur which may also affect those same VECs are identified [in the EIS]. Future actions that are approved within the study area must be considered; officially announced and reasonably foreseeable actions should be considered if they may affect those VECs [identified in the EIS] and there is enough information about them to assess their effects. Some of these actions may be outside the study area if their influence extends for considerable distances and length of time".[4]

11. It is incorrect for a cumulative effects assessment to consider only "projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval."[5] Such a narrow approach to determining what projects are included in the cumulative effects assessment risks "limit[ing] the ability of cumulative environmental effects assessment to contribute to informed environmental planning and decision making in the future of the project area."[6] Cumulative effects assessment must "include 'certain' and 'reasonably foreseeable' projects and, where appropriate those projects that are 'hypothetical.'"[7] In this context, "reasonably foreseeable" means that "[t]he action may proceed, but there is some uncertainty about this conclusion."[8]

12. The governing case law is clear that it is incumbent on this Panel to ensure to a proper cumulative effects assessment is conducted. "Pursuant to paragraph 16(1)(a) of the Act, every screening or comprehensive study must consider any cumulative

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4 *Cumulative Effects Assessment Practitioners Guide*, Prepared For: Canadian Environmental Assessment Agency; Prepared By: The Cumulative Effects Assessment Working Group (Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker) and AXYS Environmental Consulting Ltd., February 1999 ("Practitioners Guide") at section 1.1.

5 *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* (dated 1999, updated November 2007) (the "Operational Policy Statement").

6 *Id.*

7 *Id.*

8 *Id.*

environmental effects which are likely to result from the proposed development in combination with other projects or activities which have been or will be carried out.[9] The court in *Bow Valley* explained the need for a broad and thorough cumulative effects assessment, noting "[u]pon a review of the jurisprudence in this area, it becomes clear that, although courts have narrowly interpreted the meaning of the 'scope of the project', they have gone further in their interpretation of the cumulative effects provisions under the *Act*."[10]

13. Similarly, the court in *Friends of the West Country* confirmed that a cumulative effects assessment "is indeed mandatory" and further "that the environmental assessment shall consider the environmental effects of the project as scoped and 'any cumulative effects that are likely to result from the [scoped] project in combination with other projects or activities that have been or will be carried out."[11] The court explained "the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered."[12]

14. In undertaking a cumulative effects assessment, a panel will "breach[] its duty" if it fails "to obtain all available information about likely [related projects] in the vicinity of the project" and will further "breach[] its duty" if it fails "to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel's report."[13]

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9 *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)* (C.A), [2001] 2 F.C. 461 at paragraph 38.

10 *Bow Valley* at paragraph 47.

11 *Friends of the West Country Assn.* v. *Canada (Minister of Fisheries and Oceans)* (C.A.), [2000] 2 F.C. 263 at paragraph 25.

12 *Friends of the West Country* at paragraph 34.

13 *Alberta Wilderness Assn.* v. *Cardinal River Coals Ltd.* (T.D.), [1999] 3 F.C. 425 at paragraph 76.

B. OPG Acknowledges the HLW Project as Reasonably Foreseeable and the Need to Include it in the Cumulative Effects Assessment of the DGR Project

15. OPG has acknowledged that a HLW Project is reasonably foreseeable and has included such a project as part of the cumulative effects assessment in the EIS. OPG, however, has only considered the possibility that a HLW Project will be developed outside the Study Area and has developed its EIS on this basis. This position is wholly unsupported by evidence. OPG's failure to consider the possibility of a HLW Project within the Study Area is a critical omission in the cumulative effects assessment and materially skews the environmental assessment of the DGR Project.

16. A HLW Project is not a speculative, contingent or imaginary project nor is it even a hypothetical project. It is a certain and planned project. The NWMO is mandated under the *Nuclear Fuel Waste Act* to develop, propose to government and implement a long-term project for the management of all nuclear fuel wastes in Canada.[14] In 2005, NWMO recommended its adaptive phased management ("APM") process that would lead to "centralized containment and isolation of the used fuel in a deep geological repository in a suitable rock formation, such as the crystalline rock of the Canadian Shield or Ordovician sedimentary rock."[15] APM was accepted by the Government of Canada on June 14, 2007.[16]

17. In May 2010, NWMO commenced its process for the identification of a site for a deep geological repository for used nuclear fuel (the "Site Selection process"). On September 30, 2012, NWMO suspended expressions of interest for communities wishing to enter into the process.

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[14] *Nuclear Fuel Waste Act*, S.C. 2002, c.23, section 6.

[15] *Choosing a Way Forward: The Future of Management of Canada's Used Nuclear Fuel, Final Study*, Nuclear Waste Management Organization (November 2005) at 44 ("Choosing a Way Forward").

[16] *Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel*, Nuclear Waste Management Organization (May 2010) ("Moving Forward Together") at page 5.

18. OPG has recognized the need to include the HLW Project in its cumulative effects assessment for the DGR Project as a "reasonably foreseeable" project. In Section 10 of the EIS, Table 10.4-1 identifies a number of projects for which OPG has undertaken a cumulative effects assessment in relation to the DGR Project, including "Transfer of fuel to a Long Term Repository."[17] The description of the project states that the used fuel currently stored at the Western Used-Fuel Dry Storage Facility will, at some point in the future, be relocated to a suitable long-term storage site.[18]

19. OPG, however, only includes the possibility that a HLW Project will be developed outside the Study Area, and consequently, concludes that used fuel will be removed from the Study Area. OPG states:

> At some point in the future, used fuel and decommissioning wastes will be transferred to a long-term repository. The DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site. Any dose will be solely from the transport of used fuel, and as the used fuel is transferred off-site, will result in net reduction of dose.[19]

20. OPG has very recently confirmed both its acceptance of the need to include the HLW Project as a reasonably foreseeable project in the cumulative effects assessment and its position that only the removal of nuclear fuel wastes from the Study Area are reasonably foreseeable. On December 12, 2012, in response to EIS-06-233, OPG states: "[I]t is reasonably foreseeable that used fuel will be transported to a deep geological repository outside of the Bruce nuclear site."

21. OPG has provided no substantive explanation or justification for its decision to consider only the possibility of a HLW Project outside the Study Area. OPG offers

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17 EIS, *supra* note 1 at s. 10, table 10.4-1.

18 OPG notes that NWMO is mandated to seek an informed willing host community for the long-term management site and that used fuel transfer is not expected until 2035 or later. Despite this, OPG recognizes the project as reasonably foreseeable and includes it in the cumulative effects assessment. EIS, *supra* note 1 at s. 10, table 10.4-1.

19 *Id.* at 10-37, s.10.6.4.

only the nonsensical statement "the DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site."[20]

C. *Evidence Demonstrates that it is as Likely or More Likely that the HLW Project Will be Developed Within the Study Area*

22. NWMO has now closed the period for expressions of interest from communities wishing to enter into the Site Selection Process. Some 21 communities located primarily in Ontario are engaged in the process. All five of the municipalities within the Study Area (the "Study Area Communities")—nearly a quarter of all communities engaged in the site selection process—have entered into the process. All five have passed initial screening and have issued council resolutions to move on to more advanced stages of the Site Selection process.

23. In the August 9 Submission SON explained that all available evidence demonstrates that the development of the HLW Project at the Bruce Nuclear site, or within one of the Study Area Communities, is reasonably foreseeable and that this outcome is as likely or more likely than the development of a HLW Project at any location outside the Study Area. At paragraphs 23 to 58 of the August 9 Submission, SON set out in detail the many factors which make it reasonably foreseeable that the HLW Project will be developed within the Study Area.

24. OPG has sought to demonstrate that the Bruce Nuclear Site, and the Study Area more generally, has characteristics that make it technically and operationally superior to any other potential candidate site for a deep geological repository for nuclear wastes. These characteristics, which accord with the very criteria that NWMO will consider as part of APM and Site Selection, include:

    a. Ideal geological conditions demonstrated through in-depth study for over a decade.[21]

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20 *Id.*

21 See August 9 Submission, at paragraphs 25 to 28.

b. OPG owned land, with sufficient available space for the construction of another deep geological repository, or expansion of the DGR Project.[22]

c. An existing secure and controlled nuclear site.[23]

d. Canada's only site with demonstrated and proven secure routes and protocols for transportation of nuclear wastes.[24]

e. Significant percentage of waste already on site (over 40% of Canada's used fuel waste).[25]

f. Existing "nuclear community" with all local municipalities expressing interest for a HLW Project.[26]

g. No identified policy constraints.[27]

25. The evidence makes clear that the Study Area Communities must be considered the "front runners" in the Site Selection process, based on OPG's and NWMO's own analysis. No other community—let alone a contiguous group of communities—currently in the Site Selection process, or elsewhere in Canada, has this collection of characteristics and circumstances marking its suitability for a HLW Project. No other site currently in the Site Selection process has had more than preliminary and cursory assessments of site suitability or technical feasibility. None are existing nuclear communities, none have undergone any assessment of the potential for safe and secure transportation of nuclear wastes, and of course, no other candidate site is currently owned and operated by OPG or currently holds a majority of spent nuclear fuel.

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22 *Id.* at paragraph 32.

23 *Id.* at paragraph 25.

24 *Id.* at paragraph 31.

25 *Id* at paragraph 29.

26 *Id.* at paragraph 33.

27 *Id.* at paragraphs 35 to 37. In addition, all communities have passed the initial site screening process, and more importantly, OPG and NWMO argue in their EIS that there are no policy constraints relating to the DGR Project, or any residual adverse impacts on VECs that cannot be mitigated. NWMO will certainly argue that this is *prima facie* evidence that the same analysis will apply to the HLW Project.

26. As explained at paragraphs 38 and 39 of the August 9 Submission, the DGR Project will become a "pilot project" for the HLW Project, allowing the NWMO to meet the requirements of its Adaptive Phased Management, generate extensive site specific data, develop and demonstrate operational processes, including transportation of nuclear wastes, processing and internment of wastes in the repository, and continue the building—or manufacturing— of "local community acceptance." If the DGR Project is approved and constructed, it will greatly *increase* the likelihood that the HLW Project will be constructed at the Bruce Nuclear site, or elsewhere within the Study Area.

27. Lastly, the Study Area Communities are a five-member cluster of communities within the Study Area. While it is exceedingly unlikely that any of the communities will be screened out for technical reasons at any stage of the Site Selection Process, even if one or more of the communities withdraws from the process, there is still a significant chance that some will remain, ensuring that a technically viable host community within the Study Area will remain through to the end of the process.

D. To Allow OPG to Ignore the Possibility of HLW Project within the Study Area will Materially Skew the Cumulative Effects Assessment and Undermine the EA

28. OPG has acknowledged that a HLW Project is a reasonably foreseeable project that must be addressed in the review of its DGR Project as part of the cumulative effects analysis. OPG baldly asserts, however, that the only possibility that must be considered is that the HLW Project will be developed outside the Study Area. This is simply wrong.

29. OPG implicitly takes the position that it is more likely that a HLW Project will be developed in one of the communities outside the Study Area currently in the Site Selection Process. By making this assumption, OPG's analysis has omitted critical cumulative effects considerations and seeks to demonstrate a net cumulative effect *benefit* to the Study Area through a reduction in radioactivity. OPG offers no

explanation for how it could have come to such a conclusion and OPG's position in this regard is flatly contradicted by all available evidence.

30. OPG has failed to consider, and has deprived the Panel and public the opportunity to consider, the many critical adverse environmental effects arising from the co-location of the DGR Project and a HLW Project within the Study Area. As explained at paragraphs 70 to 74 of the August 9 Submission, the DGR Project itself is a first-of-kind project that poses unique and untested challenges. These challenges are compounded, and significantly magnified, if the DGR Project is co-located with a HLW Project. The inclusion of a HLW Project as a cumulative effect project will require significant new data, study and analysis, including (i) assessment of radiation effects from normal operations, transportation and accidents and malfunctions, (ii) accidents and malfunctions probability scenarios, effects and response; (iii) operational considerations resulting from increased intensification and demand on resources; (iv) socio-economic effects, including public perception, stigma effects and social acceptance; (v) transportation issues relating to increased intensification and unique issues regarding transportation of fuel wastes; and (vi) technical feasibility considerations relating to co-location.

31. A HLW Project would cause impacts identical in kind, and to the same VECs, as the DGR Project, but with a greater magnitude given the nature of the nuclear wastes and the cumulative effect of the two projects. When a potential future project will have similar effects to the project under review, it militates strongly in favour of including that potential future project in the cumulative effects assessment.[28]

32. For example, as explained at paragraph 73 of SON's Application, transportation is a complex and critical issue for the long-term management of used nuclear fuel. However, transportation of nuclear wastes is completely omitted from the EIS. OPG has failed to address any stand-alone effects on the DGR Project resulting from the transportation of used nuclear full wastes or any cumulative effects resulting from

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28 August 9 Submission at paragraph 63.

the transportation of used nuclear fuel wastes in addition to the ongoing transportation of other nuclear wastes to the Study Area. Yet, OPG has failed to consider these matters despite including the removal of nuclear fuel wastes from the Study Area as an identified cumulative effects project.[29]

33. OPG recognizes that a stigma effect may result from the development of the DGR Project, which it defines as "negative images attached to a neighbourhood, community, other geographic area and its residents or to local products and services."[30] OPG, however, has included no analysis at all regarding the potential stigma effect from the DGR Project and the HLW Project in combination, or from the already extant confounding of the two projects in the media and among the public. This omission ignores, and patently biases, a critical consideration relating to the development of deep geological repositories. International experience demonstrates that stigma effects are definitive issues relating to the viability of nuclear waste repository developments.[31]

34. The need for social acceptance and public support for nuclear waste disposal programs has been a hallmark of Canadian law and public policy.[32] OPG appears to have recognized this to a degree, and describes its public engagement program it states is intended to fulfill the requirements under the *CEAA* and the *NSCA*.[33] OPG,

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29 Questions respecting transportation of nuclear wastes appear to have been a common concern expressed during OPG's public engagement. OPG states that one of the "Frequently Asked Questions" during open house meetings concerned transportation of nuclear wastes to the site. OPG stated response was "...The DGR Project will result in no changes to the volumes, means, or routes for transport." EIS at page 6-269. Again, this response reflects OPG's skewing of the cumulative effects analysis and of public understanding and perception. OPG fails to consider changes in volume, means, routes or types of nuclear waste transportation resulting from an HLW Project within, or outside of, the Study Area and in so doing *reverses* the potential adverse effects resulting from the two projects in this regard.

30 EIS at page 7-180

31 A recent example is the abandonment of the nuclear waste repository project in west Cumbria, England, which was reportedly based on the local communities concerns regarding the negative impacts on the local tourism economies. This was same issue has been cited as the reason for the abandonment of the proposed Yucca Mountain waste repository in Nevada, USA. "Nuclear Waste: Too Hot to Handle", New Scientist, February 18, 2013, available at http://www.newscientist.com/article/mg21729040.100-nuclear-waste-too-hot-to-handle.html.

32 August 9 Submission at paragraph 74.

33 EIS at page 2-1

however, has based its entire public consultation and engagement process on the basis that there is no connection between the DGR Project and the HLW Project, and further, on the basis that an HLW Project within the Study Area is not reasonably foreseeable.[34]

35. OPG has held out that there is evidence of strong overall support for the DGR Project from the community.[35] It is impossible to understand from the record what level of public support for the DGR Project would have existed, or exists today, if the connection between the DGR Project and the possibility of a HLW Project being developed within the Study Area was understood by or explained to the public. We must ask: "if people living in the area understood that the DGR Project might lead to the permanent disposal of all of Canada's used nuclear fuel waste within the same area, would they care?" This is a matter that must be addressed as part of a proper cumulative effects analysis.

36. The DGR Project and the HLW Project are the most significant nuclear projects in Canada's history. A failure to consider the possibility of a HLW Project inside the Study Area is no minor omission, it is a fundamental deficiency. The possibility of these two projects being developed within the same geographical region fundamentally changes the complexion and impacts of the DGR Project. Without consideration of the HLW Project within the Study Area, the environmental assessment of the DGR Project is rendered all but meaningless.

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[34] OPG makes this clear as part of its identified seven "key messages" for public consultation: "The DGR will not contain used nuclear fuel. It is for the long-term management of L&ILW. The long-term management project for Canada's used fuel is NWMO's Adaptive Phased Management (APM) Project. DGR and APM are separate, distinct projects." EIS at page 2-3.

[35] EIS Exec Summary at vii. OPG bases this on the results of a telephone survey, which OPG states indicated that 60% voted in favour of the DGR. EIS, Executive Summary at vi. This is profoundly misleading as there was no vote, and the telephone poll did not ask this question. In fact, the poll question made no reference at all to "the DGR", nor to "nuclear waste", "permanent disposal", or "underground disposal". The poll question did not even make clear reference to the location of the planned project. The question asked was: *"Do you support the establishment of a facility for the long-term management of low and intermediate level waste at the Western Waste Management Facility?"* EIS at page 2-10.

E. No Confusion Between the Projects, Rather Concern over the Connection Between the Two Projects

37. In its letter of February 1, 2013, the Panel identifies the possibility that some confusion may exist with regard to the information or lack of information provided to the SON by Ontario Power Generation or the NWMO regarding APM. To be clear, there is no confusion on behalf of SON regarding APM or the DGR Project. Rather, there is deep concern about a connection between the two projects that continues to be ignored and omitted from consideration in this environmental assessment.

38. As outlined in the August 9 Submission, SON has continuously raised concerns with OPG and NWMO regarding the connection between the DGR Project and a HLW Project. SON's concern has always been that the DGR Project would lead to the development of, or "pave the way" for, a HLW Project in the Study Area, and within SON Traditional Territory. OPG and NWMO have consistently failed to respond directly to this concern and have repeatedly and deliberately obfuscated the matter by stating that no used fuel would be placed in the DGR Project.[36]

39. OPG's public consultation and engagement activities reveal how common a concern this has been—the connection between the DGR Project and the future of used fuel disposal.[37] OPG has consistently responded that no used fuel would be placed in the DGR Project, or that the DGR Project and the HLW Project are separate and distinct projects. Both of these answers actively avoid the issue. There is no record in the EIS at all of OPG or NWMO acknowledging the possibility of a HLW Project being developed within the Study Area or any connection between the projects.[38] Rather, the record suggests that OPG and NWMO have relied on a formalistic distinction

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[36] For examples of this, refer to letters attached to SON's August 9 Submissions, at paragraphs 51 to 54, and EIS at page 2-17.

[37] For examples, see pages 2-17, 2-18, Table 2.3.4-1, Table 2.4.2-1, Table 2.5.1-1, page 2-75, Table 2.6.1-1 "Frequently Asked Question", Table 2.6.2-1.

[38] It is unclear from the record whether NWMO or OPG expressly held out, or relied on, the position that fuel would be removed from the Study Area. SON has submitted information requests seeking details of these many meetings, as well as the messages delivered by OPG and NWMO representatives, but these requests appear not yet to have been forwarded. SON IRs 1.19 and 1.20, submitted to Panel June 15, 2012.

between the two projects to assuage public concern about the connection between the two projects and the possibility of a HLW Project being developed within the Study Area.

40. In very recent submissions, OPG acknowledges the emergence of an increased number of NGO's and citizen's groups expressing concerns about the DGR Project and its connection to a HLW Project. OPG states in its report that "[m]any stakeholder opponents have expressed concerns that if OPG's DGR for low and intermediate level waste is successful, it will pave the way in Bruce County for NWMO's Adaptive Phased Management approach for used nuclear fuel."[39] It is clear from this statement that many stakeholders, in addition to SON, continue to express concern about the connection between the two projects, not confusion about which project is which. The report also demonstrates that OPG continues to obfuscate by asserting that no used nuclear fuel will be placed in the DGR Project or that the DGR Project and APM are separate and distinct projects, notwithstanding the clear concession in the EIS that a HLW Project is a reasonably foreseeable project, and the clear evidence set out herein and in the August 9 Submission that a community in the Study Area is a likely candidate for the ultimate siting of a HLW Project.

41. It would be highly improper for this review to aid in managing public concerns regarding the connection between the DGR Project and the HLW Project by allowing the deliberate exclusion from consideration of a HLW Project within the Study Area. Such a result would fly in the face of all available evidence and evident public concern and would fundamentally undermine the legitimacy of the review.

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[39] Ontario Power Generation's Written Submission for the Joint Review Panel's Socio-Economic Technical Information Session March 20, 2013, under cover letter dated February 21, 2013, page 18.

THIS SUBMISSION IS BY:

SAUGEEN OJIBWAY NATIONS

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BY EMAIL: DGR.Review@ceaa-acee.gc.ca

December 21, 2012

Dear Ms. Myles:

Re: Follow-up on SON Submission on Cumulative Effects

I write to follow-up on Saugeen Ojibway Nations' ("SON") August 9, 2012 submission to the Joint Review Panel (the "Panel"). SON's submission, entitled "Application for a Determination on the Scope of Review of OPG's DGR Project and the Inclusion of a Project for the Long-Term Management of High Level Nuclear Wastes," raised concerns with the failure of the proponent to include consideration of cumulative effects that would follow from the co-location of a deep geological repository for high-level nuclear wastes (a "HLW Project") within the study area for the planned deep geological repository for low and intermediate-level nuclear wastes. As SON explained in its submission, the failure of the proponent to include a HLW Project in its cumulative effects analysis distorts that analysis and renders the environmental impact statement—and thus the assessment being undertaken by the Panel—fundamentally flawed.

As SON explained in its submission, there is ample evidence demonstrating that Ontario Power Generation Inc. ("OPG"), the Nuclear Waste Management Organization ("NWMO") and the Canadian Nuclear Safety Commission ("CNSC") have taken and are continuing to take actions that significantly increase the likelihood that a HLW Project will be constructed in the study area and within SON Territory. As SON explained, the DGR Project currently being reviewed and the HLW Project are inextricably intertwined and a HLW Project is unquestionably a "reasonably foreseeable" project that must be included in the proponent's analysis of cumulative effects.

In the time since SON made its submission, additional information has come to light that further supports SON's position and reinforces the need for the proponent to revise its EIS to take account of the future construction of a HLW Project within the study area.

Arthur Pape* Richard B. Salter* Jean Teillet* Alex Monem* Colin Jesse Salter*
EC, NWT, Yukon & Ont Bar Ont, EC, NWT & Yukon Bar Ont, EC, NWT & Manitoba Bar Ont Bar Ont & NWT Bar

*Indicates Personal Law Corporation

As indicated in SON's August 9 submission, all five municipalities in the study area have formally entered NWMO's siting process to be considered host communities for the HLW Project. As of September 30, 2012, NWMO has suspended expressions of interest for communities that might be willing to host a HLW Project. Each of the municipalities in the study area has now passed the initial screening process to assess site suitability. On October 25, 2012, the municipality of Brockton issued a council resolution to advance to stage 3 of the site selection process. On November 19, 2012, the municipality of Huron-Kinross also passed a resolution advancing it to stage 3 of the process. On November 26, 2012, the municipality of Saugeen Shores passed a similar resolution. In addition to these activities, NWMO, as well as CNSC, continue to hold meetings and information sessions in the region on issues relating to the development of a HLW Project. Collectively, these developments demonstrate with certainty that the study area is being strongly considered as the site for the HLW Project, and consequently, that such a development is reasonably foreseeable.

As explained in SON's submission, on November 1, 2011, SON sent a letter to Albert Sweetnam, OPG Executive Vice President for Nuclear Projects. In that letter, SON asked, *inter alia*, that OPG commit that it "will not support the development of a used-fuel repository within SON Traditional Territory if SON opposes such a development" and that "OPG will not plan or develop additional nuclear waste management projects within SON Territory without the support of SON." At the time SON made its submission to the Panel, no response to that letter had been received. On October 24, 2012, SON received a response letter, attached here. OPG has refused to commit to SON that it will not support the development of a HLW Project within SON Territory if SON opposed the project. Rather, OPG states only that "OPG has heard your position regarding the siting of a [HLW] facility within SON territory and has and will continue to communicate your position to the NWMO Board of Directors."

With this response, OPG persists in its refusal to provide any assurances to SON that a HLW Project will not be sited within SON Territory. Further, OPG refuses to support SON in its position that no such project should be developed over SON objections, and refuses to state a position about OPG's preference or expectations regarding the siting of a HLW Project. Yet OPG continues to take the position in its EIS, and in response to Information Requests, that it is reasonably foreseeable that used fuel will be removed from the study area.

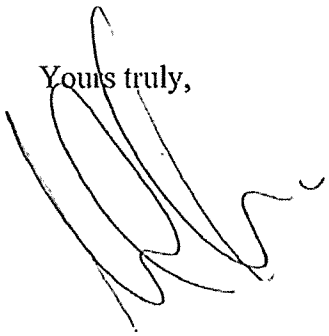
On December 12, 2012, OPG provided responses to information requests served by the Panel as IR Package #6. In its response to IR # EIS-06-233 OPG reiterated its position that a "reasonably foreseeable project" is "Transfer of Used Nuclear Fuel to a Long-Term Repository." OPG explained that "[I]t is reasonably foreseeable that used fuel will transported to a deep geologic repository outside of the Bruce nuclear site. Again, OPG

provides no justification for this statement and fails to address—or even mention—facts that suggest the greater likelihood of used fuel be transported into the study area. For example, OPG makes no mention of facts set out above that all of the municipalities within the study area have formally entered NWMO's siting process, have now passed the initial site screening stage and at least three have progressed to more advanced stages of the process.

OPG's continued insistence that used-fuel will be transported out of SON Territory for the purpose of this EA process, while refusing to provide assurances to SON in this regard, is self-serving, misleading and has the effect of perverting a fair and credible environmental assessment of its project.

SON feels it is necessary to ensure the Panel is aware of the continuing developments respecting the siting of a HLW Project within the study area of the DGR Project, and to ensure that the Panel has all necessary information available to it as it makes its determination on SON's submission and assesses the adequacy of the proponent's EIS. SON is ready to provide additional information or otherwise assist the Panel in any way that it can.

Yours truly,



Alex Monem

Encl.

ONTARIO POWER GENERATION

Albert Sweetnam
Executive Vice President

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OPG Proprietary

October 24, 2012

File No: 00216-CORR-08500-0431727-T20

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
R.R. #5
Wiarton, ON N0H 2T0

Chief Randall Kahgee
Saugeen First Nation
RR #1
Southampton, ON N0H 2L0

Dear Chiefs Lee and Kahgee:

Re: OPG-SON Comprehensive Agreement on Nuclear Waste Management Facilities in SON Territory

Thank you for your letter of November 1st, 2011, outlining your key interests with respect to OPG's nuclear waste management activities in your territory. Again, I wish to apologize for the length of time it has taken to provide a response. OPG is committed to having the support of communities in which we operate, including the SON's. To this end we have spent a considerable amount of time consulting with various stakeholders to ensure that OPG could provide a comprehensive response to your requests.

As per our meeting of September 24th, we have committed to put our response in writing.

OPG is prepared to:

- Enter into a process to resolve legacy issues arising from past developments at the Bruce Nuclear site;
- Establish a forum to ensure SON is provided the information it needs regarding OPG's current and future nuclear waste management plans and programs;
- Enter into a agreement to ensure the SON participates in the economic benefits of the DGR, including for example, employment, training, and business opportunities;
- OPG's Board of Director approval will be required to move to the construction phase of the project. OPG is prepared to wait for up to one year, following receipt of the Joint Review Panel Environmental Assessment Report, to allow the SON to seek their community's input on this project. It is expected that community input will be in the form of a community referendum. The results of the community's referendum will be presented to OPG's Board of Directors for their consideration. OPG will be seeking an informed referendum that will allow OPG to address the community directly;
- The NWMO used fuel siting process has created a new obstacle in our relationship. OPG has heard your position regarding the siting of a facility within SON territory and has and will continue to communicate your position to the NWMO Board of Directors.

- As committed to at our September 24th meeting OPG confirms that the NWMO Board has been informed that the SON's position on the fuel waste repository is that no fuel waste can be stored in the SON traditional territory without the agreement of the SON.

OPG is committed to building a strong relationship with your communities. It is hoped that through our joints efforts we can build a relationship model that is both long term and mutually beneficial.

Regards,

Albert Sweetnam
Executive Vice President
Nuclear Projects
Ontario Power Generation

Cc: D. Pawlowski
J. Heil
D. Jones

Affidavit of Randall Kahgee

AFFIDAVIT OF RANDALL KAHGEE

I, **RANDALL KAHGEE**, Chief of the Chippewas of Saugeen First Nation, in the Province of Ontario, MAKE OATH AND SAY:

1. My name is Randall Kahgee, I am a member of the Chippewas of Saugeen First Nation in Ontario. I live on the communal lands of Saugeen, known as Saugeen First Nation Reserve #29. I am the elected Chief of Saugeen and have been for over 6 years. I also sit as the Chief for Saugeen in a Joint Council with the Chippewas of Nawash Unceded First Nation. Together the two First Nations act as the Saugeen Ojibway Nations ("SON"). In my capacity as Chief of Saugeen and as a member of the Joint Council of SON, I have personal knowledge of the matters to which I hereinafter depose, except where stated to be on information and belief, and to these last said matters, I verily believe them to be true.

2. I first became aware of OPG's proposed deep geologic repository for low and intermediate level nuclear wastes (the "DGR Project" or the "Project") in approximately 2003. At the time, I was acting as legal counsel to SON on a variety of matters. The DGR Project is proposed to be built at the current Bruce Nuclear Site which is located in the heart of SON Traditional Territory.[1]

3. I have been involved in all aspects of SON's involvement with the DGR Project since that time, including many internal technical meetings with SON leadership, legal counsel and technical advisors, community meetings at both Saugeen and Nawash, meetings with provincial and federal government representatives, and meetings with

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[1] Appended hereto as Exhibit "A".

Ontario Power Generation ("OPG") and the Nuclear Waste Management Organization ("NWMO").

4. I have also made submissions relating to the DGR Project, and related projects, at various regulatory proceedings, including at the Joint Panel Review hearings on the OPG's application to build new reactors at its Darlington facility, the Bruce Nuclear Generation Station restart application review and hearings relating to Bruce Power's proposal to transport and recycle decommissioned steam generators.

5. Over this time I have heard and communicated one key message – the DGR Project has the potential to cause tremendous harm to SON's Rights, interests and way of life and this Project cannot go ahead unless these risks are fully assessed and our people understand and accept them. The Project will change our Territory and our peoples' future forever and it is inconceivable that the DGR Project could go ahead without the acceptance and support of our people.

The Saugeen Ojibway Nation are the People of this Place

6. The Saugeen Ojibway Nations and our ancestors are the Anishnabek people of the Great Lakes region. Our creation story tells us that our People originate here, from an island called Michilimackinac in the strait between Lake Huron and Lake Michigan.

7. We have lived and relied on our Traditional Territory (the Anishinaabe-aki) since time immemorial. SON Traditional Territory extends east from what we now call Lake Huron to the Nottawasaga River and south from the tip of the Bruce Peninsula (or "Saugeen Peninsula") to the Maitland River system, 11 miles south of Goderich. Our Traditional waters around these lands include the lakebed of Lake Huron from the shore to the international boundary with the United States and the lakebed of

Georgian Bay to the halfway point. Our Territory has been recognized by governments and proponents in various agreements and otherwise.[2]

8. The grave sites of our ancestors can be found throughout our Territory. Still today, our dead are brought back to this land to be buried. Our ancestors are buried on the very site on which the DGR Project is planned to be built. We refer to this site as "Jiibegmegoong". The site was disturbed in the 1950's and remains were removed. These remains were returned to the burial site in 1998 and agreements have been reached between SON and Bruce Power to allow our members to visit the site for ceremonial purposes.

9. Within our territory, the Saugeen Ojibway Nations occupy large, unceded reserves (which we refer to as our communal lands) bordering Lake Huron and Georgian Bay, resulting from our Treaties with the Crown. We enjoy exclusive use and occupation of those lands, and they are critical to sustaining our future. They house our residential communities and places of high cultural and spiritual importance. They are an important ground for our subsistence fishing, as well as for our hunting and our gathering. They are the base for many current and future economic opportunities, including a commercial fishery and valuable recreational properties.

10. SON also enjoy the exclusive use of a large hunting reserve in the northern part of the Saugeen Peninsula.

The Treaties

11. SON continue to have and exercise Aboriginal and Treaty rights throughout our Territory. Our Aboriginal and Treaty rights reflect our unique historical, cultural and

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[2] Our Territorial map has been attached to agreements with Ontario Power Generation Inc., Bruce Power Inc., the Ministry of Energy and Infrastructure on behalf of the Government of Ontario, and others. Our map hangs on the wall of the visitor's centre at the Bruce Nuclear facility.

spiritual relationship to the territory and our special relationship with the Crown. Over the years, our people have signed many treaties with the Crown[3].

12. Our relationship with the Crown is based on our Treaties, which are solemn agreements between our people and the governments of the time to share access to the land and preserve peace, and protect our way of life as Aboriginal people within our Territory.

13. The Royal Proclamation of 1763 constituted a promise by the Crown to protect Aboriginal lands, including our territory, from encroachment by non-Aboriginal settlers. The Proclamation was issued at a time when Aboriginal people held the balance of power in the Great Lakes region, and was a recognition of Aboriginal ownership of our territory as a pre-existing interest that co-existed with any assertion of Crown "Sovereignty".

14. In 1764, Crown representatives met with more than 1,500 of our Anishnabek Chiefs and Warriors, including SON representatives, at Niagara Falls. Here, the Royal Proclamation was explained as a fundamental commitment to treat Aboriginal peoples with honour and justice. It was explained that the Crown would only require the "eastern corner" of the Great Lakes, and that the Anishnabek would flourish with the British as their allies. After days of meetings, the first Treaty between our People and the Crown was entered into as an agreement between equals and for mutual benefit. The Treaty of Niagara was sealed by the delivery of two wampum belts, and became sacred and inviolable.

15. After the Treaty of Niagara, SON ancestors signed other Treaties with the Crown respecting our Territory. Two major Treaties signed in 1836 and 1854 recognize our rights throughout our Territory and set aside our large unceded communal lands for our exclusive use and occupation.

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[3] A compendium of which is appended hereto as Exhibit "B". Also, the history of our early treaties was neatly summarized by Justice Linden in his Report of the Ipperwash Inquiry, 2007, vol. 1

16. Treaty 45½ was signed in 1836 under the threat of ever increasing encroachment by non-Aboriginal settlers and the Government's professed inability to prevent it. SON ancestors agreed to a surrender of 1.5 million acres of our lands south of the Saugeen Peninsula, in return for, among other things, a promise by the Crown that it would protect the Saugeen Peninsula and surrounding islands and fisheries from further encroachment.

17. In 1854, Treaty 72 was signed under similar circumstances and with the same promises by the Crown. By Treaty 72, the majority of land on the Saugeen Peninsula was surrendered with the exception of our Communal lands.

18. By signing Treaties, our ancestors never intended to become subjects of the Crown, or to surrender their authority over the land. Our Treaties were not intended to, and did not, sever our connection to our Territory, or give up our right to be sustained by our lands, waters and resources.

19. Despite the context of duress under which we signed our Treaties, or the Crown's continuing failure to honour the promises and obligations they contain, our Treaties fundamentally recognize our special relationship with the Crown and our Aboriginal and Treaty rights throughout our territory.

20. Our Treaties create enduring relationships between SON and the Crown. Their words, and the understandings on which they were based, are recognized and affirmed by Canada's Constitution and continue to have the full force of law in Ontario and Canada, and their importance has been recognized in international law.

Historical and Continued Use of the Territory

21. Our identity as an Aboriginal people grows out of our relationship and connection to our Territory. Our people have a fundamental and unbroken connection to our

Territory, and we continue to depend on our lands for our survival economically, culturally and spiritually. We continue to define ourselves as a people through our connection to our lands.

22. Our people have occupied and relied on our Territory for their physical, cultural and spiritual survival since time immemorial. Our place on the land and in our waters was recognized by the Crown through our many treaties. This has been recognized by OPG in their work relating to the DGR Project, and affirmed and documented in their environmental impact statement (the "EIS").[4] Our place on the land has been recognized and affirmed in many agreements with governments and proponents, including the agreement to constitute the Joint Review Panel for the current review.[5]

23. Our constant use and reliance on our Territory for our livelihood and our cultural and spiritual survival is well documented. It was explicitly recognized in the historic legal case of *R. v. Jones and Nadjiwon*:

> The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became essential items. The trade developed further with the growing population of

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4 OPG Environmental Impact Statement, March 2011, section 6.9.3

5 Appended hereto as Exhibits "C", "D" and "E".

> settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.[6]

24. Our ancestors used and occupied the Anishinaabe-aki historically, and we continue to do so today. Our territory consists of everything integral to life - the lands, rivers, lake, winds, grass, people, animals and fish. The Anishinaabe-aki has sustained our People physically and spiritually for countless generations, and must continue to do so far into the future.

25. Our Elders have recently given their account of our history on the land in testimony that will support our legal claims to assert title and aboriginal rights within our Territory. Over many days, our Elders recounted an oral history of our historical and ongoing use of and reliance on the Territory, as well as the place names by which we know our lands and waters[7].

26. We use and occupy the Anishinaabe-aki now as our ancestors did, in a variety of ways and for many purposes, including hunting, fishing and gathering for sustenance, healing, cultural and trade purposes. It is the source of our identity as Aboriginal people, and the base for our cultural activities and spiritual ceremonies. We rely on its resources to support ourselves economically. We continue to exercise governance functions and stewardship, in order to protect the Territory and ensure its ongoing ability to sustain our people.

27. Despite the constant encroachment of our lands by industry and European and other settlers over the last many centuries, our people have fought to maintain our connection to the land and our culture and our traditional practices. We have fought

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[6] *R.* v. *Jones and Nadjiwon* (1993) O.R. (3d) 421 (Ont. Prov. Ct.) See also: Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship Volume vol. 2 at p 462

[7] Appended hereto as Exhibit "F": Keeshig Direct (Tab 2) at 51; Keeshig Cross (Tab 1) 225; 493-494; 495-97; Ted Johnston Cross (Tab 3) at 19; 153-167; Shawbedees Direct (Tab 5) at 47-48; Shawbedees Cross (Tab 4) at 47-48; 76; 262-263; 363; Nadjiwon Direct (Tab 8), at 45-46; Nadjiwon Cross (Tab 7), at 443-445; Ross Johnston Direct (Tab 9) at 63-64.

for the protection and space so that we can preserve our Territory and culture and so that we can strengthen our traditional practices and allow our future generations to continue those.

28. Still today, our communities rely on our Territory for our economic survival. Our people have always been a fishing peoples. This history is well documented and culminated in the recognition of our Treaty right to a commercial fishery in *R. v. Jones and Nadjiwon*.[8]

29. Our people have continuously relied on the waters of Lake Huron and Georgian Bay to make a living. Although government action has sometimes pushed our commercial and sustenance fishing to the brink of collapse, we have persevered.[9]

30. Councillor Paul Jones, of the Nawash Unceded First Nation, has told the long story of our SON fishery in an affidavit. I will not repeat his story, but I will say that our people have fought as hard as any peoples in the history of this country to have our rights recognized and protected, and to protect the resource so that it will be able to sustain us far into the future. It is with great pride that our people can say we have saved our fishery and can now hope to restore it to its central place in our lives.

31. As part of our ongoing efforts to protect the Territory and protect our peoples right to use and rely on the Territory as they always have, we have entered into protection

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[8] *Supra*

[9] Appended hereto as Exhibit "F", Tab 5: Recently, an SON Elder described our decades long fight for rights, and specifically, our right to a commercial fishery as: "And we would like the same thing [self-government], but one of these days that door - we keep knocking on that door and it's going to fall down. The hinges ain't going to take it. We've been pounding on that door for 150 years or more. We may have given up some of our land but we never gave it all up. A lot of us right across the country have never given it all up, and yet laws are made for us to lose more and more. And I think it's about time that both governments gives us the respect that we deserve, if you expect some of us to respect your way of thinking. Remember - we did not know Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday. We did not know two feet, six inches, a meter in those days. We kept what our people thought they needed to survive. And the lake and the fisheries are our survival. Resources, they've been depleted, but not by my people, but by other people. And we're only asking for our fair share."

agreements with the government of Ontario. In 2010, SON and the Ministry of Energy and Infrastructure in Right of the Ontario entered into an agreement that created mechanisms to protect SON rights and interests from impacts caused by new energy projects (the "MEI Agreement").

32. The MEI Agreement also commits SON and Ontario to carry out a landmark study to map and understand SON historical, ongoing and future uses of its Territory. Such an initiative has never been carried out, and the results will constitute both a repository of our history and use of land, as well as a road map for the Territory and our future within it.

33. Under the terms of the MEI Agreement, the study – called the Natural and Cultural Values Study (or "NCVS") – will include in its scope the historical, current and future aspects of SON uses of land, water and resources within the area for spiritual and cultural purposes; SON harvesting for both traditional and sustenance purposes, and commercial purposes; and other economic purposes consistent with SON's historical reliance on the territory to support its culture.[10]

34. Importantly, the results of the NCVS will be used as the basis for ongoing consultation efforts between SON and government respecting future energy development initiatives. It will also be the basis for SON engagement with planners and energy developers and will help inform decisions respecting future projects within the area. Prior to any decisions respecting certain critical energy development initiatives (e.g. major transmission projects on the Saugeen Peninsula or off-shore renewable energy development) SON and Ontario have agreed to enter into a consultation process that would, among other things, consider the results of the NCVS.[11]

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10 MEI Agreement, section 24 (appended hereto as Exhibit "C").

11 MEI Agreement, sections 25, 28, 30 and 31 (appended hereto as Exhibit "C").

35. SON and Ontario have engaged researchers from the University of Guelph to carry out preliminary scoping work for the study. A draft proposal is now before the parties. Ontario and SON are still in discussions about securing the appropriate funding, which Ontario has committed to doing under the terms of our Agreement.[12] We expect that once these administrative issues are finalized, our Study will begin.

36. Until this study is completed, and we have a systematic and complete survey of the historical, current and future uses by SON of the Territory, it is impossible to gauge the breadth of impacts a project like the DGR Project could have on SON Rights and interests. It is deeply troubling that Ontario would allow its major energy development corporation to proceed with plans as significant as the DGR Project, with significant potential to impact our rights and interests and use of land far into the future, before this collaborative study has been completed or even before preliminary results have been achieved. It is my belief that this is inconsistent with the legal commitments of our Agreement.

37. Over the course of the last several years, SON has undertaken extensive research to document our historical occupation of our Territory, and our historical and ongoing uses of the Territory. This work will be presented in a series of reports, that will be the first systematic documentation of many of the uses of and relationship to the Territory by our people. We expect that these reports will be completed soon, and could be used to support ongoing engagement between SON, governments and proponents to understand the potential risks and harms of proposed projects and initiatives, like the DGR Project.[13]

38. Since the time of *R. v. Jones and Nadjiwon*, we have negotiated a number of agreements with the Government of Ontario to recognize our rights to the fishery in these waters and protect the fishery for our continued use[14].

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12 MEI Agreement, s. 27 (appended hereto as Exhibit "C").

13 This work has been undertaken in support of title claims currently before the courts.

14 These are documented in the Affidavit of Paul Jones, August 15, 2013 (appended hereto as

39. In January 2013, we signed a substantive agreement with Ontario that not only protects the fishery, but puts mechanisms in place to help SON rebuild its fishery and return it to its central place in our economy and culture. The history that led to this agreement, as well as the terms of the agreement and the efforts that SON and Ontario have committed to, and begun, to rebuild the SON fishery are recounted in the affidavit of Paul Jones[15].

40. Our communities also rely on our Territory as the basis of our tourism and recreational economy. Both Saugeen and Nawash have thriving tourism economies which only stand to become more important with time.

41. Nawash has approximately 500 cottages for lease along the shore of the Georgian Bay, which can rent for as much as $1,000 per week during peak season. Nawash also operates the Cape Croker Indian Park camping grounds. Park rates range from roughly $40 per night for campsites and $65 for cabins. Last year, the Park accommodated more than 5,000 overnight campers. Last year, from all tourism sources Nawash generated roughly $1-million in personal income.

42. Saugeen communal lands contain the vast majority of what is referred to as Sauble Beach, one of the premier beach locations and tourism attractions in Ontario. This area draws hundreds of thousands of visitors each year, from which our community derives significant benefit. Saugeen intends to increase the value of these resources to our people and economy in the future, and to ensure that this is done in a way that is integrated into the vision of our communities.

43. Saugeen also has a large number of recreational properties that it leases to seasonal residents. Currently, Saugeen has over 1,200 leases that bring in significant revenue to our community that we rely on to provide capacity and services for our people.

Exhibit "G".

[15] *Supra*

The revenues from our leasing business represent over 30% of Saugeen's annual budget, in addition to over $30-million in private income. Any threat to this would be catastrophic for our community.

44. Most significantly, however, our people and communities rely on our Territory for our cultural identity – the Saugeen Ojibway people and our culture cannot be separated from this place. Professor Darlene Johnston, a Nawash member, gave extensive testimony at the Ipperwash Inquiry into the killing of Dudley George. During her testimony she spoke of the connection between our people and the land. Justice Linden summarizes her testimony:

> Professor Johnston explained the connection between totemic identity and the soul that remains with the body. The Aboriginal people in the Great Lakes area have a totemic or clan system that is patrilineal. Children are born into the clan or dodaim of their father. The Anishnabek belong to clans such as the Beaver, Crane, and Caribou. They believe the derive from animals. In Aboriginal culture, there is an "interconnection...between people and animals" and "the land". The dodaim or totemic identity is inscribed on the grave posts rather than the personal name of the deceased.[16]

45. Professor Johnston concluded her testimony simply with: "for the Anishnaabeg, the Great Lakes region is more than geography. It is a spiritual landscape."[17]

46. I have spent my whole life listening to my Elders. I have spent many many hours listening to my community as their Chief and I know this – if we were every required to leave our Territory, if our lands and water could no longer sustain us, it would be the end of us as a people. We have no other place to go. And if our people start to fear developments in the Territory, if we become anxious about the safety of our lands and waters, if we develop a dread of accident in the future – a deep and fundamental connection will be severed. It will be a deadly blow to our cultural existence.

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16 Linden, Report of the Ipperwash Inquiry, 2007, Volume 1, at p.24

17 *Ibid.*

Protecting our Territory and Our Rights, Interests and Way of Life

47. It is for this basic reason that SON leadership has taken such extraordinary steps, since before the time of treaty until the present day, to protect our Territory, and our Rights and interests within our Territory. We have made clear what our Rights and obligations are within our Territory and we have committed enormous resources and time to ensuring that those are respected.

48. The rights recognized in our Treaties are not frozen or predetermined. They evolve to allow us to exercise our essential rights and practice our way of life as Aboriginal Peoples in a modern context.

49. Fundamentally, our Aboriginal and Treaty rights entitle us to be sustained as Aboriginal Peoples by the lands, waters and resources of our territory, and to protect our territory to ensure that it will be able to sustain us far into the future. These Rights include a right to autonomy, self determine our own future within our Territory.

50. SON asserts that, at a minimum, our Aboriginal and Treaty rights include the following:

a) The right to continue to be a distinct people living within our territory.
b) The right to maintain our culture, language and way of life.
c) The right to be sustained by our lands, waters and resources.
d) The right to the exclusive use and occupation of our Communal lands.
e) The right to continued use of all of our territory.
f) The right to harvest for sustenance, cultural, and livelihood purposes.
g) The right to be meaningfully involved in decisions that will affect our territory so that we can protect our way of life for many generations to come.
h) The right to be the stewards of our territory.

51. SON rights include valuable commercial fishing rights in Lake Huron and Georgian Bay. These rights were recognized and confirmed in *R. v. Jones and Nadjiwan*. As described above, and in the affidavit of Paul Jones, our commercial fishing rights are of a central and growing importance to us culturally, as well as economically.

52. We have entered into other agreements with Ontario that recognize and protect our rights within the Territory from risks posed by development, including nuclear. In 2007 we learned of a proposal by Hydro One Networks Inc. ("Hydro One") to develop a new transmission line along the Bruce to Milton corridor, which connects our Territory to the demand centres to the south. The line was designed to enable the continued and expanded nuclear generation at the Bruce Nuclear facility, as well as expanded power generation from many renewable energy projects throughout our Territory. At the same time in 2007, the Ontario Power Authority issued its 20 year plan for energy supply and demand for Ontario – the Integrated Power Supply Plan (the "IPSP").

53. The IPSP set out a dramatic plan for increased industrialization of our Territory for electrical energy generation purposes. An expansion of nuclear generation, over 1400 MWs of wind energy, off-shore wind development off our shores and adjacent to our most fertile fishing grounds, and a new transmission line running up the Saugeen Peninsula from Owen Sound to the Tobemory.

54. SON appeared before the Ontario Energy Board on both the review of Hydro One's Bruce to Milton transmission line application and OPA's IPSP review. In both applications we made the basic submissions that none of these projects should proceed until the impacts on SON Rights and interests are fully understood, and appropriate accommodations are reached. We argued that this could only be achieved through an full consultation and accomodation process between SON and the Crown – here, the Government of Ontario.

55. This led to two years of negotiations between SON and the Ministry of Energy and Infrastructure on behalf of Ontario, with the hope of arriving at an accommodation agreement that would ensure the protection of our Territory and our Rights . In January, 2010, we entered into an historic agreement which, we believe, has gone a significant way towards achieving the goal of protecting our place on the land in the face of future energy development.

56. The MEI Agreement contains many protections, including creating expectations that energy developers will engage with SON to ensure proposed projects are developed in a way that respects and protects of SON Rights and interests. The agreement specifically addresses key concerns relating to transmission infrastructure development on the Saugeen Peninsula and future development of off-shore energy projects in SON traditional waters.

57. The agreement also addresses the special challenges posed by nuclear developments in our Territory. Specifically, the agreement addresses decisions regarding nuclear developments within the Territory and recognizes that these must be addressed and that Ontario and others must come to the table with SON to resolve them. The agreement states that:

> 33. SON has expressed concern about the history, current operations and future of the Bruce Nuclear site. The Parties agree that the resolution of these issues is complex and will require the participation of multiple parties, including SON, Ontario, Canada, Bruce Power, Ontario Power Generation and the Nuclear Waste Management Organization based on their respective authorities and roles.
>
> 34. The Parties recognize that a consultation and accomodation process is the appropriate mechanism for addressing the future of nuclear projects and facilities in Anishnaabekiing and that the process may include consideration of concerns relating to existing projects.
>
> 35. The Minister agrees to be a party to a consultation and accommodation process established between SON, Canada and other federal agencies around the future of nuclear projects and facilities in Anishnaabekiing,

focused on those matters for which Ontario has jurisdiction, responsibilities or a role in decision-making.

58. I believe the current decisions being made in connection with the DGR Project, and more broadly, strategic level decisions about nuclear waste management issues within our Territory, are precisely the matters that are contemplated in our agreement with Ontario. I believe that all responsible parties, including the governments of Canada and Ontario, OPG and NWMO must deal with us honourably under law and our agreement to resolve these matters, and that these decisions must not be made without our deep and central involvement.

The DGR Project and the Nuclear Waste Problem in our Territory

59. We have known about and had deep concerns about the nuclear wastes problems in our Territory for many many years. It has been a consistent worry to our people, and in the last few years, our people have become increasingly worried that decisions are being made without our involvement – a continuation of terrible history of our peoples exclusion from decisions that have fundamentally changed our Territory.

60. In the 1960's, decisions were made to build a nuclear facility at Douglas Point. This was a project by Ontario Hydro, of which Ontario Power Generation is a successor. Those decisions, which first brought nuclear industrialization to our Territory and changed it forever, were made without any consultation or involvement of our people whatsoever. It is from these early decisions that our current nuclear waste problems originate.

61. These problems were compounded immeasurably be another decision made without any involvement or consultation with our people – the decision to develop the Western Waste Management Facility (the "WWMF") at the Bruce Nuclear site in 1974. The WWMF is the central repository for all the low and intermediate level nuclear waste from OPG owned reactors in Ontario. These wastes are transported by truck through our Territory for processing and storage at the facility. It is because of the decision to create the

WWMF that we are now faced with current scope of nuclear waste issues, and the current proposal to build the DGR Project.

62. In addition to this, we have accumulating high level nuclear wastes – spent nuclear fuel – from over 50 years of operation of the Bruce Nuclear reactors. We are told that the accumulated used nuclear fuel from this facility represents 40% of all the used nuclear fuel in Canada.

63. It is without question that the nuclear waste problem facing our people is the most serious in all of Canada and, very likely, all of the world. We are the First People of this Territory and the only people who will remain here forever, and yet we were totally excluded from all decisions that led to these problems. We will not tolerate our continued exclusion from such decisions.

64. OPG now proposes to build the DGR Project which has the potential to increasing harms to our Rights and Territory and will impose on us permanent risks. The Project will ensure the continued and increased importation of nuclear wastes into our Territory for many decades, it will dispose of these wastes permanently in our Territory, affecting our people for all remaining generations. It poses risks to our people, Rights and interests that have not been properly studied or understood.

65. Our people have been deeply troubled by the clear and unacknowledged connection between OPG's DGR Project and NWMO's plans to build a DGR for all of Canada's used fuel – there is overwhelming evidence that the development of the DGR Project at the Bruce Nuclear site will lead to the development of the used fuel repository within the same site our elsewhere within our Territory.

66. We have raised our concerns consistently with OPG representatives, as well as representatives from the governments of Canada and Ontario, and NWMO. The EIS submitted by OPG confirms our constant questions in this regard.[18]

67. We have sought assurances from OPG and NWMO that there was no connection between these projects, and that the used fuel repository would not be put in our Territory over our peoples' objections. OPG and NWMO have refused to provide these assurances.[19]

68. SON has even made submissions to this Panel, asking that the connection between these two projects be considered in the course of this environmental assessment. We made submissions setting out the significant evidence that siting of a used fuel repository in our Territory, and within the Study Area, was reasonably likely and increased by the potential development of the DGR Project. We made subsequent submissions demonstrating the growing evidence of such a connection. However, this Panel has refused to consider the used fuel repository as part of the cumulative effects assessment in this review, and accepts OPG's position that the used-fuel repository could not be developed at the Bruce Nuclear site because Kincardine has not entered into the now closed siting process. The Panel has accepted this without receiving any assurances from NWMO that this is, in fact, the case.[20]

69. Our communities have met many many of times over the last decade to talk about the nuclear waste problems facing our territory and our people. Our people understand that the we as a people bear responsibility to be part of determining a solution for these problems and are willing to accept this responsibility as part of our role as stewards of our lands and waters.

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18 For example, see OPG's Deep Geologic Repository Project, Environmental Impact Statement, March 2011, page 2-18.

19 Appended hereto as Exhibit "H".

20 *Ibid.*

70. But our people have been clear from the very start – we must be included in the decision making concerning the future of our territory and no major project dealing with nuclear waste management could go ahead without our involvement and support. Our people cannot be left on the outside – we must be at the table for all decisions that will affect our people and Territory in fundamental ways.

71. SON has taken this position consistently in meetings with proponents and governments and in regulatory proceedings. On behalf of SON, I delivered this basic message to the Commission during the Joint Panel Review of OPG's proposal to build new nuclear reactors at the Darlington site, as well as at CNSC proceedings respecting Bruce Power's application to refuel and restart two refurbished reactors, the public hearing into whether the DGR Project would go to a Panel review, and the hearing into Bruce Power's proposal to ship and recycle used steam generators.[21]

72. Our position remains the same to this day – there can be no project that will so dramatically shape the future of our peoples' future like the DGR without the involvement and support of the SON people.

73. OPG has now recognized this. On August 7, 2013, the President of Ontario Power Generation, Mr. Tom Mitchell, sent a letter to the SON Chiefs stating that OPG will not move forward with the construction of the DGR Project until the SON community is supportive of the Project.[22]

74. The commitment made in this letter is the result of many, many years of discussion between SON and OPG regarding the DGR Project and its central significance for SON Rights and Territory. We are very pleased that OPG has recognized the proper role of SON as decision-makers within our Territory and we are hopeful that the relationship between OPG and SON will continue to grow in a positive way.

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[21] See for example SON submissions in hearings respecting OPG's Darlington NNPP environmental assessment, appended hereto as Exhibit "I".

[22] Appended hereto as Exhibit "J".

75. It is only through this commitment and the implementation of a process that will allow our people to understand the DGR Project fully, including all its potential risks and how it fits into a broader picture of nuclear waste management issues, that the SON communities could ever decide whether they were supportive of the Project, and whether the Project can fit into our view of the future.

76. However, as welcome and hopeful as this development has been, we are still struggling. NWMO has not given us similar assurances respecting the potential development of its HLW DGR in our Territory. Contrary to its own adaptive phased management policy, as well as the foundational work of the Seaborn Panel, NWMO has not given us any assurance that it would seek our support for its HLW DGR project, or that it would not build such a project in our Territory over our communities objections.

The Risks and Harms to SON Rights and Interests from the DGR Project

77. Our experts have told us, and our people understand, that there is a great deal of uncertainty surrounding the safety of the DGR Project and the harms and risks it poses to our people, Rights and Territory. We understand that there are many unanswered questions about impacts that could occur during construction and operation of the facility, as well as the long-term safety of the Project over the thousands of years it is required to operate safely and properly. We know that OPG has failed to ask questions relating to potential stigma effects from the Project and the

devastating impacts these could have on our commercial fishery and tourism economies.

78. Perhaps more importantly, our people still have questions and concerns about how the DGR Project fits into the overall plan for dealing with all of nuclear issues facing our Territory, including the issue of the spent nuclear fuel.

79. OPG has planned its Project to dispose of nuclear waste in our Territory forever. It will create permanent harms and risks for our Territory and people. It will forever change our Territory and become part of the stories of our land, our cosmology. But it is not a positive story.

80. Until just recently, our people have not been asked whether and under what circumstances we could accept such risks. We have been excluded from decision making for the future of our territory and people, though we are being asked to shoulder the risk for all time.

81. We hope that this has now changed. We believe that OPG's commitment to us that it will not move ahead with the construction of the DGR Project until the SON communities are supportive is the only way in which the DGR Project could ever be built.

SWORN BEFORE ME at the)
City of Toronto, in the)
Province of Ontario)
this 15th day of August, 2013)
)

Commissioner for Taking Affidavits

LSUC # 60974J

CHIEF RANDALL KAHGEE

EXHIBIT "A"

Ojibway Names

Neyaashiinigaamiing = Cape Croker

Kookookoo-Miinis = Owl Island now Hay Island

Paagwaumgwut /Paagwaumquit =Shallow Lake

Saugdawong = Place of the River's Mouth nowSouthampton

Giigonke Piinsaugen = Fishing Islands

Chi-sintub'dik = Big boulder turning over now Tobermory

Sintub'dik = Little Tub now Cape Hurd

Chi-Mookmaunkiing= Land of the Big Knives now United States of America

Saukiing Neyashiing = now Bruce Peninsula

Nitaage-kamiing = Hunting Grounds

Manidoomiinising/Odawa-miinising= Manitoulin Island

Waaboozhoo-Miinis = Rabbit Island

Notchi-mawaniing = Hunter's Point

Naamewikwedong = Sturgeon Bay now Colpy's Bay

Chi-wikwedong = Big Bay now Owen Sound Bay

This is Exhibit ...4..... referred to in the affidavit of ...Randall Kahsee.....
sworn before me, this ....15th.....
day of ....August..... 20..D.....

.....
A COMMISSIONER FOR TAKING AFFIDAVITS

EXHIBIT “B”

This is Exhibit ....B..... referred to in the affidavit of ...Randall Kahgee... sworn before me, this .....15th..... day of ...August..... 2017....

A COMMISSIONER FOR TAKING AFFIDAVITS

SAUGEEN OJIBWAY NATION TERRITORIES
TREATIES & PROCLAMATIONS

Document	Page
1. Royal Proclamation, dated 7 October 1763	1
2. Treaty # 45 1/2, dated 9 August 1836	3
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4. Treaty # 67, "Half-Mile Strip", dated 2 September 1851	11
5. Proclamation, dated 7 November 1851	12
6. Treaty # 72, Surrender of the Saugeen Peninsula, dated 13 October 1854	15
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8. Treaty # 331, Surrender of Reserve of the Caughnawaga Indians, dated 4 September 1856	25
9. Treaty # 79, Surrender of Caughnawaga Lands, dated 9 February 1857	26
10. Treaty # 80, Transfer of the Colpoy's Bay Reserve, dated 16 January 1857	27
11. Treaty # 82, Surrender of the Newash Reserve, dated 9 February 1857	28
12. Treaty # 93, Surrender of Colpoy's Bay Reserve, dated 16 August 1861	29
13. Treaty # 213, Chippewas of Nawash Surrender of White Cloud Island, dated 14 January 1885	30
14. Treaty # 214, Chippewas of Saugeen Surrender of White Cloud Island, dated 17 January 1885	31
15. Treaty # 222, Chippewas of Nawash Surrender of Fishing Islands and Cape Hurd Islands, dated 7 October 1885	36
16. Treaty # 223, Chippewas of Saugeen Surrender of Fishing Islands and Cape Hurd Islands, dated 15 October 1885	37
17. Treaty # 225, Chippewas of Saugeen Surrender of 16 acres on Griffiths Island, dated 18 July 1886	44
18. Treaty # 226, Chippewas of Nawash Surrender of 16 acres on Griffiths Island, dated 5 July 1886	45
19. Treaty # 416A, Chippewas of Saugeen Surrender of Hay and Griffiths Islands, dated 13 April 1899	52
20. Treaty # 416B, Chippewas of Nawash Surrender of Hay and Griffiths Islands, dated 15 May 1899	53
21. Treaty # 424, Chippewas of Saugeen Surrender of French Bay Road, dated 8 September 1899	60

A. Royal Proclamation of 1763[1]

THE ROYAL PROCLAMATION

October 7, 1763

BY THE KING, A PROCLAMATION

GEORGE R.

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace, concluded at Paris, the 10th Day of February last; and being desirous that all Our loving Subjects, as well of our Kingdom as of our Colonies in America, may avail themselves with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation, We have thought fit, with the Advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving Subjects, that we have, with the Advice of our Said Privy Council, granted our Letters Patent, under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

First — The Government of Quebec bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John, to the South end of the Lake Nipissim; from whence the said Line, crossing the River St. Lawrence, and the Lake Champlain, in 45. Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

Secondly — The Government of East Florida, bounded to the Westward by the Gulph of Mexico and the Apalachicola River; to the Northward by a Line drawn from that part of the said River where the Chatahouchee and Flint Rivers meet, to the source of St. Mary's River, and by the course of the said River to the Atlantic Ocean; and to the Eastward and Southward by the Atlantic Ocean and the Gulph of Florida, including all Islands within Six Leagues of the Sea Coast.

Thirdly — The Government of West Florida, bounded to the Southward by the Gulph of Mexico, including all Islands within Six Leagues of the Coast, from the River Apalachicola to Lake Pontchartrain; to the Westward by the said Lake, the Lake Maurepas, and the River Mississippi; to the Northward by a Line drawn due East from that part of the River Mississippi which lies in 31 Degrees North Latitude, to the River Apalachicola or Chatahouchee; and to the Eastward by the said River.

Fourthly — The Government of Grenada, comprehending the Island of that name, together with the Grenadines, and the Islands of Dominico, St. Vincent's and Tobago. And to the end that the open and free Fishery of our Subjects may be extended to and carried on upon the Coast of Labrador, and the adjacent Islands, We have thought fit, with the advice of our said Privy Council to put all that Coast, from the River St. John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, under the care and Inspection of our Governor of Newfoundland.

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

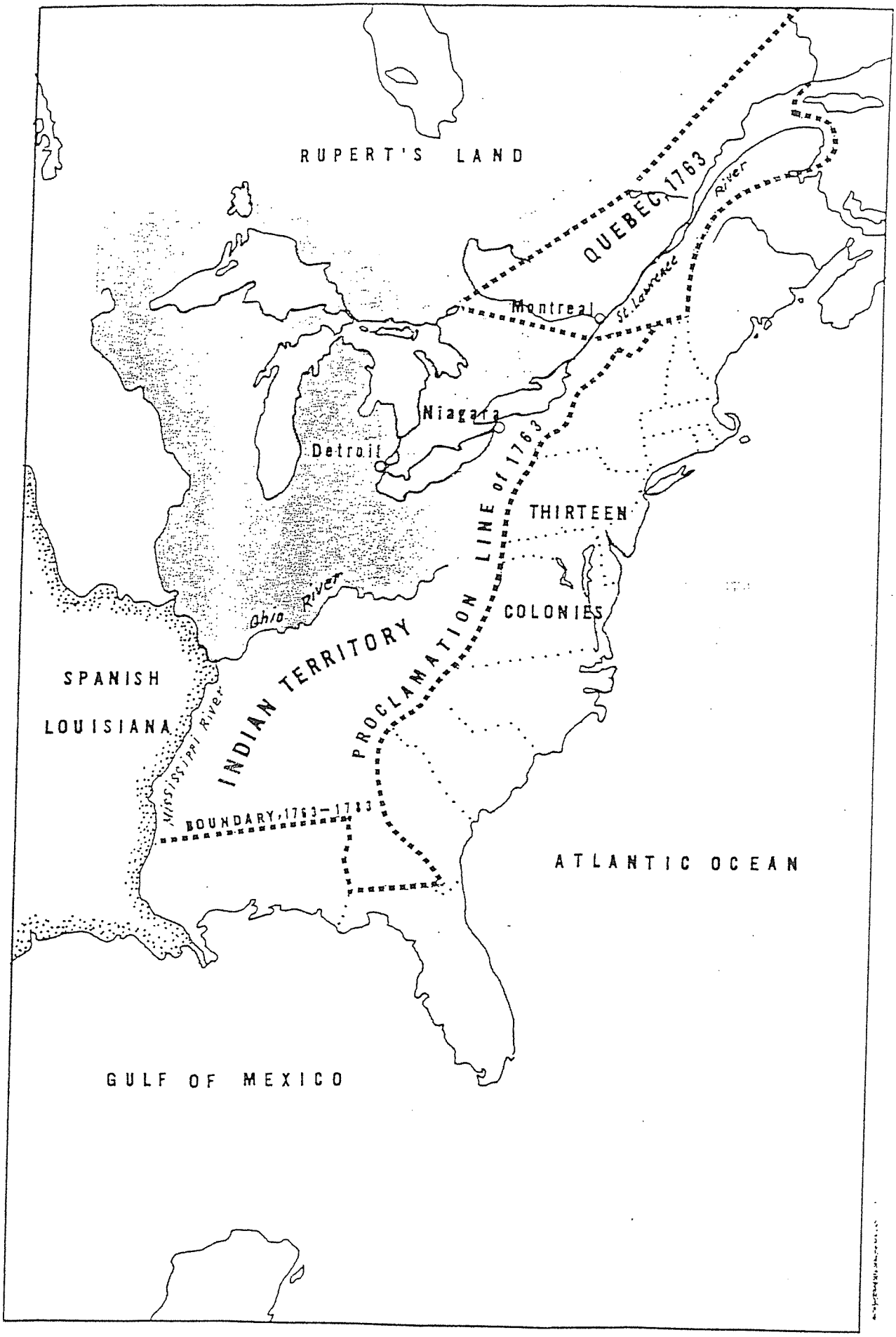
And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING


RUPERT'S LAND
QUEBEC 1763
River
Montreal
St. Lawrence
Niagara
Detroit
PROCLAMATION LINE of 1763
THIRTEEN
COLONIES
Ohio River
INDIAN TERRITORY
SPANISH
LOUISIANA
Mississippi River
BOUNDARY, 1763—1783
ATLANTIC OCEAN
GULF OF MEXICO

No. 45.

MY CHILDREN:

Seventy snow seasons have now passed away since we met in Council at the crooked place (Niagara), at which time and place your Great Father, the King, and the Indians of North America tied their hands together by the wampum of friendship.

Since that period various circumstances have occurred to separate from your Great Father many of his red children, and as an unavoidable increase of white population, as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds it has become necessary that new arrangements should be entered into for the purpose of protecting you from the encroachments of the whites.

In all parts of the world farmers seek for uncultivated land as eagerly as you, my red children, hunt in your forest for game. If you would cultivate your land it would then be considered your own property, in the same way as your dogs are considered among yourselves to belong to those who have reared them; but uncultivated land is like wild animals, and your Great Father, who has hitherto protected you, has now great difficulty in securing it for you from the whites, who are hunting to cultivate it.

Under these circumstances, I have been obliged to consider what is best to be done for the red children of the forest, and I now tell you my thoughts.

It appears that these islands on which we are now assembled in Council are, as well as all those on the north shore of Lake Huron, alike claimed by the English, the Ottawas and the Chippewas.

I consider that from their facilities and from their being surrounded by innumerable fishing islands, they might be made a most desirable place of residence for many Indians who wish to be civilized, as well as to be totally separated from the whites; and I now tell you that your Great Father will withdraw his claim to these islands and allow them to be applied for that purpose.

Are you, therefore, the Ottawas and Chippewas, willing to relinquish your respective claims to these islands and make them the property (under your Great Father's control) of all Indians whom he shall allow to reside on them; if so, affix your marks to this my proposal.

MANITOWANING, 9th August, 1836.

F. B. HEAD,
J. B. ASSEKINACK,
MOKOMMUNISH, (totem)
TAWACKKUCK,
KIMEWEN (totem),
KITCHEMOKOMON (totem),
PESCIATAWICK (totem),
PAIMAUSEGAI (totem),
NAINAWMUTTEBE (totem),
MOSUNEKO (totem),
KEWUCKANCE (totem),
SHAWENAUSEWAY (totem),
ESPANIOLE (totem),
SNAKE (totem),
PAUTUNSEWAY (totem),
PAIMAUQUMESTCAM (totem),
WAGEMAUQUIN (totem).

No. 45½.

To the Saukings:

MY CHILDREN,

You have heard the proposal I have just made to the Chippewas and Ottawas, by which it has been agreed between them and your Great Father that these islands (Manatoulin), on which we are now assembled, should be made, in Council, the property (under your Great Father's control) of all Indians whom he shall allow to reside on them.

I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this island or to that part of your territory which lies on the north of Owen Sound, upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land, which your Great Father engages for ever to protect for you from the encroachments of the whites.

Are you therefore, the Sauking Indians, willing to accede to this arrangement; if so, affix your marks to this my proposal.

MANITOWANING, 9th August. 1836.

Witness:

T. G. ANDERSON, *S.I.A.*,
JOSEPH STINSON, *Genl. Supt. of Weslayan Missions*,
ADAM ELLIOT,
JAMES EVANS,
F. L. INGALL, *Lieut. 15th Regt. Commandg. Detacht.*,
TALFOURD W. FIELD, *Dist. Agent.*

F. B. HEAD,
METIEWABE (totem),
ALEXANDER (totem) KAQUTA BUNEVAIREAR,
KOWGISAWIS (totem),
METTAWANSH (totem),

453

9 August 1836

Iowa & Wisconsin Territories

Act to extend the Jurisdiction of the Iowa & Wisconsin Territory over all the Indians & the Country belonging to the United States West of the Mississippi River

— To the Saukings. —

My Children —

You have heard the proposal I have just made to the Chippaways and Ottaways, by which it has been agreed between them and your Great Father that those Islands (Manatoulin) on which we are now assembled, should be made, in Council the property (under Your Great Father's Control) of all Indians whom he shall allow to reside on them —

I now propose to you that You should surrender to your Great Father, the Sauking Territory you at present occupy and that you should repair to this Island, upon which proper houses shall be built for you, and proper assistance given to enable you

* In to that part of your Territory, which lies on the West of Grand River —

to become civilized and to cultivate land which your Great Father engages for ever to protect for you from the encroachments of the whites.

~~If such are your sentiments and~~
~~at present I only state~~
~~liberty, you will from full~~
~~to consider it as your~~

Are you therefore the Saukies Indians willing to accede to this Arrangement, if so, affix your marks to this my proposal.

Manatawaming
August 9th 1836.

Königsberg

Mr Alexander

Peter

W. Anderson S. J. A

Joseph Standen Gunner Deputy Victualler

Adam Ellis L

James Evans

T. Lingell

Wm Bent

Edward Wallis

Richard

Statement of Metigwob
on the surrender of the
Sahgeeng Territory
13th Sept. 1836

Original in Six Nations/New Credit
Department of Indian Affairs Agency
Files, filed as No. 123-1836.

Statement of Metigwob one of the Sahgeeng Chiefs, made in a General Council held at the River St. Clair on the 13th Sept. 1836.
Respecting the surrender of the Sahgeeng Territory to the British Government.

Metigwob stated that the British Governor Sir Francis B. Head asked them if they would consent to remove from Sahgeeng and settle on the Manitoulin Islands. That if they would consent to go they should have the first choice of location on the Island.

That he was sent by their Great Father the King of England to speak to them on the subject of their surrendering to Government all the Sahgeeng Territory, and that if they did not listen and comply to the words of their Great Father and comply with his wishes, he would cast them off and never again do any thing for them in the way of giving presents.

That he, Metigwob, replied that he would not give him an answer to his request until, he had consulted with the Chiefs belonging at St. Clair, River Credit, and Munceytown.

That the Governor said to him that he had nothing to do with the Chiefs aboved named, his treaty was with them and that he must have an answer from them now.

That His Excellency asked them is they would like to settle on the point of land running from Owen's Sound to Lake Huron which he would reserve for them and for all the Methodist Indians as their future settlement.

That he Metigwob, consulted with his principal men, on this subject, and they said they would like the plan as there were many fish in that place.

That Sir F.B. Head also stated to them that they the Sahgeeng Indians owned all the islands in the vicinity of that neck or point of land, he was about to reserve for them. and that he would remove all the white people who were in the habit of fishing on their grounds.

That it would be much better for them to comply with his wishes, as it would be all in vain for them ever to attempt to hold their Territory, for the white people would come on their lands in spite of all they could do, and they could not be prevented. Therefore it would be much to their advantage to settle on the Manitoulin Island or on the point of land he was going to reserve for them.

That he did not consider that the soil belonged to them, but to the Crown of Great Britain, by the Right of Conquest, and that all they claim they had upon those lands was the right of hunting on them.

That if they would now surrender all their right to the said Territory he would give them any thing they might ask---That if they wanted money he would give it to them.

That after they had selected a place for their future settlement he would be glad to see them at Toronto and then he would inform them more particularly what he would do for them in the way of assisting them to build log huts and furnishing them with farming utensils.

That he M. did not understand many things that the Governor said to them and that he and his fellow Chiefs were over persuaded to sign the surrender.

Statement
of Witnesses
on the Amended
Petitions
of
Various
Citizens -

13th Sept., 1836.

That Sir H. B. Hend also stated to them
that they the Aborigines inhabit
all the Islands but the vicinity of the
neck or point of land, he was about to
reserve for them, and that he would
remove all the white people who are
in the habit of fishing on their ground
That it would be much better for
them to comply with his wishes, as
would be all for their own
attempts to hold their Territory, for the white
people would come on their lands in spite
of all they could do, and they could not be
prevented. Therefore it would be much
their advantage to settle on the Furneaux
Islands or on the point of land he was going
to reserve for them.

That he did not consider that the land
belonged to them, but to the Crown of
Great Britain, by the Right of Conquest, and
that all they claim of any kind upon that land
was the right of hunting on them.

That if they would give up
all their rights to their Territory, he
would give them arms and they should
be treated as his children.

That after they had decided upon
for their future settlement he would
endeavour to see them as often as
and then he would endeavour to
questions what he could do for
them in the way of assisting them to build
huts and for making them comfortable
by blankets.

That he he did not understand
from them that the Tasmanians claimed the
and that he and his fellow citizens
were induced to settle the Furneaux

Statement of Metigwob one of the Saheeng Chiefs, made in a General Council held at the River St. Clair on the 13th ~~Aug~~ Sept. 1836: Respecting the Surrender of the Saheeng Territory to the British Government.

Metigwob stated that the Lieut.-Governor Sir Francis Head asked them if they would consent to remove Saheeng and Live on the Manitoulin Island. That they would consent to go they should have their first choice of location on the Island. That he was sent by their Great Father the King of England to speak to them on the subject of their removing to Saheeng and all the Saheeng Indians, and that if they did not listen and ~~comply~~ to the words of their Great Father and comply with his wishes, he would cast them off and never again own them for his children in the way of ~~any~~ protection.

That he, Metigwob, replied that he could not give him an answer to his request until, he had consulted with the Chiefs belonging at St. Clair, River Credit, and Munceytown.

That the Governor said to him that he had nothing to do with the Chiefs above named, his treaty was with them and that he must have an answer from them.

That His Excellency asked them if they would like to settle on the point of Land running from Drummond Island to Lake Huron and, he would reserve for them and for all the Ottawa Indians as their future Settlement.

That he Metigwob, consulted with his principal men on this subject, and they said they would like the plan and there were many that in that place

Elgin & Kincardine

Declaration by Her Majesty in favor of the Ojibway Indians respecting certain Lands on Lake Huron

Recorded 14th July 1851

Province of Canada

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith ——— To all to whom these Presents shall come ——— Greeting.

Whereas the Ojibway Indians commonly known as the Saugeen Indians with our permission and with the permission of our Royal Predecessors have for a long time enjoyed and possessed and still do Enjoy and possess all that tract of land lying on the shore of Lake Huron and which is butted and bounded or otherwise known as follows; Commencing at the mouth of the River Saugeen, thence following the North bank thereof about five Miles to the boundary lines surveyed by Deputy Provincial Surveyor Charles Rankin in the Year one thousand Eight hundred and forty six, thence along the said line North Seventy six degrees fifteen minutes East one thousand four hundred and Eighty three chains sixty one links to the North West angle of the Town plot of Sydenham, thence along the North West outline of the said Town plot North thirty nine degrees East fifty nine chains forty five links to the South bank of the Pottawattamie River, thence across the River and along the North bank thereof with the stream to Owen's Sound, Bounded on the East, North and West by Lake Huron, including any Islands in Lake Huron within seven miles of that part of the main land comprized within the hereinbefore described Tract of Land. ——— And Whereas it is our Royal Will and pleasure that the said Ojibway Indians and their posterity should continue to Enjoy the said above described Tract of land in such manner as may be most to the advantage of the said Ojibway Indians and their posterity .... And Whereas the said Ojibway Indians have caused it to be represented to us that it would be greatly to their advantage if We would cause Our Royal Will in the premises to be so declared that it may at all times hereafter be fully and certainly known by our Heirs and Successors and all others whom the same may concern; ——— And We being willing and desirous to accede to the wishes of the said Ojibway Indians of Our Special grace, certain knowledge and mere motion do hereby declare and make known that it is our Royal Will and pleasure that the said Ojibway Indians and their Posterity for Ever shall possess and Enjoy and at all times hereafter continue to possess and Enjoy the said above described Tract of Land, or the proceeds of the sale thereof (if sold as hereinafter provided for) and the rents, issues and profits of the said Tract of land or of the proceeds of the sale thereof (if sold as aforesaid) without any hindrance whatever on our part or on the part of Our Heirs and Successors or of Our or their Servants or Officers. ——— Provided always and We do hereby declare Our Royal will and mind to be, and these Presents are made upon the express Condition that it shall at all times hereafter be in the power of the said Ojibway Indians to surrender and yield up all their rights in or out of the Tract of land or lands or any part thereof to Us or to Our Heirs and Successors or to any person or persons appointed by Us or our Heirs or Successors, to receive the same in order and to the intent and purpose that the said Tract of land or any part thereof Concerning which any such Surrender may be made, may be sold by us or Our Heirs and Successors or by any person or persons appointed for that purpose by Us or by Our Heirs and Successors and the proceeds [illegible]

for the use and benefit of the said Ojibway Indians and their posterity; — Provided always and We do further declare Our Royal Will and Mind to be that no such Surrender shall be approved of or acted upon unless assented or approved at a Meeting of the Sachems Chiefs or principal men of the said Ojibway Indians held in the presence of some Officer appointed to superintend or to assist in superintending Indian Affairs; and it is Our Royal Will and pleasure that such Surrender when so assented or may be made from time to time, and that the parcels of land to which such Surrender may refer, shall and may with all convenient speed be sold by Us and Our Heirs and Successors and the proceeds thereof applied to and for the use and benefit of the said Ojibway Indians and their Posterity. —

In Testimony Whereof We have caused these Our Letters to be made Patent and the Great Seal of Our said Province to be hereto affixed. —

Witness Our Right Trusty and Right well Beloved Cousin James Earl of Elgin and Kincardine, Governor General of British North America and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick and the Island of Prince Edward and Vice Admiral of the same &c. &c. &c. —

At Montreal this twenty ninth day of June in the year of Our Lord one thousand eight hundred and forty seven and in the Eleventh Year of Our Reign. —

(D. Daly)
Secy.

Province of Canada

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith ... To all to whom these Presents shall come .... Greeting.

Declaration by Her Majesty in favor of the Ojibway Indians respecting certain Lands on Lake Huron

Whereas the Ojibway Indians commonly known as the Saugeen Indians with our permission and with the permission of our Royal Predecessors have for a long time enjoyed and possessed and still do enjoy and possess all that tract of land lying on the shore of Lake Huron and which is butted and bounded or otherwise known as follows; Commencing at the mouth of the River Saugeen, thence following North bank thereof about five miles to the boundary lines surveyed by Deputy Provincial Surveyor Charles Rankin in the year one thousand eight hundred and forty six, thence along the said line North seventy six degrees fifteen minutes East one thousand four hundred and Eighty three chains sixty one links to the North West angle of the Town plot of Sydenham, thence along the North West outline of the said Town Plot North thirty nine degrees East fifty nine chains forty five links to the South bank of the Pottowattami River, thence across the River and along the North bank thereof with the stream to Owen's Sound, Bounded on the East, North and West by Lake Huron, including any Islands in Lake Huron within seven miles of that part of the mainland comprized within the hereinbefore described Tract of Land.

And Whereas it is our Royal Will and pleasure that the said Ojibway Indians and their posterity should continue to Enjoy the said above described Tract of land in such manner as may be most to the advantage of the said Ojibway Indians and posterity... And Whereas the said Ojibway Indians have caused it to be represented to us that it would be greatly to their advantage if We would cause our Royal Will in the premises to be so declared that it may at all times hereafter be fully and certainly Known by our Heirs and Successors and all others whom the same may concern: And We being willing and desirous to accede to the wishes of the said Ojibway Indians of our especial grace, certain Knowledge and mere motion do hereby declare and make known that it is our Royal Will and pleasure that the said Ojibway Indians and their Posterity for ever shall possess and enjoy and at all times hereafter continue to possess and Enjoy the said above described Tract of land or the proceeds of the sale thereof (if sold as hereinafter provided for) and the rents, issues and profits of the said Tract of land or the proceeds of the sale thereof (if sold as aforesaid) without any

hindrance whatever on our part or on the part of our Heirs and Successors or of Our or their servants or officers. Provided always and We do hereby declare our Royal Will and mind to be, and these Presents are made upon the express condition that it shall at all times hereafter be in the power of the said Ojibway Indians to surrender and yield up all their rights in or out of the Tract of land or lands or any part thereof to Us or to Our Heirs and Successors or to any person or persons appointed by Us or Our Heirs or Successors, to receive the same in order and to the intent and purpose that the said Tract of land or any part thereof concerning which any such Surrender may be made, may be sold by us or Our Heirs and Successors or by any person or persons appointed for that purpose by Us or by Our Heirs and Successors and the proceeds thereof applied to and for the use and benefit of the said Ojibway Indians and their posterity; Provided Always and We do further declare Our Royal Will and mind to be that no such Surrender shall be approved of or acted upon unless resolved on or approved at a meeting of the Sachems Chiefs or principal men of the said Ojibway Indians held in the presence of some officer appointed to superintend or to assist in superintending Indian Affairs; And it is our Royal Will and pleasure that such Surrender when so resolved on may be made from time to time and that the parcels of land to which such Surrender may refer shall and may with all convenient speed be sold by Us and Our Heirs and Successors and the proceeds thereof applied to and for the use and benefit of the said Ojibway Indians and their Posterity.

In Testimony Whereof We have caused these Our Letters to be made Patent and the Great Seal of our said Province to be hereto affixed.
Witness our Right Trusty and Right Well Beloved Cousin James, Earl of Elgin and Kincardine, Governor General of British North America and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick and the Island of Prince Edward and Vice Admiral of the same.
& & &
At Montreal this twentyninth day of June in the Year of Our Lord one thousand Eight hundred and forty seven and in the Eleventh Year of Our Reign.

D Daly
Secy

No. 67.

To all whom these presents shall come—GREETING.

KNOW ye, that we, the undersigned Chiefs of the Chippewa Tribe of Indians residing at Saugeen and at Owen Sound, have surrendered and do hereby surrender, on behalf of our said tribe, and with their entire knowledge and consent, unto Her Most Gracious Majesty, Queen Victoria and Her successors, all and singular that certain tract or parcel of land and premises situate, lying and being in the Counties of Grey and Bruce, in the Province of Canada, and composed of the southerly part of the lands commonly called and known by the name of the Saugeen Tract, which is bounded on the south by Lake Huron and the Huron District, and on the north by the Georgian Bay, and comprised within the following limits, that is to say: Commencing on the present southern limit of said Indian tract at the intersection thereof by the easterly side of the allowance for road between the fourth and fifth concessions of the Township of Derby, being about three miles westerly from the Indian Village of Neywash; thence north nine degrees west forty chains, statute measure, to a post to be planted; thence south seventy-six degrees fifteen minutes west, or parallel with the said southerly line of limit of the said Indian lands, twelve hundred chains, or to within about two miles of the Indian Village of Saugeen; thence south nine degrees east forty chains to the said southern present limit of the said Indian lands; thence north seventy-six degrees and fifteen minutes east twelve hundred chains to the place beginning, containing by admeasurement four thousand and eight hundred acres of land. To have and to hold the said tract of land and its appurtenances, unto Her said Majesty Queen Victoria and Her successors for ever, in trust for the purpose of being sold to the best advantage, and the proceeds thereof to be invested in such a fund or funds as the Governor General or other person administering the Government of Canada for the time being may direct, for the benefit of our said tribe and their posterity.

IN TESTIMONY WHEREOF, we, the said undersigned Chiefs, together with the Principal Men or Warriors of our said tribe, have hereunto affixed our respective seals and totems in signification of our signatures and deliberate and voluntary act and deed, this second day of September, in the year of Our Lord one thousand eight hundred and fifty-one.

Read and explained in open Council at Owen Sound. Signed, sealed and delivered to Thomas G. Anderson, Superintendent in the Indian Department, on behalf of Her Majesty Queen Victoria and Her successors, in presence of us:
C. RANKINE, *D.P.S.*
JOHN FROST,
FRANCIS ASSIKINNEK, *Interpreter*,
DAVID SAWYER, *Interpreter*.
Certified,
T. G. ANDERSON, *S.I.A.*

JACOB METEGOB, (totem) [L.S.]
ALX. MADWAYOSH, (totem) [L.S.]
JOHN KEWAYUAHWON, (totem) [L.S.]
JOHN MANEDOWOB, (totem) [L.S.]
JOHN WAHSAGEYHIG, (totem) [L.S.]
JOSEPH R. JAMES, (totem) [L.S.]
JOHN T. WABBABDICK, (totem) [L.S.]
JOHN JONES, (totem) [L.S.]
THOS. WAHBAHDICK, (totem) [L.S.]
JOHN SNAKE, (totem) [L.S.]
GEORGE RYERSON, (totem) [L.S.]
GEO. AUTHUR TABEGUM, (totem) [L.S.]

PROVINCIAL REGISTRAR'S OFFICE,
QUEBEC, 19th February, 1852.

I certify that the within Surrender has this day been entered upon the records of this office in Lib. C. S., Folio 47.

THOS. AMIOT,
Deputy Registrar.

Proclamation
Placing certain Tracts of
Land set apart for the
Indians under the provisions
of the Act 13 & 14 Victoria Ch.74

Recorded 22^{d} Nov^{r} 1851
In Lib. C.O. Folio 65

Tho. Amiot
Depy Regr

Elgin & Kincardine

Province of Canada

Victoria by the grace of God of United Kingdom of Great Britain and Ireland, Queen Defender of the Faith & c. & c.

To all to whom these Presents shall come ..... Greetings

Whereas in and by an act of the Parliament of the Province passed in the Session thereof held in the thirteenth and fourteenth years of Our Reign, Chaptered amongst the Public General Acts of the Session in which the same was passed, as Chapter Seventy-four and intitled " An Act for the protection of the Indians in Upper Canada, from imposition, and the property occupied or enjoyed by tham from trespass and injury" - it is amongst other things in effect enacted, That the provisions in the tenth, eleventh and twelfth Sections in the said Act contained should extend and be construed to extend to such Indian Lands only in Upper Canada as the Governor of our said Province for the time being should, from time to time by Proclamation under the Great Seal thereof, think fit to declare and make subject to the same, and so long only as such Proclamation should remain unrevoked and in full force.- And whereas it has been deemed expedient by Our Governor of Our said Province that the said provisions should be extended to the following Lands, that is to say:

* * *

Reserved for the occupation of the Saugeen and Owen Sound Indians

And the Tract of Land occupied by the Saugeen and Owen Sound Indians bounded on the North, East, and West by the waters of Lake Huron and the Georgian and Owens' Sound Bays and on the South by a strip of land lately ceded to the Crown by the Saugeen Indians and those settled at Owen's Sound and which abuts in part on the Townships of Derby and Arran containing about Four hundred and Seventy-eight thousand Eight hundred acres together with all the Islands within seven miles of the coast.

The said Lands so described as aforesaid being in the use, occupation and enjoyment of Indians in Upper Canada ...unmolested possession and enjoyment thereof. Now therefore know Ye, that We taking the same into our Royal consideration, and approving of the extension of the said provisions of the said Act to the said lands hereinbefore described, do hereby declare and make all and singular the said lands hereinbefore mentioned and every part thereof, subject to the said provisions in the said tenth eleventh and twelfth Sections of the said Act contained, according to the form of the Statute in such case made and Provided - Of all which premises the Superintendent General, the Assistant Superintendent General, and every Subordinate Superintendent of Indian Affairs, the Commissioners in the above

recited Act mentioned and referred to, and all Our Justices, Sheriffs, Bailiffs, Constables and other Officers of Justice and all others Our Liege Subjects, are hereby required to take notice and to govern themselves accordingly.

In testimony whereof We have caused these Our Letters to be made Patent and the Great Seal of Our said Province to be hereunto affixed, Witness Our Right Trusty and Right Well Beloved Cousin James, Earl of Elgin and Kincardine, Knight of the Most Ancient and Most Noble Order of the Thistle, Governor General of British North America and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick and the Island of Prince Edward and Vice Admiral of the same &&& At Quebec this Seventh day of November in the year of Our Lord one thousand eight hundred and fifty one and in the fifteenth year of Our Reign.

By Command

E Meredith
Asst Secy

Proclamation

Placing certain Tracts of land at the disposal of the Governor under the provisions of the Act 13 & 14 Vict. Cap. 99

Recorded 22nd Nov. 1851
In Lib. C.O. Folio 65

Dep. Regr

Public Archives of Canada, Record Group 68 (Registrar General)
Patent Book No. 51

Upper Canada

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith &c.

To all to whom these Presents shall come — Greeting —

Whereas an Act was passed in the Parliament of the Province of Canada in the Session thereof held in the fourth and fifth years of our Reign intituled An Act to encourage the Settlement of Upper Canada by Immigrants and for the Sale and Management of the Public Lands in the said Province and by the said Act it is amongst other things enacted that the Governor of the said Province may from time to time by Proclamation to be published in the Canada Gazette set apart such Tracts of Land within the said Province as he may think fit for the Settlement of Indians and may declare that the said Lands shall be held for the Use of such Indians as the Council of the said Province may think proper to place thereon and may make such Regulations for the Location Disposition and Government of the said Lands when so set apart as to him may seem meet and may from time to time revoke or alter such Regulations as he may think fit Provided always that no such Proclamation should be made until the Boundaries of the Lands proposed to be so set apart should have been defined by actual Survey and that no such Proclamation should have any force or effect until the same should have been approved by the Governor General of the said Province and it has been declared expedient by the Governor of the said Province that the said Provisions should be extended to the undermentioned Lands that is to say:

Reserved for the occupation of the Mississauga Indians of Rice Lake —
- In the Township of South in the County of Peterborough and all being situated on the North side of Rice Lake.
- Twelfth Concession Lots Numbers Sixteen Seventeen Eighteen and Nineteen
- Thirteenth Concession Lots Numbers Seventeen Eighteen Nineteen and Twenty and Broken Lot Number Twenty one Twenty two and Twenty three
- Fourteenth Concession Lots numbers Eighteen Nineteen Twenty Twenty one Twenty two Twenty three and Twenty four

Reserved for the occupation of the Mississauga Indians of Rice Lake —
- In the Township of Otonabee in the County of Peterborough
- Eleventh Concession A Block of Twelve hundred acres. Said Block was formerly laid out as a Town Plot but has since been given to the Indians.
- South Concession Lots Four Five and Seven and the Broken Front of Three

Reserved for the occupation of the Mississauga Indians of Smith —
- In the Township of Hamilton in the County of Northumberland
- First Concession Lots Numbers Eleven Twelve Thirteen Fourteen Fifteen Sixteen Seventeen and Eighteen Second Concession Lots Numbers Ten Eleven Twelve Thirteen Fourteen Fifteen Sixteen and Broken Lot in front of Lot Sixteen

Reserved for the occupation of the Mississauga Indians of Sheguiandah —
- In the Township of Carbright in the County of Durham
- Eleventh Concession Lots Numbers Six and Seven
- Twelfth Concession Lots Numbers Seven and Eight

Reserved for the occupation of the Saugeen and Owen Sound Indians —
- And the Tract of Land occupied by the Saugeen and Owen Sound Indians bounded on the South Eastward and Westerly by the Waters of Lake Huron and the Saugeen and Owen Sound Bays and on the North by a Strip of Land lately ceded to the Crown by the Saugeen Indians and known as Reserve at Owen Sound and which abuts in front on the Townships of Derby and Bruce Containing about Four hundred and twenty eight Thousand eight hundred acres together with all the Islands within three miles of the Coast.

The said Lands as described as aforesaid being in the new occupation or enjoyment of Indians in Upper Canada

[illegible] Commissioners [illegible] and appraisal [illegible] of the said Lands [illegible] Commissioners and Superintendent thereof. Know Ye therefore Hereby Do Grant and Declare that We taking the same into Our Royal Consideration and approving of the Division of the said Premises of the said Act to the said Lands hereinbefore described do hereby declare and order all and singular the said Lands hereinbefore described and meant thereby subject to the said Provisions in the said Sixth Clause and Proviso of the said Act contained according to the Intent of the Statute in such case made and Provided Of all which premises the Superintendent General the Assistant Superintendent General and every Subordinate Superintendent of Indian Affairs the Commissioners in the above recited Act mentioned and referred to and all Sheriffs Bailiffs Constables and other Officers of Justice and all other Our Liege Subjects are hereby required to be Aiding and Assisting themselves accordingly

In Testimony whereof We have caused these Our Letters to be made Patent and the Great Seal of the said Province to be hereunto affixed, Witness Our Right Trusty and Right well Beloved Cousin James Earl of Elgin and Kincardine Knight of the Most Ancient and Most Noble Order of the Thistle Governor General of British North America and Captain General and Governor in Chief in and over the Provinces of Canada Nova Scotia New Brunswick and the Island of Prince Edward and Vice Admiral of the same &c. &c. &c. at Quebec this Seventh day of September in the year of Our Lord one thousand eight hundred and fifty one and in the fifteenth year of Our Reign

By Command

[illegible]
Registrar

13 and 14 Victoria (1850) Cap. 74 (Province of Canada). An Act for the Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by them from Trespass and Injury. [passed August 10, 1850]

WHEREAS it is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada*, and it is hereby enacted by the authority of the same, That no purchase or contract for the sale of land in Upper Canada, which may be made of or with the Indians or any of them, shall be valid unless made under the authority and with the consent of Her Majesty, Her Heirs or Successors, attested by an Instrument under the Great Seal of the Province, or under the Privy Seal of the Governor thereof for the time being. . . .

X. And whereas for the purpose of affording better protection to the Indians in the unmolested possession and enjoyment of their lands, it is expedient to give more summary and effectual powers to the Commissioners appointed or who may be appointed by virtue of the Act of the Province of Upper Canada, passed in the second year of Her Majesty's Reign, chaptered fifteen, and intituled, *An Act for the protection of the lands of the Crown in this Province from trespass and injury*, and also by virtue of the Act of this Province, passed in the twelfth year of Her Majesty's Reign, chaptered nine, and intituled, *An Act to explain and amend an Act of the Parliament of the late Province of Upper Canada, passed in the second year of Her Majesty's Reign, intituled, 'An Act for the protection of the lands of the Crown in this Province 'from trespass and injury, and to make further Provision for that purpose,'* to enable them more efficiently to protect the said lands from trespass and injury, and to punish all persons trespassing upon or doing damage thereto: Be it therefore enacted, That it shall not be lawful for any person or persons other than Indians, and those who may be inter-married with Indians, to settle, reside upon or occupy any lands or roads or allowances for roads running through any lands belonging to or occupied by any portion or Tribe of Indians within Upper Canada, and that all leases, contracts and agreements made or to be made, purporting to have been or to be made, by any Indians, or by any person or persons inter-married with any Indian or Indians whereby any person or persons other than Indians shall be permitted to reside upon such lands, shall be absolutely void; and if any person or persons other than Indians, or those who may be inter-married with Indians as aforesaid, shall without the license of the said Commissioners or any or either of them, (which license, however, the said Commissioners or any of them, may at any time revoke,) settle, reside upon or occupy any such lands, roads or allowances for roads, it shall be the duty of the Commissioners or any or either of them, on complaint made to them or any of them, and on due proof of the fact of such settlement, residence or occupation, to issue their or his warrant under their hands and seals, or his hand and seal, directed to the Sheriff of the County, or Union of Counties in which the said lands may lie, or if the said lands may not be situated within any County or Union of Counties, then such warrant shall be directed to any literate person who may be willing to act in the premises, commanding him forthwith to remove all such persons settling, residing upon or occupying such lands, with his, her or their families, from the said lands or roads or allowances for roads, and it shall be the duty of such Sheriff, or other person accordingly, to remove such person or persons, and for that purpose he shall have and possess the same powers as in the execution of criminal process: Provided always, nevertheless, that the provisions in this and the two following sections of the Act contained, shall extend and be construed to extend to such Indian lands only as the Governor of this Province for the time being shall from time to time, by Proclamation under the Great Seal thereof, think fit to declare and make subject to the same, and so long only as such Proclamation shall remain unrevoked and in full force.

XI. And be it enacted, That so often as any person or persons after being or having been removed as aforesaid, shall return to settle, reside upon or occupy any of the said lands or roads or allowances for roads, the said Commissioners or any or either of them, upon their or his view, or upon proof by any witness or witnesses on oath, to be made or taken before the Commissioners or any or either of them, and upon their or his being satisfied that the said person or persons has or have returned to, settled, resided upon or occupied any of the said lands or roads or allowances for roads, then and in every such case, such Commissioners or Commissioner shall direct and send their or his warrant, under their hands and seals or his hand and seal, to the Sheriff of the County or Union of Counties within which such lands may lie, or to any literate person there, or if the said lands shall not be situated within any County or Union of Counties, then to any literate person, commending him forthwith to arrest such person or persons, and to commit him, her or them to the Common Gaol of the said County or Union of Counties in which the said lands may lie, or to the Common Gaol of the nearest County or United Counties to the said lands, if the said lands shall not be within any County or United Counties, there to remain for such time as shall be ordered by the Commissioners or by any or either of them, not exceeding thirty days: and such Sheriff or other person shall accordingly arrest the said party or parties, and deliver him, her or them to the Gaoler or Sheriff of the said County or United Counties as aforesaid, who are hereby required to receive such person or persons, and the said person or persons to confine and imprison in the said Common Gaol for the term aforesaid, there to remain without bail and without being entitled to the liberties of the limits of the said Gaol; and such Commissioners or any of them shall cause the judgment or order against such person or persons to be drawn up, and no such judgment shall be liable to be removed by *Certiorari* or otherwise, or to be appealed from, but shall be deemed and taken to be final.

XII. And be it enacted, That if any person without the license in writing of the Commissioners or of any or either of them, shall hereafter trespass upon any of the said lands or roads or allowances for roads, by cutting any trees, saplings, shrubs, underwood or timber thereon, or by carrying away or removing any of the trees, saplings, shrubs, underwood or timber therefrom, or by removing any of the stone or soil of the said lands, roads or allowances for roads, each person so trespassing shall for every tree he shall cut, carry away or remove, forfeit and pay the sum of five pounds, and for cutting, carrying or removing any of the saplings, shrubs, underwood or timber, under the value of five shillings, the sum of one pound, but if over the value of five shillings, then the sum of five pounds, and for removing any of the stone or soil aforesaid, the sum of five pounds, such fine to be imposed and recovered by the said Commissioners or any or either of them, by distress and sale of the goods and chattels of the party or parties fined, or the said Commissioners may, without proceeding by distress and sale as aforesaid, upon the non-payment of the said fine, order the party or parties to be imprisoned in the Common Gaol as aforesaid, for a period not exceeding thirty days, when the fine shall not exceed five pounds, or for a period not exceeding three calendar months, when the fine shall exceed the sum of five pounds; and upon the return of any warrant for distress or sale, if the amount thereof have not been made, or if any part of it may remain unpaid, the said Commissioners or any or either of them, may commit the party or parties who may be in default upon such warrant or warrants to the Common Gaol as aforesaid, for a period not exceeding thirty days, if the sum claimed by the said Commissioners upon the said warrant do not exceed five pounds, or for a time not exceeding three calendar months, if the sum claimed do exceed five pounds; all which fines shall be paid to Her Majesty, Her Heirs or Successors, or to some officer acting under Her authority, to be disposed of for the use and benefit of the Indians, as the Governor of this Province for the time being may be pleased to direct.

No. 72.

SURRENDER OF THE SAUGEEN PENINSULA.

We, the Chiefs, Sachems and Principal Men of the Indian Tribes resident at Saugeen, Owen Sound, confiding in the wisdom and protecting care of our Great Mother across the Big Lake, and believing that our Good Father, His Excellency the Earl of Elgin and Kincardine, Governor General of Canada, is anxiously desirous to promote those interests which will most largely conduce to the welfare of His red children, have now, being in full Council assembled, in presence of the Superintendent General of Indian Affairs, and of the young men of both tribes, agreed that it will be highly desirable for us to make a full and complete surrender unto the Crown of that Peninsula known as the Saugeen and Owen Sound Indian Reserve, subject to certain restrictions and reservations to be hereinafter set forth. We have therefore set our marks to this document, after having heard the same read to us, and do hereby surrender the whole of the above named tract of country, bounded on the south by a straight line drawn from the Indian village of Saugeen to the Indian village of Nawash, in continuation of the northern limits of the narrow strip recently surrendered by us to the Crown; and bounded on the north-east and west by Georgian Bay and Lake Huron, with the following reservations, to wit: 1st. For the benefit of the Saugeen Indians we reserve all that block of land bounded on the west by a straight line running due north from the River Saugeen, at the spot where it is entered by a ravine, immediately to the west of the village, and over which a bridge has recently been constructed, to the shore of Lake Huron; on the south by the aforesaid northern limit of the lately surrendered strip; on the east by a line drawn from a spot upon the coast at a distance of about ($9\frac{1}{2}$) nine miles and a half from the western boundary aforesaid, and running parallel thereto until it touches the aforementioned northern limits of the recently surrendered strip; and we wish it to be clearly understood that we wish the Peninsula at the mouth of the Saugeen River to the west of the western boundary aforesaid to be laid out in townpark lots and sold for our benefit without delay; and we also wish it to be understood that our surrender includes that parcel of land which is in continuation of the strip recently surrendered to the Saugeen River.

We do also reserve to ourselves that tract of land called Chief's Point, bounded on the east by a line drawn from a spot half a mile up the Sable River, and continued in a northerly direction to the bay, and upon all other sides by the lake.

2nd. We reserve for the benefit of the Owen Sound Indians all that tract bounded on the south by the northern limit of the continuation of the strip recently surrendered; on the north-west by a line drawn from the north easterly angle of the aforesaid strip (as it was surrendered in 1851, in a north easterly direction); on the south-east by the sound extending to the southern limit of the Caughnawaga Settlement; on the north by a line two miles in length and forming the said southern limit. And we also reserve to ourselves all that tract of land called Cape Crocker, bounded on three sides by Georgian Bay, on the south-west side by a line drawn from the bottom of Nochemowenaing Bay to the mouth of Sucker River, and we include in the aforesaid surrender the parcel of land contained in the continuation to Owen's Sound of the recently surrendered strip aforsaid.

3rd. We do reserve for the benefit of the Colpoy's Bay Indians, in the presence and with the concurrence of John Beattie, who represents the tribe at this Council, a block of land containing 6,000 acres, and including their village, and bounded on the north by Colpoy's Bay.

All which reserves we hereby retain to ourselves and our children in perpetuity, and it is agreed that the interest of the principal sum arising out of the sale of our lands be regularly paid to them so long as there are Indians left to represent our tribe without diminution at half yearly periods.

And we hereby request the sanction of our Great Father the Governor General to this surrender, which we consider highly conducive to our general interests.

Done in Council, at Saugeen, this thirteenth day of October, 1854.

It is understood that no islands are included in this surrender.

Signed and sealed:

L. OLIPHANT,
Supt. Genl. Indian Affairs.

PETER JACOBS,
Missionary.

Witnesses:

JAS. ROSS, *M.P.P.*,
C. RANKIN, *P.L.S.*,
A. MCNABB,
Crown Land Agent.

JOHN (totem) KADUHGEKWUN, [L.S.]
ALEX. (totem) MADWAYOSH, [L.S.]
JOHN (totam) MANEDSWAB, [L.S.]
JNO. THOS. (totem) WAHBUHDICK, [L.S.]
PETER (totem) JONES, [L.S.]
DAVID SAWYER, [L.S.]
JOHN H. BEATY, [L.S.]
THOMAS (totem) PABAHMOSH, [L.S.]
JOHN (totem) MADWASHEMIND, [L.S.]
JOHN (totem) JOHNSTON, [L.S.]
JOHN AUNJEGAHBOWH, [L.S.]
JAMES NEWASH, [L.S.]
THOMAS (totem) WAHBUHDICK, [L.S.]
CHARLES KEESHICK. [L.S.]

COPY *of a Report of a Committee of the Honorable the Executive Council, approved by His Excellency the Governor General on the 27th September*, 1855.

On a memorandum dated 12th instant, from the Superintendent General of Indian Affairs, submitting certain proposed changes, as shown in two certain plans, in the shape of the Indian reserves in the tract commonly called the Saugeen Peninsula, lately surrendered to the Crown, both changes having been assented to by the Indians in Council, and recommending:

1st. That the reserve known as the Saugeen Reserve, now bounded on the west by a straight line running due north from the River Saugeen at the spot where it is entered by a ravine immediately to the west of the village, be bounded instead by the Indian path called the Copway Road, which takes a north-westerly direction, as shown by the red line in the plan. This change will give the Saugeen Indians a small increase of frontage on Lake Huron, and will not interfere with the town plot now laid out on the tongue of land contained between that lake and the River Saugeen.

2nd. That the south-western boundary of the Cape Crocker Reserve, now formed by a line drawn from the bottom of Nochemowenaing Bay to the mouth of Sucker River, start instead from the south shore of Hope Bay, at a small point about a mile from its head, and strike Lake Huron two miles south of Sucker River, as shown by the plan. This change would cut off from the Indians one mile of frontage on Hope Bay, giving them in compensation two miles extra frontage on the Georgian Bay. The head of Hope Bay has been recommended by Mr. Dennis, the surveyor of the tract, as the site for a town, and the present position of the south-western boundary of the reserve would render it impossible to carry out his suggestion.

The Committee recommend that the proposed changes be effected.

Certified.

WM. H. LEE,
C.E.C.

COPY *of a Report of a Committee of the Honorable the Executive Council, dated 31st January, 1855, approved by His Excellency the Governor General in Council on the 3rd February*, 1855.

On a communication dated 31st January, ult., from the Superintendent General of Indian affairs, transmitting a surrender from the Chippewa Indians of Saugeen and Owen Sound to Her Majesty, in trust of a tract of land situated in the County of Grey, and forming part of the Peninsula on the north-east shore of Lake Huron, commonly called the "Saugeen Reserve," and requesting that the trust may be accepted by Your Excellency in Council and entered upon the records in the offices of the Commissioner of Crown Lands and Provincial Registrar.

The Committee recommend that the trust be accepted, and that an entry be made thereof in the offices of the Commissioner of Crown Lands and Provincial Registrar.

Certified.

WM. H. LEE,
C.E.C.

To the Honorable
The Provincial Registrar,
&c., &c., &c.

PROVINCIAL REGISTRAR'S OFFICE,
QUEBEC, 15th February, 1855.

I hereby certify that the foregoing surrender and minute of the Executive Council thereon have been entered upon the records of this office in Lib. C. S., Folio 129.

THO. AMIOT,
Depy. Regr.

No 72.

Surrender
of the
Daugen Stack.
13 Oct. 1854.

[redacted] of the Saugeen Peninsula

[redacted] Chiefs Warriors and Principal Men
[redacted] Indian tribes residents at Saugeen
[redacted] from hand, considering as the wisdom
[redacted] and protection, care of our Great Mother
[redacted] the Big Lake, and desirous that our
[redacted] Children may be taught
[redacted] and Canadian Government, Generally
[redacted] Country, and promote their interests
[redacted] will most largely conduce to the welfare
[redacted] Red Children, have now, here in full
[redacted] Council assembled in presence of the Superintendent
half Indian Agent, and of the Young men of both
[redacted] tribes, agreed of with the Right Honorable
[redacted] for to make a fair and complete surrender
[redacted] unto the Crown of that Peninsula known
[redacted] as the Saugeen and been bound Indian Reserve
[redacted] subject to certain restrictions and reservations
[redacted] hereinafter set forth. We have therefore
[redacted] for our part this document after having
[redacted] heard the same read & do, and do hereby
[redacted] surrender the whole of the above named
[redacted] tract of country bounded on the South
[redacted] by a straight line drawn from the Indian
[redacted] village of Saugeen to the Indian village of
[redacted] Owen Sound & continuation of the Northern limit
[redacted] of the Township recently surrendered by
[redacted] us to the Crown, and bounded on the North
[redacted] East and West by Georgian Bay and Lake
[redacted] Huron, with the following reservations, that
[redacted] is for the benefit of the Saugeen Indians

we reserve all that block of land bounded
West by a straight line running due north from
the River Saugeen at the spot where it is crossed
by a ravine immediately to the west of the village
and over which a bridge has recently been constructed
to the Shore of Lake Huron — On the South by
the aforesaid northern limits of the lately surrendered
Strip on the East by a line drawn from a spot
upon the coast at a distance of
about ~~99~~ Nine Miles and a half from the Western
boundary aforesaid and running parallel thereto
until it touches the aforementioned northern
limits of the recently surrendered strip — And we
wish it to be clearly understood that we reserve
the Peninsula at the Mouth of the Saugeen River to
the west of the western boundary aforesaid to
be laid out in town plots and sold for
our benefit without delay, and we also wish
it to be understood that our surrender includes that
parcel of land, which is in contemplation of the
recently surrendered, to the Saugeen River —
We do also reserve for ourselves that tract of land
called Chief's Point, bounded on the East by a line drawn
from a spot half a mile up the Sable River
and continued in a northerly direction to the Bay
and upon all other sides by the Lake —
2ndly. We reserve for the benefit of the Owen
Sound Indians all that tract bounded on the
South by the Northern limits of the Continuation
of the strip recently surrendered, on the North
West by a line drawn from the North Easterly
angle of the aforesaid strip (as it was surrendered
in a North Easterly direction
in 1857) on the South East by the Summit ~~to~~ standing to the

Southern limit of the Coughnawaga Settlement
on the North by a line two miles in length and
parallel to said Southern limit — And we also
request & covenant all that tract of land called
Cape Croker bounded on three sides by Georgian
Bay on the South East side by a line drawn from the
head of Owen Sound Bay to the
head of Cacker River — And we include
in this surrender the parcel of land
contained in the Continuation Bowens Island
recently surrendered by us aforesaid.
2dly We do reserve for the benefit of the Colpoys
Bay Indians in the presence of and with the
concurrence of John Beattie who represents
the tribe at this Council a block of land
containing two miles and including their
village and bounded on the north by Colpoys
Bay —

All which reserves we hereby retain to
ourselves and our children in perpetuity, and
it is agreed that the interest of the principal
sum accruing out of the sale of our lands
be regularly paid to them at Colpoy Bay as there
all Indians left to represent our tribe without
diminution at half yearly periods —

And we hereby request the sanction of our
Great Father the Governor General to this
surrender which we consider highly conducive
to our general interest —

Done in Council at Saugeen
this thirteenth day of October 1854

It is understood that no islands are included in this surrender

[illegible]

Signed and Sealed

John [illegible]

John Rank

Asst. Gen.l Indian Affairs Upper [illegible]

Peter Jacobs

Missionary

[illegible]

Jno. Thomas [illegible]

Witnesses.

Jas. Ross M.P.P. [illegible]

C. Rankin P.S. [illegible]

H. M. Hatt [illegible]

Clerk Indn Dept

[illegible]

[illegible]

John [illegible]

James [illegible]

L. Clipsham

Thomas [illegible]

Charles [illegible]

[illegible]

Province of [illegible]

to wit

I hereby Certify that the foregoing Surrender, Memorial, Declaration, Indenture, Release, and Grant, have been entered upon the Records of this Office in Lib. C.S. Folio 129.

[illegible]

Copy of a Report of a Committee of the Hon.ble the Executive Council, approved by His Excellency the Governor General on the 27.th September 1855.

On a Memorandum dated 12.th Instant from the Superintendent General of Indian Affairs, submitting certain proposed changes, as shewn in two certain plans, in the Shape of the Indian Reserve in the Tract Commonly called the Sauguen Peninsula, lately surrendered to the Crown, both changes having been assented to by the Indians in Council; and recommending

1.st That the Reserve known as the Sauguen Reserve, now bounded on the West by a straight line running due North from the River Sauguen at the Spot where it is entered by a Ravine immediately to the West of the Village, be bounded instead by the Indian path called the Colpway Road which takes a North Westerly direction, as shewn by the red line in the plan - This change will give the Sauguen Indians a

Small

small increase of frontage on Lake Huron, and will not interfere with the Town Plot now laid out on the tongue of land contained between that Lake and the River Saugeen.

2. That the South Western boundary of the Cape Croker Reserve now formed by a line drawn from the bottom of Nochemowenaing Bay to the Mouth of Sucker River start instead from the South Shore of Hope Bay at a small point about a Mile from its head, and strike Lake Huron two Miles South of Sucker River, as shewn by the plan. This change would cut off from the Indians one Mile of frontage on Hope Bay, giving them in compensation two Miles extra frontage on the Georgian Bay - The Head of Hope Bay has been recommended by Mr. Dennis the Surveyor of the Tract as the site for a Town, and the present position of the South Western Boundary of the Reserve would render it impossible to carry out his suggestion.

The Committee recommend that the proposed changes be effected.

Certified

W. H. Lee.

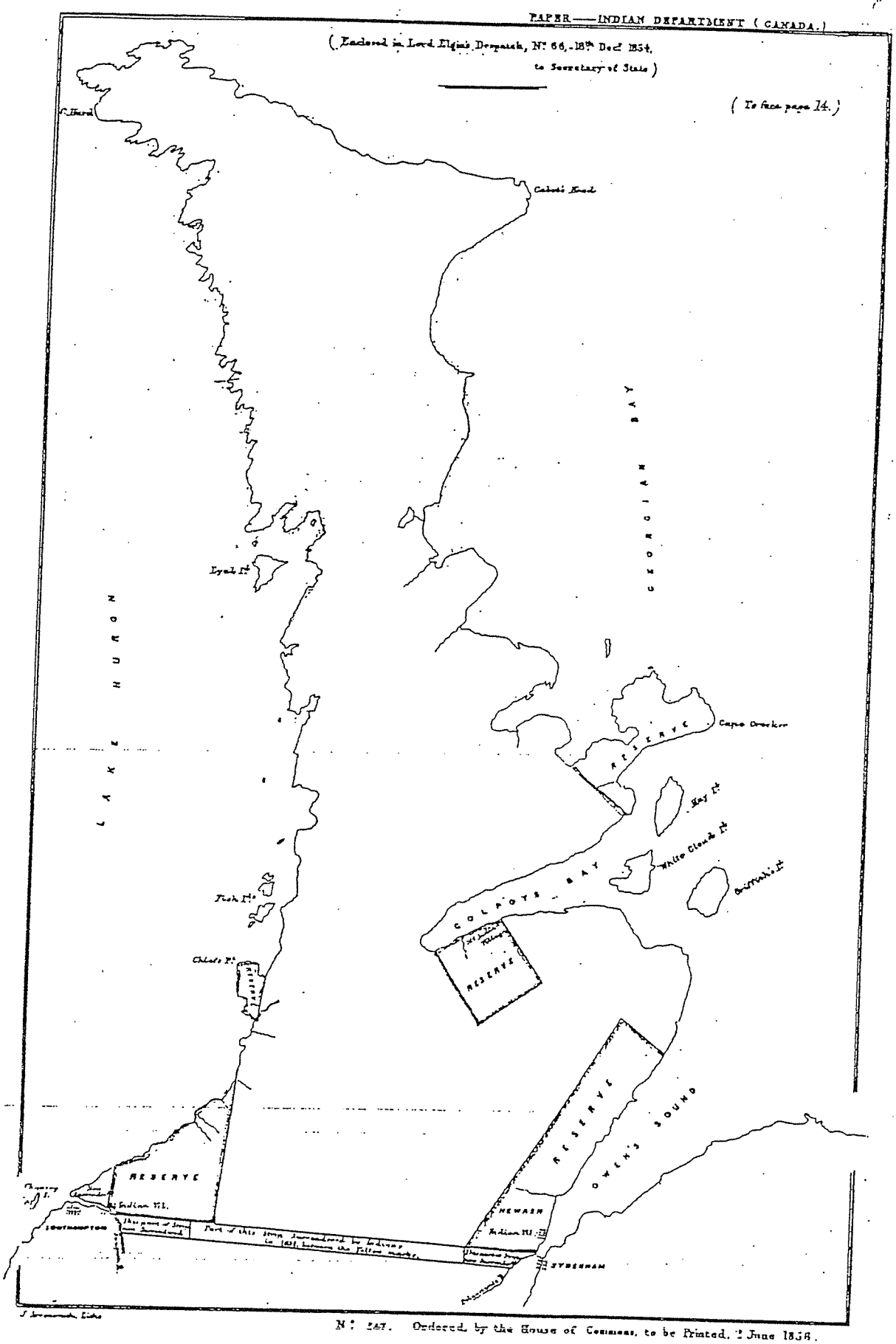
Copy of a Report of a Committee of the Honorable the EXECUTIVE COUNCIL, dated 31st January 1855 approved by His Excellency the Governor General in Council on the 3rd February 1855.

On a Communication dated 31st January ult. from the Superintendent General of Indian Affairs, transmitting a Surrender from the Chippewa Indians of Saugeen & Owen's Sound to Her Majesty in Trust, of a Tract of Land situated in the County of Grey, and forming part of the Peninsula on the North East Shore of Lake Huron commonly called the "Saugeen Reserve", & requesting that the Trust may be accepted by Your Excellency in Council and entered upon the Records in the Offices of the Commissioner of Crown Lands and Provincial Registrar.

The Committee recommend that the Trust be accepted & that an Entry be made thereof in the Offices of the Commissioner of Crown Lands & Provincial Registrar.

Certified
Wm. H. Lee
Clk Ex Co

[Map of Lands Surrendered in the Saugeen Peninsula, 1854]

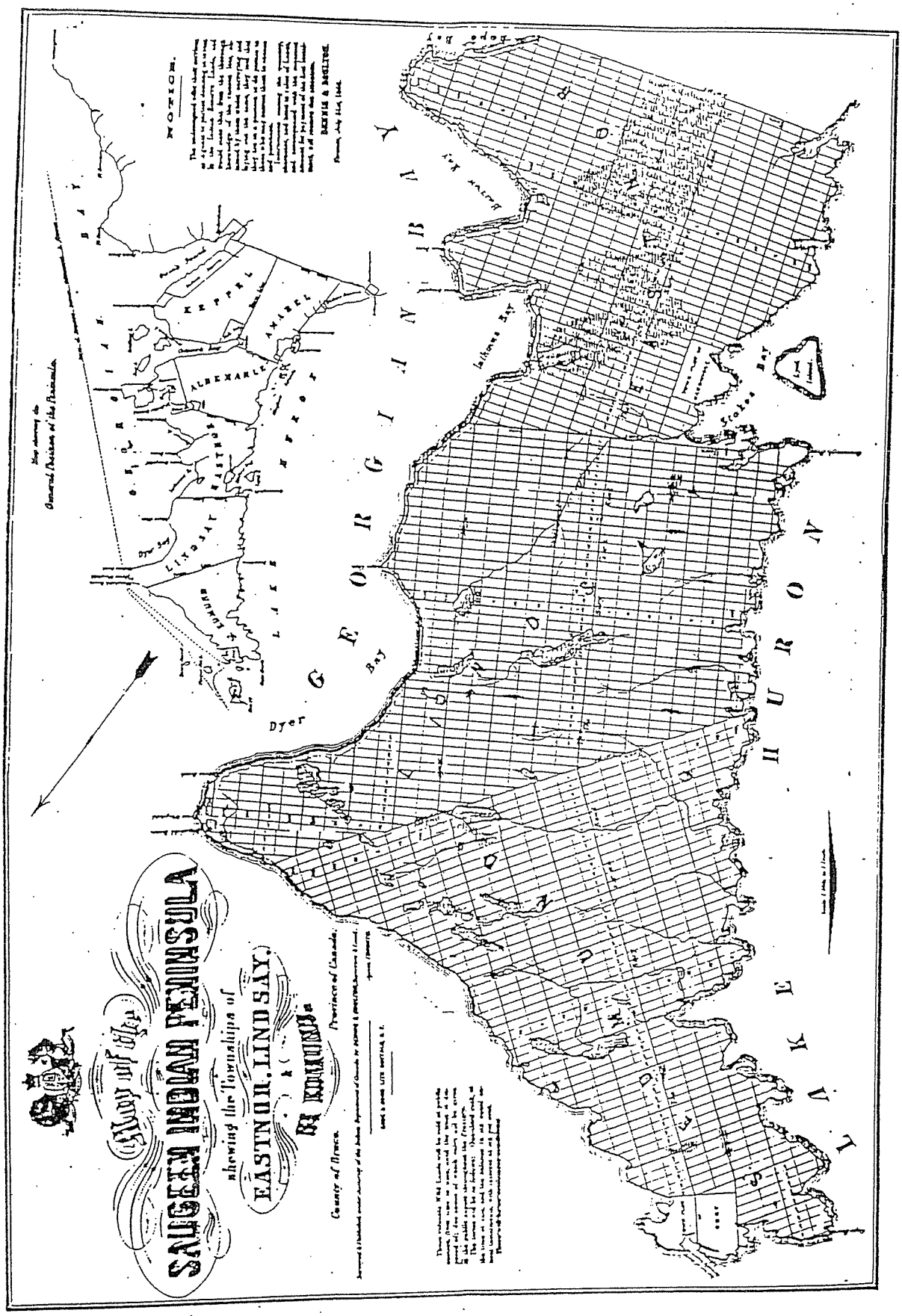


N° 247. Ordered, by the House of Commons, to be Printed, 2 June 1856.

Harry Rawsell, Printer.

SOURCE: Imperial Blue Books, Box 18, 1856, No. 247, Ontario Archives

SOURCE: National Map Collection Call number H2/420/BRUCE/1856 · NMC-21388
Copied from a 15" x 20" photo reproduction at the Union of Ontario Indians Office.



SOURCE: National Map Collection Call Number H2/420/BRUCE/1856 : NMC 21867
Copied from a 15"x20" photo reproduction.

This map for research purposes only.

Proclamation
Declaring certain Indian
Reserves to be placed under
the provisions of the Act
13 & 14 Vict: Ch:74

Recorded 2nd April 1856
In Lib. C.M. Folio 161

Tho. Amiot
Depy Regr

Edmund Walker Head

Province of Canada

Victoria by the grace of God of United Kingdom of Great Britain and Ireland, Queen Defender of the Faith & c. & c.

To all to whom these Presents shall come ..... Greetings

A Proclamation

Whereas in and by an act of the Parliament of the Province passed in the Session thereof held in the thirteenth and fourteenth years of Our Reign, Chaptered amongst the Public General Acts of the Session in which the same was passed, as Chapter Seventy-four and intitled " An Act for the protection of the Indians in Upper Canada, from imposition, and the property occupied or enjoyed by tham from trespass and injury" - it is amongst other things in effect enacted, That the provisions in the tenth, eleventh and twelfth Sections in the said Act contained should extend and be construed to extend to such Indian Lands only in Upper Canada as the Governor of our said Province for the time being should, from time to time by Proclamation under the Great Seal thereof, think fit to declare and make subject to the same, and so long only as such Proclamation should remain unrevoked and in full force.- And whereas it has been deemed expedient by Our Governor of Our said Province that the said provisions should be extended to the following Lands, that is to say:

1st The Reserve adjoining the Town of Southampton bounded on the West by a straight line running due North from the river Saugeen at the spot where it is entered by a ravine immediately to the West of the Village and over which a bridge has recently been constructed to the shore of Lake Huron, - on the South by the aforesaid Northern limit of the lately surrendered strip.- on the East by a line drawn from the spot upon the Coast at a distance of about nine miles and a half from the Western Boundary aforesaid and running parallel thereto until it touches the aforementioned Northern limit of the recently surrendered strip.

2nd The Reserve at Chief's Point, Lake Huron, bounded on the East by a line drawn from a spot half a Mile up the Sable River and continued in a Northerly direction to the Bay and upon all other sides by the Lake.

3rd The Reserve at Owen's Sound, bounded on the South by the Northern limit of the continuation of the Strip recently surrendered,- on the North West by a line drawn from the North Easterly Angle of the aforesaid Strip (as it was surrendered in 1851) in a North Easterly direction,- on the South East by the Sound extending to the Southern limit of the Caughnawaga settlement,- on the North by a line two miles in length and forming the said Southern limit.

4th The Reserve at Cape Crocker bounded on three sides by Georgian Bay, on the South West Side by a line drawn from the bottom of Nochemowaning Bay to the Mouth of the Sucker River.

5th The Reserve at Colpoy's Bay, a block of land containing 6000 acres and including the Village and bounded on North by Colpoy's Bay.

Now therefore know Ye, that We taking the same into our Royal consideration, and approving of the extension of the said provisions of the said Act to the said lands hereinbefore described, do hereby declare and make all and singular the said lands hereinbefore mentioned and every part thereof, subject to the said provisions in the said tenth eleventh and twelfth Sections of the said Act contained, according to the form of the Statute in such case made and Provided - Of all which premises the Superintendent General, the Assistant Superintendent General, and every Subordinate Superintendent of Indian Affairs, the Commissioners in the above recited Act mentioned and referred to, and all Our Justices, Sheriffs, Bailiffs, Constables and other Officers of Justice and all others Our Liege Subjects, are hereby required to take notice and to govern themselves accordingly.

In testimony whereof We have caused these Our Letters to be made Patent and the Great Seal of Our said Province of Canada to be hereunto affixed, Witness Our Trusty and Well Beloved Sir Edmund Walker Head, Baronet, Governor General of British North America and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick and the Island of Prince Edward and Vice Admiral of the same &&&
At Toronto this Eighteenth day of March in the year of Our Lord one thousand eight hundred and fifty six and in the nineteenth year of Our Reign.

By Command

Proclamation

Declaring certain Indian Reserves to be placed under the provisions of the Act 13 & 14 Vict: Ch: 74.

Recorded 2nd April 1856 In Lib. C.M. Folio 161.

Deputy Regr

by the Northern limit of the continuation of the Strip recently surrendered from the North West by a line drawn from the North Easterly Angle of the aforesaid Strip (as it was surrendered in 1851) in a North Easterly direction, — on the South East by the Sound extending to the Southern limit of the Caughnawaga settlement on the North by a line two miles in length and forming the said Southern limit. —

4th. The Reserve at Cape Croker bounded on three sides by Georgian Bay, on the South West side by a line drawn from the bottom of Nodenoonsing Bay to the Mouth of the Sucker River —

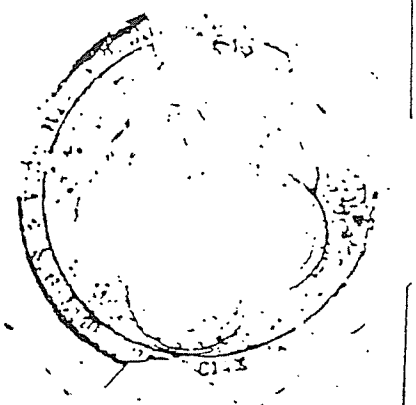
5th. The Reserve at Colpoy's Bay, a block of land containing 6000 acres and including the Village and bounded on the North by Colpoy's Bay —

Now Therefore Know Ye, that We taking the same into Our Royal Consideration, and approving of the extension of the said Provisions of the said Act to the said Lands hereinbefore described, do hereby declare and ordain that the said Lands hereinbefore mentioned and every part thereof, shall be subject to the said provisions in the said tenth eleventh and twelfth sections of the said Act contained, according to the form of the Statute in such case made and provided — Of all which Premises the Superintendent General, the Assistant Superintendent General, and every Subordinate Superintendent of Indian Affairs, the Commissioners in the above recited Act mentioned and referred to, and all Our Justices, Sheriffs, Bailiffs, Constables and other Officers of Justice and all others Our Liege Subjects, are hereby required to take notice and to govern themselves accordingly —

In testimony whereof, We have caused these Our Letters to be made Patent and the Great Seal of Our said Province of Canada to be hereunto affixed. Witness Our Trusty and Well Beloved Sir Edmund Walker Head, Baronet Governor General of British North America and Captain General and Governor in Chief in and over Our Provinces of Canada Nova Scotia New Brunswick and the Island of Prince Edward and Vice Admiral of the same &c — &c — &c — At Toronto this Eighteenth day of March in the year of Our Lord one Thousand eight hundred and fifty six and in the nineteenth of Our Reign. —

By Command —

Geo. E. Cartier
Secretary —



Province of Canada

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith &c &c &c

To all to whom these Presents shall come Greeting:

A Proclamation

Whereas in and by an Act of the Parliament of the Province of Canada passed in the Session thereof held in the thirteenth and fourteenth years of Our Reign, Chaptered amongst the Public General Acts of the Session, in which the same was passed, as Chapter Seventy four and intituled "An Act for the protection of the Indians in Upper Canada, from imposition, and the property occupied or enjoyed by them, from trespass and injury," it is amongst other things in effect enacted, That the provisions in the tenth, eleventh and twelfth Sections in the said Act contained should extend and be construed to extend to such Indian Lands only in Upper Canada as the Governor of the said Province for the time being should, from time to time, by Proclamation under the Great Seal thereof, think fit to declare and make subject to the same, and so long only as such Proclamation should remain unrevoked and in full force. And whereas it has been deemed expedient by Our Governor General of Our said Province, that the said provisions should be extended to the following Lands that is to say:

1st The Reserve adjoining the Town of Southampton bounded on the West by a straight line running due North from the River Saugeen at the Spot where it is entered by a ravine immediately to the West of the Village and over which a bridge has recently been constructed to the Shore of Lake Huron, — on the South by the aforesaid Northern limit of the lately surrendered strip — On the East by a line drawn from the Spot upon the Coast at a distance of about [illegible] Nine Miles and a half from the Western Boundary aforesaid and running parallel thereto until it touches the aforementioned Northern limit of the recently surrendered strip

2nd The Reserve at Chief's Point, Lake Huron, bounded on the East by a line drawn from a Spot half a Mile up the Saugeen River and continued in a Northerly direction to the Bay and upon all the other sides by the Lake.

No. 331.

KNOW ALL MEN BY these presents that we the undersigned Chiefs and Warriors of the Caughnawaga Band of Indians now residing on that piece or parcel of land described and marked on Messrs. Dennis and Boulton's map of the Saugeen Indian Peninsula as the "Reserve of the Caughnawaga Indians a copy of which is hereunto annexed. In consideration of the sum of Six Hundred and seventy two pounds and two Shillings of lawful money of Canada to us in hand paid by the *Indian Department* of the said Province, the receipt whereof we do hereby acknowledge. Have by these presents sold assigned transferred and set over unto the said Indian Department the said "Reserve of the Caughnawaga Indians—Saving and excepting and always reserving out of the same Three hundred acres of land (for the benefit of three families of the said Band of Indians (intending residents on the same) to be chosen decided upon and appointed by the said Indian Department.

To have and to hold the same unto the said Department upon the trusts and for like purposes of other lands held by the said Department for the benefit of Indians.

In Witness Whereof we have hereunto set our hands and seals at the town of Sydenham in the County of Grey this Fourth day of September in the year of our Lord one thousand eight hundred and fifty six

In Presence of
ISAAC MAY
M. ANDERSON.
Certified to have been Executed in my presence
T. G. ANDERSON
S. I. A.

ATONWA x TEHAIASE	[L.S.]
ATONWA x TEKAISNWAONTERE	[L.S.]
THAWIS x SAIA8ONNITAKEREN	[L.S.]
WISHE x SAKSTISHOTTHA	[L.S.]
SAK x SAKSHENTHETHA	[L.S.]
JOHN x KALAHENDAT	[L.S.]
RORON x THARONTAWAKON	[L.S.]
SARA x THEKANIATAREKON	[L.S.]
SOSE x KETONHA	[L.S.]
SOSE x ORAKWAKEN	[L.S.]
SA8ATIS x TE8ENNITOKEN	[L.S.]
HENNIAS x KARAKWASA	[L.S.]
SAKSARIE x OTSETOKON	[L.S.]

TORONTO 6th Sept 1856.

SIR,—I have the honour to report to you that in obedience to your instructions of the 2nd Instant I proceeded to Owen Sound and have now to Enclose a quit claim from the Caughnawaga Indians, signed by thirteen of the Heads of families, releasing to the Dept. all their right and title to that part of the Saugeen Peninsula which had been reserved for their use and benefit. Excepting Three hundred Acres from which Three families decline removing, such Three hundred Acres to be allotted to them in such part as the Dept. may see fit.

They are desirous that the amount of £672.2/ Cy. should be sent to Mr. Alex. McNabb for distribution among them with as little delay as possible so that they may be enabled to remove at once.

I have the honor to be Sir
Your Most Obedient Humble Servant
T. G. ANDERSON
S. I. A.

R. T. PENNEFATHER ESQ
Supt. Genl. Toronto, C. W.

No. 79.

To all to whom these presents shall come :—

Be it known that whereas Peter Jones Kegedonce, Geoge A. Tabegwun, John Thomas Wabatick, John Snake, Abner Elliot, John Johnson and Charles Keeshick, on the part of the Chippewa Indians residing at Nawash, Owen Sound ; and Baptist Beauvin, a Mohawk Indian, residing on the Caughnawaga Tract, on the north shore of Owen Sound, on the part of the three Caughnawaga families who remain located on said tract, were appointed by their respective people at a full Council to proceed as a deputation to Toronto, for the purpose of treating with their Father the Governor General for a surrender of the reserve which they respectively occupy.

And whereas the contemplated treaty between the Crown and the said Nawash Indians for the surrender of the aforesaid reserve has been this day made and executed, it is deemed by all the parties named desirable that the said Caughnawaga families should also surrender and yield up to the Crown the lands which they occupy in the aforesaid Caughnawaga settlement, and remove to Cape Croker with the Nawash Band, and it is therefore agreed upon by all the contracting parties that the said three Caugnnawaga families consisting of fifteen persons, including men, women, and children, shall and hereby do yield up the said three lots, to wit: thirteen, seventeen, and eighteen, to the Crown, for the purpose of being sold in common with other surrendered land, for the benefit of the Chippewa Indians of Nawash, and will remove therefrom when required by the Governor General to do so, and the members of the Nawash Tribe do hereby admit the said Caughnawaga Indians to a full share and participation in all revenues and privileges enjoyed or to be enjoyed by the said Nawash Band.

It is further agreed that the heads of the said three Caughnawaga families, viz., Baptiste Beauvin, Louis Beauvin and Michel Montour shall be entitled to receive out of the first payment by the purchasers of said land the appraised value of their respective buildings and other improvements, also the further sum of ten pounds per head to each member of their respective families, and on removing to Cape Croker they will be located on twenty-five acre lots in like manner as is agreed upon by the treaty already named. Provided always, that this agreement shall not be held as binding unless the majority of the Nawash Band concur therein, which concurrence or dissent from it is required to be expressed before Richard Carney, Esquire, within one month from this date.

In Testimony Whereof, the parties hereunto affix their hands and seals, at Toronto, this ninth day of February, one thousand eight hundred and fifty-seven.

Read, explained through the interpreters. Signed, sealed and delivered in presence of us :
W. R. Bartlett,
Michael Turnor,
S. Y. Chesley.

Peter Jones Kegedonce, (totem). [L.S.]
George A. Tabagwun, (totem). [L.S.]
John T. Wabatick, (totem), [L.S.]
John Snake, (totem), [L.S.]
Abner Elliot, [L.S.]
John x Johnson, [L.S.]
Charles Keeshick, [L.S.]
Baptist x Beauvin. [L.S.]

Approved,
R. T. Pennefather,
Supt. Gen'l.

No. 80.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chiefs, Headmen, and Warriors of the respective bands of Ojibway Indians, located at the villages of Saugeen and Nawash, on the Saugeen Peninsula, that for and in consideration of the natural love and affection which we have for our Indian brothers located on the reserve on Colpoy's Bay, on said Peninsula, have hereby agreed to give, grant, alien, release and confirm, and by these presents we do give, grant and bequeath unto our Indian brothers on the said reserve, and to their heirs and assigns forever, all and singular our interest in that certain parcel or tract of land situate, lying and being at the head of Colpoy's Bay, on the said Peninsula, now in occupation of our Indian brothers, known as the Colpoy's Bay Band of Indians, as shown on the drafts or plans of the said Saugeen Peninsula, together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the same unto the said band of Indians, their heirs or assigns, to their own use and behoof forever.

We, the aforesaid Chiefs, Headmen and Warriors, do make this gift subject to the approval of our Great Father the Governor General. At the same time we hope that our Great Father will sanction this our bequest to our Indian brothers, and will confirm it unto them by such writings as may be considered necessary for the purpose.

IN WITNESS WHEREOF we have hereunto affixed our names and totems this sixteenth day of January, one thousand eight hundred and fifty-seven.

Signed, and executed, in presence of:
THOMAS STAG, *Chief.*
JOHN H. BEATTY, *Intpr. and Writer.*
JOHN SMITH, *Chief.*
JOSEPH JONES.
PETER YORK, *Intpr.*

Owen Sound Indians:
PETER JONES x KEGEDONCE, (totem)
GEORGE x ARTHUR TABEQUWN, (totem)
JOHN x JOHNSTON, (totem)
JOHN THOMAS x WAHBAHTICK, (totem)
JAMES x NAWASH, (totem)
CHARLES KEESHICK, (totem)
LOUIS x JOHNSTONE,
JOSEPH NAH x BEQUON,
PETER x WABIZE,
WILLIAM x WANKEY,
FRANCIS x ONUHGEWUN,
PETER x KEESHICK,
DOMINICK x JOHSTON,
MOSES x MONEDOQUIWIS,
DANIEL x ELLIOTT,
DAVID x NAWASH,
THOMAS x SOLOMON,
DAVID T. x WAHBAHTICK,
JOSEPH x MESHEKAKAKE,
ABNER x ELLIOTT,
JOHN x SNAKE,
WILLIAM ANGUS,

Signed and executed in our presence:
JOHN H. BEATTY,
Interpreter and Writer,

JOHN SMITH, *Chief,*
JOSEPH JONES.

Saugeen Indians:
CHIEF ALEXANDER x MADWAYOSH, (totem)
CHIEF JOHN x JOHNSTON, (totem)
CHIEF JOHN x WADAUGEGWON, (totem)

Warriors:
THOMAS x PAPEWMOSH,
JOHN x AUGE-GAW-BOW,
JOHN x MANE-DO-WEB,
THOMAS x NAU-WAN-KWA,
JOHN x NA-DWASHUMD,
JOSEPH x AUSHANWANSEGA,
SIMPSON x QUAKEGESHIG,
CHARLES x NASHAWKEWAWEAONG,
JACOB x MESHAUBOOG,
HENRY x MADWAYOSH,
AARON x PANYASHEGWAWDENG,
JOHN x AU-WON-AU-GOAT,
ISAAC x SANEGWABISH,
JAMES x ANDANSONOGOKOG,
KANBE x KE-SHE-QUOT,
JOHN x NADWASHEMUD,
JAMES x WEGNOOS,
JOHN x WESLEY.

Approved:

R T PENNEFATHER.

No. 82.

To all to whom these presents shall come:

We, the undersigned Chiefs and Warriors, on behalf of the people of the Newash Band of Chippewa Indians residing at Owen Sound, send greeting.

Whereas we and our people having the fullest confidence in the paternal care and good intentions of our kind Father the Governor General towards all his Indian children, and foreseeing the great benefits that we and our posterity are likely to derive from the surrender of a large portion of our reserve, in the year of Our Lord one thousand eight hundred and fifty-four, we have, after mature consideration, in several full councils held at our village of Newash, arrived at the conclusion that it will be to our advantage to place at the disposal of Our Father the Governor General the land upon which we now reside, commonly known as the Newash or Owen Sound Reserve, in order that he may cause the same to be sold for our benefit. Be it therefore known that we, Peter Jones Kegedonce and George A. Tabegwun, Sachem Chiefs, John Thomas Wabatick, John Snake, Abner Elliot, John Johnson and Charles Keeshick, Interpreter, Councillors and Principal Men of the Newash Band, for and on behalf of our said tribe, do hereby surrender, make over and convey to Her Most Gracious Majesty Queen Victoria, Her heirs and successors, all and singular that certain tract or parcel of land and premises situate, lying and being on the westerly side of the Owen Sound in the Georgian Bay, known as the Newash Reserve, and containing about ten thousand acres of land, be the same, more or less, which tract of land is butted and bounded and otherwise known and described as follows, viz: On the north-east by the water of Owen Sound, on the north-west by the head line road between the seventeenth and eighteenth concessions of the Township of Keppel and the southerly boundary of the lands lately occupied by the Caughnawaga Indians, on the south-west by a straight line as represented by Mr. Rankin's plan of survey, being the boundary between said reserve and the said Township of Keppel, and on the south-east by the head line between concession A of Keppel and the strip of land surrendered in the year one thousand eight hundred and fifty-one.

To have and to hold the said land and premises, with all and singular its hereditaments and appurtenances, to Her said Majesty Queen Victoria, Her heirs and successors forever, to the intent and purpose that Her said Majesty, her heirs and successors, may sell and dispose of the same for the sole use and benefit and behoof of us, the aforesaid Newash Band of Indians and our posterity forever, subject, however, to such deductions for defraying the expense of survey and the subsequent management of the sale of the land as are incidental by a general rule to all other Indian lands, and also to the following conditions, viz.:—

1st. That so soon as the above named reserve shall be sold and we are required to remove from it there shall be assigned to each Indion family, constituted as such before the year one thousand eight hundred and sixty, a lot of twenty-five acres, surveyed for the purpose, in our reserve at Cape Croker, exclusive occupation and right of cultivation of such lot is thus assigned to each Indian family, so long as the unity of the family is retained, but upon the breaking up of any such family or the extinction of its males or its separation from the tribe by migration it will be competent for the Governor General to re-assign or reserve any lot so vacated for the best advantage of the tribe at large.

2nd. That the sum of one thousand pounds shall be advanced from the proceeds of the first sale of the aforesaid tract for the erection of frame dwelling houses at Cape Croker, of dimensions similar to those we now occupy at Newash, to be built under the direction of the Indian Department, and that afterwards from three to five houses shall be erected annually at said place until each individual having a right to a house shall be supplied, the expense of these last mentioned to be borne from our annuity or interest funds.

3rd. That each individual of the tribe now participating in our annuity shall receive ten pounds from the proceeds of the first instalment paid on the land to be sold, and the tribe shall further be entitled hereafter to receive from the principal arising from such sale (should circumstances render it necessary) a sum sufficient to build a church or for such other permanent improvement as the Governor General may approve of.

4th. That one acre be reserved and set apart for a burying ground.

The foregoing arrangement must be and remain null and void to all intents and purposes, unless it receive the assent of His Excellency the Governor General in Council.

In Testimony Whereof, we, the aforesaid Chiefs and Councillors, have hereunto affixed our names and totems in signification of our assent and concurrence to the foregoing surrender, at the City of Toronto, this ninth day February, in the year of Our Lord one thousand eight hundred and fifty-seven.

Read, explained through the interpreter, signed, sealed and delivered in presence of us Michael Turnor, W. R. Bartlett, E. J. Chesley.	R. T. Pennefather, *Supt. Genl.*,	[L.S.]
	S. Y. Chesley,	[L.S.]
	Peter Jones Kegedonce, (totem)	[L.S.]
	George Arthur Tabegwun, (totem)	[L.S.]
	John Thomas Wabatick, (totem)	[L.S.]
	John Snake, (totem)	[L.S.]
	Abner Elliott,	[L.S.]

COPY *of a Report of a Committee of the Honorable the Executive Council, dated the 18th February, 1857, approved by His Excellency the Governor General in Council on the same day.*

On a report of the Superintendent General of Indian Affairs submitting for ratification by Your Excellency in Council a surrender to the Crown dated 9th February, 1857, from the Chiefs and Councillors of the Newash Band of Chippewa Indians residing at Owen Sound, in the Georgian Bay, of the tract or parcel of land and premises situate on the westerly side of the Owen Sound, known as the Newash Reserve, and containing about ten thousand acres of land, upon certain conditions set forth in the deed of surrender.

The Superintendent General submits for the reasons stated in his report that it would be for the advantage both of the Indians themselves and the country at large to accept this surrender, with a view to the tract being immediately surveyed and laid open for settlement.

The Committee recommend that the surrender be accepted and enrolled in the offices of the Commissioner of Crown Lands and of the Provincial Registrar, with a view to the tract being immediately surveyed and laid open for settlement, as submitted by the Superintendent General of Indian Affairs.

Certified,

WM. H. LEE,
C. E. C.

To the Honorable,
The Provincial Registrar,
&c., &c., &c.

PROVINCIAL REGISTRAR'S OFFICE.
TORONTO, 20th February, 1857.

I hereby certify that the within surrender, together with the Minute in Council hereto annexed, have been entered upon the records of this office in Lib. C. S., Fols. 164, 165, 166, 167.

THO. AMIOT,
Deputy Registrar.

No. 93.

KNOW ALL MEN BY THESE PRESENTS that we, the undersigned Chiefs and principal men of the band of Indians known as the Colpoy's Bay Band, now residing at Colpoy's Bay in the County of Grey and Province of Canada, for certain good reasons us thereunto moving, have, for ourselves as well as for every member of our said band, ceded and by these presents do cede, relinquish, surrender and yield up to Her Most Gracious Majesty Queen Victoria and Her successors all our right, title, interest and claim whatsoever that we now have or may hereafter pretend to have to a certain tract of land containing six thousand acres situate lying and being on the south-east side of Colpoy's Bay, in the Township of Keppel, County of Grey and Province of Canada, which said tract of land was set apart for us and reserved to our sole use by the Chippewa Indians of Saugeen and Owen Sound.

NOW KNOW YE that we have been moved to make the surrender above alluded to with the view of removing from our present place of residence to join our brethren, the Chippewas of Lakes Huron and Simcoe on the Christian Island.

We do therefore with the advice and consent of our said band in council assembled hereby surrender in trust to be sold for our benefit the aforementioned six thousand acres of land upon the following conditions, that is to say:—

1st. The land to be sold by auction without conditions of settlement, the terms of sale to be one-fourth of the purchase money down and the remainder in six equal annual instalments, bearing interest at six per cent, but no timber to be cut except by actual settlers, on the condition on which timber on Crown lands may now be cut, until purchase money is paid up in full, and the proceeds, after deducting cost of survey, sale and other incidental expenses, to be funded for the benefit of the Colpoy's Bay Band of Indians.

2nd. The value of the individual and public improvements to be required of the purchaser at the time of sale, in order that the amount may be paid over to the Indians.

IN WITNESS WHEREOF we have hereunto set our hands and seals with our totems at Colpoy's Bay this sixteenth day of August, in the year of Our Lord one thousand eight hundred and sixty-one.

Signed, sealed and delivered in our presence, being first read, interpreted and explained:—
W. R. BARTLETT, *S.I.A.*,
F. T. WILKES, *J., C. Crt. of Grey.*

JOSEPH JONES, *Chief*, [L.S.]
JOHN SMITH (totem), *Chief*, [L.S.]
WALKER SMITH (totem), *Councillor*, [L.S.]

Warriors:
THOS. JONES (totem),
ISAAC WAHBEGENEES (totem),
WILLIAM SAHGEWEBE (totem),
JAMES BARREL,
CHAS. MEGIS (totem),
LUKE SNAKE (totem).

We do hereby certify that the foregoing surrender of the tract called Colpoy's Bay Reserve, containing six thousand acres, has been assented to by the Chiefs of the band of Indians known as the Colpoy's Bay Band at a meeting of their council this day assembled on the said reserve, summoned for that purpose according to their rules and in our presence.

Dated this seventeenth day of August, A.D., 1861.

F. T. WILKES,
Judge, County Crt., County of Grey.

W. R. BARTLETT, S.I.A.

COPY *of a Report of the Committee of the Honorable the Executive Council, approved by His Excellency the Governor General in Council on the 10th September,* 1861.

On a memorandum dated 28th August, 1861, from the Honorable the Commissioner of Crown Lands, submitting for acceptance by Your Excellency in in Council, under the Act 23rd Vic., Cap. 151, Sec. 4, Art. 2, a surrender bearing date 16th August, 1861, by the Colpoy's Bay Indians, of six thousand acres of land, situate in the Township of Keppel, in the County of Grey, U.C.

The Committee advise that the surrender be accepted and enrolled in the usual manner in the offices of the Provincial Registrar and Commissioner of Crown Lands.

Certified,

WM. H. LEE, *C.E.C.*

To the Honorable,
The Commissioner of Crown Lands,
&c., &c., &c.

PROVINCIAL REGISTRAR'S OFFICE,
QUEBEC, 12th September, 1861.

I hereby certify that this surrender has been entered on the records of this office in Lib. C.S., Folio 221.

WM. KENT,
Deputy Registrar.

No. 213.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chief and Principal Men of the Chippewa Indians of Nawash, resident on our reserve at Cape Croker, in the County of Bruce, in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in council assembled, do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen, Her heirs and successors forever, all and singular that certain parcel or tract of land and premises situate, lying and being in the County of Grey and Province of Ontario, containing by admeasurement fourteen hundred acres, be the same more or less, and being composed of that certain island known as "White Cloud" Island, situate at the entrance of Colpoy's Bay, in the County and Province aforesaid.

To have and to hold the same unto Her said Majesty the Queen, Her heirs and successors forever, in trust, to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, in equal proportions with the Chippewas of Saugeen.

And we, the said Chief and Principal Men of the said the Chippewas of Nawash, do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of said White Cloud Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this fourteenth day of January, in the year of Our Lord one thousand eight hundred and eighty-five.

Signed, sealed and delivered in the presence of, after having been read over, interpreted and explained:
FREDK. LAMORANDIÈRE, *Secy.*,
WILLIAM MCGREGOR, *Chief*,
WILLIAM ANGUS, *Chief.*

PETER SKEDONE, [L.S.]
WM. JOHNSON, [L.S.]
LEWIS NADGEWON, [L.S.]
CHARLES JONES KEGEDONCE, [L.S.]
JOSEPH J. KEGEDONCE, [L.S.]
PAUL JOHNSON, [L.S.]
SOLOMON J. KEGDONCE, [L.S.]
ELIJAH JONES, [L.S.]
JAMES TOMAN, [L.S.]
JAMES SOLOMON, [L.S.]
JOHN AKWENZEE, [L.S.]
ABNER ELLIOTT, [L.S.]
WILLIAM WOHKAS, [L.S.]
ABRAM SKY, [L.S.]
FRANK NADGWON, [L.S.]
PETER ELLIOTT, [L.S.]
CHARLES MEGRISS, [L.S.]
LOUIS SOLOMON, [L.S.]

DOMINION OF CANADA,
PROVINCE OF ONTARIO,
COUNTY OF GREY.
To Wit:

Personally appeared before me Frederick Lamorandière, of the Village of Cape Croker, in the Province of Ontario, and Wm. B. McGregor, Chief of the said Band of Indians.

And the said Frederick Lamorandière for himself saith:

That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Cape Croker Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said release or surrender.

And the said Wm. B. McGregor says:

That the annexed release or surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their rules, and held in the presence of the said Frederick Lamorandière.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the reserve of the said Band of Indians or interested in the land mentioned in the said release or surrender.

That he is a Chief of the said Band of Indians and entitled to vote at the said meeting or council.

Sworn before me by the said deponents at the Town of Owen Sound, in the County of Grey, this twenty-fourth day of Feb., A.D. 1885.

FRED. LAMORANDIERE,
WM. B. McGREGOR.

HENRY MACPHERSON,
J. C. C., C. Grey.

Recorded 8th April, 1885.
Lib. 95, Folio. 572.

L. A. CATELLIER,
Dep. Registrar-General of Canada.

No. 214.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chief and Principal Men of the Chippewa Indians of Saugeen, resident on our reserve at Saugeen, in the County of Bruce, in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in council assembled, do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen, Her heirs and successors forever, all and singular that certain parcel or tract of land and premises situate, lying and being in the County of Grey and Province of Ontario, containing by admeasurement fourteen hundred acres, be the same more or less, and being composed of that certain island known as "White Cloud" Island, situate at the entrance of Colpoy's Bay, in the County and Province aforesaid.

To have and to hold the same unto Her said Majesty the Queen, Her heirs and successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, in equal proportions with the Chippewas of Nawash.

And we, the said Chief and Principal Men of the said the Chippewas of Saugeen do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of said White Cloud Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this seventeenth day of January, in the year of Our Lord one thousand eight hundred and eighty-five.

Signed, sealed and delivered in the presence of, after having been first read over, interpreted and explained.
JOHN CREIGHTON, *Agent*,
WM. B. WALKER, *Interpreter*.

Chief HENRY H. MADWAYOSH, his [L.S.]
Chief JOHN x KADAGEGWUN, mark. [L.S.]
DAVID ROOT, [L.S.]
JOHN GEORGE, [L.S.]
JOHN x KAWAQUM, his mark. [L.S.]
SIMSON x QUAGEGEZHIG, his mark. [L.S.]
JOHN x JAMES, his mark. [L.S.]
RALPH x JOHNSON, his mark. [L.S.]
THOMAS x NAGUM, his mark. [L.S.]
SOLOMON E. JAMES, [L.S.]
CEPHAS KAHBEEJE, [L.S.]
HYRAM AHYAHBA, [L.S.]
JNO. x A. KEWANZEE, his mark. [L.S.]
JOSHUA x MADWISHIMIND, his mark. [L.S.]
ANSON x PERITO, his mark. [L.S.]
ALEX. x MANDOWOB, his mark. [L.S.]
THOMAS MANDEWOB, [L.S.]
THOMAS x KAHGUA, his mark. [L.S.]
JOHN K. AHYANBA, [L.S.]
JOSHUA x AHYANBA, his mark. [L.S.]
ALEXANDER x MANDEWAN, his mark. [L.S.]
PETER x PETANAGUOD. his mark. [L.S.]

DOMINION OF CANADA,
PROVINCE OF ONTARIO,
COUNTY OF GREY.
To Wit:

Personally appeared before me John Creighton, of the Village of Saugeen, in the Province of Ontario, Indian Agent, and Henry H. Madwayosh, Chief of the said Band of Indians.

And the said John Creighton for himself saith:

That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Saugeen Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superindent-General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said release or surrender.

And the said Henry H. Madwayosh says:

That the annexed release or surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their rules, and held in the presence of the said John Creighton.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the reserve of the said Band of Indians or interested in the land mentioned in the said release or surrender.

That he is a Chief of the said Band of Indians, and entitled to vote at the said meeting or council.

Sworn before me by the deponents John Creighton and Henry H. Madwayosh, at the Town of Owen Sound, in the County of Grey, this 24th day of Feby., A. D. 1885.

JOHN CREIGHTON,
HENRY H. MADWAYOSH.

HENRY MACPHERSON,
J. C. C. C. GREY.

Recorded 4th April, 1885.
Lib. 95, Fol. 571.

L. A. CATELLIER,
Dep. Registrar-General of Canada.

499(a)

Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of The Chippewa Indians of Nawash resident on our Reserve at Cape Croker in the County of Bruce in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being ~~in the~~ in the County of Grey and Province of Ontario containing by admeasurement Fourteen hundred acres be the same more or less and being composed of that certain Island known as "White Cloud" Island situate at the entrance of Colpoys Bay in the County and Province aforesaid.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, in equal proportions with the Chippewas of Sangeen.

AND WE, the said Chief and Principal men of the said the Chippewas of Nawash do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the Sale of said White Cloud Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this 14th day of January in the year of Our Lord one thousand eight hundred and eighty five

Signed, Sealed and Delivered, in the presence of

after having been read over interpreted and explained.

(Sd) Fred R. Lamoreaudiere Notary.

William McGregor, Chief.

William Angus, Chief.

(Sd) Peter Kedone ⊙
Wm Johnson ⊙
Louis Madgewon ⊙
Charles Jones Kegedonce ⊙
Joseph Kegedonce ⊙
Paul Johnson ⊙
Solomon J. Kegedonce ⊙
Elijah Jones ⊙
James Johnson ⊙
James Solomon ⊙
John Akwegon ⊙
Abner Elliott ⊙
William Wobkay ⊙
Aaron Sky ⊙
Frank Madjuron ⊙
Peter Elliott ⊙
Charles Angus ⊙
Louis Solomon ⊙

33

499(b)

Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of The Chippewa Indians of Saugeen

resident on our Reserve at Saugeen in the County of Bruce in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being ~~in the~~ in the County of Grey and Province of Ontario containing by admeasurement Fourteen hundred acres be the same more or less and being composed of that certain Island known as "White Cloud" Island situate at the entrance of Colpoys Bay in the County and Province aforesaid.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to sell _____ the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the sale _____ thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever. in equal proportions with the Chippewas of Kawash

AND WE, the said Chief and Principal men of the said the Chippewas of Nawash do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of Parts White Blood Islands

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this 17th day of January in the year of Our Lord one thousand eight hundred and eighty five

Signed, Sealed and Delivered, in the presence of

after having been first read over interpreted and explained

(Seal) John Brighton Agent

Wm B. Walker, Interpreter.

(Seal) Chief Henry H. Madwagoshe

John Madaguenin his mark

David Root

John George

John his X Kawaguam mark

Simon his X Quaqueghig mark

John his X James mark

Ralph his X Johnson mark

Thomas his X Magun mark

Solomon C. James

Orpheus Kalsbeye

Hyram Ahyaba

Ino his X a Kewaugee mark

Joshua his X Madwashum mark

Anson his X Perto mark

Alex his X Mandowot mark

Thomas Mandewot

Thomas his X Kaliqua mark

John Kahayba

Joshua his X Ahyamba

Alex his X Mandewam mark

Peter his X Petonama mark

Sup. with original enclosures to Dept. of Ind. Affairs 19th March 1885

On a Memorandum dated 4th March 1885, from the Superintendent General of Indian Affairs, submitting for your Excellency's acceptance Surrenders made by the Chippewa Indians of Cape Croker and the Chippewa Indians of Saugeen respectively - (both Bands occupy Reserves on the Saugeen Peninsula) - of White Cloud Island situated at the entrance of Colpoy's Bay in the County of Bruce, Province of Ontario, in which the Indian Bands have a joint interest.

The Minister states that the Surrenders have been made with a view to the Island covered thereby being sold for the benefit of the Indians; and the deeds having been

executed

executed and attested in accordance with the provisions of the Indian Act.

The Committee recommend that the Surrenders be accepted by your Excellency accordingly.

John Macdonald

App

Laudanum

9. 3. 85.

No. 222.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chief and Principal Men of the Chippewas of Nawash, resident on our reseeve at Cape Croker, in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in council assembled, do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lady the Queen, Her heirs and successors forever, all and singular, those certain parcels or tracts of land and premises situate, lying and being in the Georgian Bay and Lake Huron and Province of Ontario, containing by admeasurement, be the same more or less, and being composed of all the islands owned by the said Band in Lake Huron and Georgian Bay, and known as the Saugeen Fishing Islands and Cape Hurd Islands, and extending from Chief's Point, Lake Huron, to Cabot's Head, Georgian Bay, excepting Barrier, Griffith and Hay Islands.

To have and to held the same unto Her said Majesty the Queen, Her heirs and successors forever, in trust, to sell the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all monies received from the sale thereof shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, along with the Chippewas of Saugeen.

And we, the said Chief and Principal Men of the said Chippewas of Nawash, do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said islands.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this seventh day of October, in the year of Our Lord one thousand eight hundred and eighty-five.

Signed, sealed and delivered in the presence of
J. W. JERMYN,
Indian Agent,
FREDK. LAMORANDIÈRE,
Secy.

W. B. MCGREGOR, [L.S.]
W. ANGUS, [L.S.]
ABNER ELLIOT, [L.S.]
JAMES IMAN, [L.S.]
JOSEPH WAHBEZE, [L.S.]
JOHN AKIWENS, [L.S.]
WILLIAM NOTSKOG, [L.S.]
PETER CHIGAHNO, [L.S]
JOSEPH AIKIMENSE. [L.S.]

DOMINION OF CANADA,
PROVINCE OF ONTARIO,
COUNTY OF GREY,
To Wit.

Personally appeared before me J. W. Jermyn, of Cape Croker, in the Co. of Bruce, in the Province of Ontario, Indian Agent, and Frederick Lamorandière, of the same place, Secretary of the Band of Indians, namely, the Chippewas of Nawash.

And the said John W. Jermyn for himself saith:

That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Chippewas of Nawash of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said release or surrender.

And the said Frederick Lamorandière says:

That the annexed release or surrender was assented to by said Band, and a majority of the male members of the said Band of Indians, of the full age of twenty-one years, then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their rules, and held in the presence of the said John W. Jermyn.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the reserve of the said Band of Indians, or interested in the land mentioned in the said release or surrender.

That he is Secretary of the said Band of Indians, and entitled to vote at the said meeting or council.

Sworn before me by the deponents John W. Jermyn and Frederick Lamorandière, at the Town of Owen Sound, in the County of Grey, this 20th day of Nov., A.D. 1885.

J. W. JERMYN,
FREDK. LAMORANDIÈRE.

SAMUEL J. CANE,
Junior Judge, County Court, County of Grey.

Recorded 14th January, 1886.
Lib. 106, Fol. 349.

L. A. CATELLIER,
Dep. Registrar-General of Canada.

No. 223.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chief and Principal Men of the Chippewas of Saugeen, resident on our reserve, in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in council assembled, do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen, Her heirs and successors forever, all and singular those certain parcels or tracts of land and premises situate, lying and being in the Georgian Bay and Lake Huron and Province of Ontario, containing by admeasurement , be the same more or less, and being composed of all the islands owned by the said Band in Lake Huron and Georgian Bay, and known as the Saugeen Fishing Islands and Cape Hurd Islands, and extending from Chief's Point, Lake Huron, to Cabot's Head, Georgian Bay, excepting Barrier, Griffith and Hay Islands.

To have and to hold the same unto Her said Majesty the Queen, Her heirs and successors forever, in trust, to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, along with the Chippewas of Nawash.

And we, the said Chief and Principal Men of the said the Chippewas of Saugeen, do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said islands.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this fifteenth day of October, in the year of Our Lord one thousand eight hundred and eighty-five.

Signed, sealed and delivered in the presence of
JAMES TELFER CONAWAY,
Indian Agent.

HENRY H. MADWAYOSH, *Chief*, [L.S.]
JOHN KADUHGEGWON, his x mark. *Chief*, [L.S.]
JOHN GEORGE, *Councillor*, [L.S.]
SIMPSON his x mark. QUAKESHIG, *Councillor*, [L.S.]
JOSHUA MEDUASHEMIND, *Councillor*, [L.S.]
DAVID ROOT, *Councillor*, [L.S.]
JOHN KEWAQUAHUM, *Councillor*, [L.S.]
ALEX. MADWAYOSH, *Interpreter*, [L.S.]
CEPHAS KAHBUGE, *Secretary*. [L.S.]

DOMINION OF CANADA,
PROVINCE OF ONTARIO,
COUNTY OF BRUCE.
To Wit:

Personally appeared before me James Telfer Conaway, of the Village of Southampton, in the County of Bruce, in the Province of Ontario, Indian Agent of the Chippewas of Saugeen, and Henry H. Madwayosh, Chief of the said Band of Indians.

And the said James Telfer Conway for himself saith:

That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Saugeen Indian Reserve, of the full age of twenty-one years, then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band, or interested in the land mentioned in the said release or surrender.

And the said Henry H. Madwayosh says:

That the annexed release or surrender was assented to by him and a majority of the male members of the said Band of Indians, of the full age of twenty-one years, then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose according to their rules, and held in the presence of the said James Telfer Conaway.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the reserve of the said Band of Indians, or interested in the land mentioned in the said release or surrender.

That he is Chief of the said Band of Indians, and entitled to vote at the said meeting or council.

Sworn before me by the said deponents James Telfer Conaway and Henry H. Madwayosh, at the Town of Walkerton, in the County of Bruce, this 17th day of October, A.D. 1885.

JAMES TELFER CONAWAY,
Indian Agent,
HENRY H. MADWAYOSH,
Chief.

J. J. KINGSMILL,
Judge, County Court, County of Bruce, Ontario.

Recorded 11th January, 1886.
Lib. 107, Fol. 251.

L. A. CATELLIER,
Dep. Registrar-General of Canada.

Dated October 13th 1855

Chippewas of Nawash

&

The Queen

Surrender

Islands in Lake

Huron & Georgian Bay

Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of

The Chippewas of
Saugeen

resident on our Reserve

in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcels or tracts of land and premises, situate, lying and being in the Georgian Bay and ~~in the County of~~ Lake Huron and Province of Ontario containing by admeasurement the same more or less and being composed of be

All the Islands owned by the said Band in Lake Huron and Georgian Bay and Known as the Saugeen Fishing Islands and the Hurd Islands and Extending from Chief's Point to Lake Huron to Cabots Head, Georgian Bay excepting Barrier, Griffith and Hay Islands

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to sell - - - - - - - - the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale - - - - - - - - thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever. along with the Chippewas of Nawash.

AND WE, the said Chief and Principal men of the said The Chippewas of Saugeen - - - - - do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this fifteenth day of October. in the year of Our Lord one thousand eight hundred and Eighty five.

Signed, Sealed and Delivered, (ago)
in the presence of
(Seal)
James Telfer Conaway
Indian Agent.

Henry H. Hadwayosh Chief (Seal)
his
John Kaduk yegion X mark. Chief (Seal)
John George, Councillor (seal)
his
Simpson X Quakeshing (seal)
mark.
Joshua Medamakemind (seal)
Councillor
David Root, Councillor (seal)
John Kewaquakem (seal)
Councillor
Alex. Hadwayosh (seal)
Interpreter.
Ephas Rabbage (seal)
Sioux

annexed

Certified a true copy
Hankondeuch
D. M.

DOMINION OF CANADA,
Province of Ontario
County of Bruce
To Wit:

Personally appeared before me, James Telfer Conaway of the Village of Southampton in the County of Bruce in the Province of Ontario Indian Agent of the Chippewas of Saugeen and Henry H. Madwayosh chief of the said Band of Indians.

AND the said James Telfer Conaway for himself saith:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Saugeen Indian Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Henry H Madwayosh

That the annexed Release or Surrender was assented to by him say: — — — — — — and a majority of the male members of the said Band of Indians, of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said James Telfer Conaway

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he — — — — is chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the said Deponents James Telfer Conaway and Henry H. Madwayosh at the Town of Walkerton in the County of Bruce this 17th day of October A.D., 1885.

(Sgd) J. L. Kingsmill
Judge County Court, County of Bruce

(Sgd) James Telfer Conaway
Indian Agent

Henry H Madwayosh
his
Chief
mark

Certified copy

Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of

the Chiefs and of
Naawash

resident on our Reserve at Cape Croker —

of Ontario in the Province
and Dominion of Canada,
for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, ~~that~~ certain parcels or tracts of land and premises, situate, lying and being in the Georgian Bay and ~~in the County~~ of Lake Huron and Province of Ontario containing by admeasurement the same more or less and being composed of be All the Islands Owned by the said Band in Lake Huron and Georgian Bay and known as the Sangeen Fishing Islands and Cape Hurd Islands and extending from Chiefs Point Lake Huron to Cabot Head — Georgian Bay excepting Barrie, Griffith and Hay Islands —

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever. along with the Chippewas of Saugeen

AND WE, the said Chief and Principal men of the said the Chippewas of Nawash do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this Seventh day of October in the year of Our Lord one thousand eight hundred and Eighty five.

Signed, Sealed and Delivered, in the presence of

J. W. Jermyn, Indian Agent

Fred K. Lamoreaux Secy

(sgd) Wm B. McGregor (Seal)

Wm Hayes (Seal)

Abner Elliott (Seal)

James Dean (Seal)

Joseph Wakbuje (Seal)

John A Simons (Seal)

William Montroy (Seal)

Peter Chyenhus (Seal)

Joseph A Kimense (Seal)

Certified true Copy

F. Lamoreaux Secy

(Seal)

DOMINION OF CANADA,

Province of Ontario

County of Grey

To Wit:

Personally appeared before me, John W Jermyn Gate Keeper, in the County of Bruce in the Province of Ontario, Indian Agent and Frederick Lamoureux Secretary ~~chief~~ of the said Band of Indians. namely the Chippewas of Rama.

AND the said John W Jermyn for himself saith :—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Chippewas of Rama present. of the full age of twenty-one years then

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Frederick Lamoureux

That the annexed Release or Surrender was assented to by say 5 said Band and a majority of the male members of the said Band of Indians, of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said John W Jermyn.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is Secretary ~~chief~~ of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the Deponents John W Jermyn and Frederick Lamoureux at the Town of Owen Sound in the County of Grey this 20th day of Nov A.D., 188 5.

(sgd) Samuel J Lane
Junior Judge County Court
County of Grey.

Examined S.S.

o/c J W Jermyn.

Fred H Lamoureux.

Certified a true copy
H Dankowlaw
Sec'y

Copy with original annexed to Supt. Gen. Indian Affairs 9 Dec 1885

On a Memorandum dated 28th November 1885 from the Hon. Sir Hector Langevin for the Superintendent General of Indian Affairs submitting Surrenders herewith made by the Chippewa Indians of Naiwish and the Chippewas of Saugeen respectively, the same being dated the 7th and 15th of October 1885, covering the Saugeen Fishing Islands and Cape Hurd Islands in Lake Huron and Georgian Bay, extending from Chief's Point, Lake Huron, to Cabot's Head, Georgian Bay, excepting the Islands known as Barrier, Griffith and Hay Islands. The Islands thus

Surrendered

surrendered to be sold by the Department for the benefit of the Cree Bands in question who are joint owners of the lands, and stating that the Surrenders have been made and duly attested in accordance with the requirements of "the Indian Act 1880."

The Committee submit the same for Your Excellency's approval

A. Campbell

app?

Lansdowne

3. 12. 85.

No. 225.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chief and Principal Men of the Chippewas of Saugeen, resident on our reserve in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said band in Council assembled, do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen, Her heirs and successors forever, all and singular that certain parcel or tract of land and premises situate, lying and being in Griffith's Island, in the County of Grey and Province of Ontario, containing by admeasurement sixteen acres, be the same more or less, and being composed of that certain portion of Griffith's Island aforesaid described as follows: Commencing at a post driven at the edge of the bank on the shore of the Island at a point north eleven degrees, west magnetically thirteen chains and seven links from the centre of the circular stone lighthouse tower; thence south eighty degrees, west magnetically six chains and ninety-one links; thence south ten degrees, east magnetically, twenty chains; thence north eighty degrees, east magnetically five chains and eighty links, more or less, to a post at the water's edge of the Georgian Bay; thence following the coast of the Island northward to the place of beginning.

To have and to hold the same unto Her said Majesty the Queen, Her heirs and successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, in connection with the Chippewas of Nawash.

And we, the said Chief and Principal Men of the said Chippewas of Saugeen do, on behalf of our people and for ourselves, hereby ratify and confirm and promise to ratify and confirm whatever the said Government may do or cause to be lawfully done, in connection with the sale and disposal of the said portion of Griffith's Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this 18th day of July, in the year of Our Lord one thousand eight hundred and eighty-six.

Signed, sealed and delivered in the presence of
JAMES T. CONAWAY.

HENRY H. MADWAYOSH, *Chief*, [L.S.]
JOHN KADEGON, *2nd Chief*, [L.S.]
JOHN GEORGE, [L.S.]
D. ROOT, [L.S.]
C. KAHBOGE, [L.S.]
JOHN KAHBOGE, [L.S.]
P. JOHN, [L.S.]
JOHN G. MASON, [L.S.]
J. C. JAMES, [L.S.]
J. CAMERON, [L.S.]
R. DION, [L.S.]

DOMINION OF CANADA,
PROVINCE OF ONTARIO,
COUNTY OF BRUCE.
To Wit:

Personally appeared before me Henry Madwayosh, of the Saugeen Indian Reserve, and James Telfer Conaway of the same place, Indian Agent, and the said Madwayosh being Chief of the said Band of Indians called Chippewas.

And the said Conaway for himself saith:

That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Chippewas of Nawash, of the full age of twenty-one years, then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose, and according to their rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band, or interested in the land mentioned in the said release or surrender.

And the said Madwayosh says:

That the annexed release or surrender was assented to by him and a majority of the male members of the said Band of Indians, of the full age of twenty-one years, then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their rules, and held in the presence of the said Madawayosh, on the 23rd day of July, 1886.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the reserve of the said Band of Indians, or interested in the land mentioned in the said release or surrender.

That he is a Chief of the said Band of Indians, and entitled to vote at the said meeting or council.

Sworn before me by the deponents Henry Madwayosh and James Telfer Conaway, at the Village of Saugeen, in the Co. of Bruce, this 28th day of July, A.D. 1886.

HENRY H. MADAWAYOSH,
JAMES T. CONAWAY.

WM. BARRETT,
Junior Judge C. C., Co. Bruce.

Recorded 6th October, 1886.
Lib. 106, Folio 522.

L. A. CATELLIER,
Dep. Registrar-General of Canada.

No. 226,

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned Chief and Principal Men of the Chippewas of Nawash, resident on our reserve in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said band in council assembled, do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen, Her heirs and successors forever, all and singular that certain parcel or tract of land and premises situate, lying and being in Griffith's Island, in the County of Grey and Province of Ontario, containing by admeasurement sixteen acres, be the same more or less, and being composed of that certain portion of Griffith's Island aforesaid described as follows: Commencing at a post driven at the edge of the bank on the shore of the island at a point north 11°, west magnetically 13 chains, 77 links from the centre of the circular stone light-house tower; thence south 80°, west magnetically 6 chains and 91 links; thence south 10°, east magnetically 20 chains; thence north 80°, east magnetically 5 chains and 80 links, more or less, to a post at the water's edge of the Georgian Bay; thence following the coast of the island northward to the place of beginning.

To have and to hold the same unto Her said Majesty the Queen, Her heirs and successors for ever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people; and upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever, in connection with the Chippewas of Nawash.

And we, the said Chief and Principal Men of the said the Chippewas of Nawash do, on behalf of our people and for ourselves, hereby ratify and confirm and promise to ratify and confirm whatever the said Government may do, or cause to be lawfully done, inconnection with the sale and dsposal of the said portion of Griffith's Island.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this fifth day of July, in the year of Our Lord one thousand eight hundred and eighty-six.

Signed, sealed and delivered in the presence of
FRED'K LAMORANDIÈRE.

ABNER ELLIOT, [L.S.]
W. ANGUS, [L.S.]
JAMES TORNALL, [L.S.]
JOHN A. KEWENZIE, [L.S.]
CHARLES JONES, [L.S.]
DANIEL ELLIOT, [L.S.]
JOSEPH A. KEWENZIE, [L.S.]
FRANK NADJWON, [L.S.]
PAUL JOHNSTON, [L.S.]
SOLOMON JONES. [L.S.]

DOMINION OF CANADA,
PROVINCE OF ONTARIO,
COUNTY OF BRUCE.
To Wit:

Personally appeared before me J. W. Jermyn, of the Village of Cape Croker, in the Province of Ontario, Indian Agent, and Fredk. Lamorandière, Secretary of the said Band of Indians.

And the said J. W. Jermyn for himself saith:

That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Chippewas of Cape Croker, of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose, and according to their rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said release or surrender.

And the said Fredk. Lamorandière says:

That the annexed release or surrender was assented to by him and a majority of the male members of the said Band of Indians, of the full age of twenty-one years, then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their rules, and held in the presence of the said J. W. Jermyn.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the reserve of the said Band of Indians, or interested in the land mentioned in the said release or surrender.

That he is Secretary of the said Band of Indians, and entitled to vote at the said meeting or council.

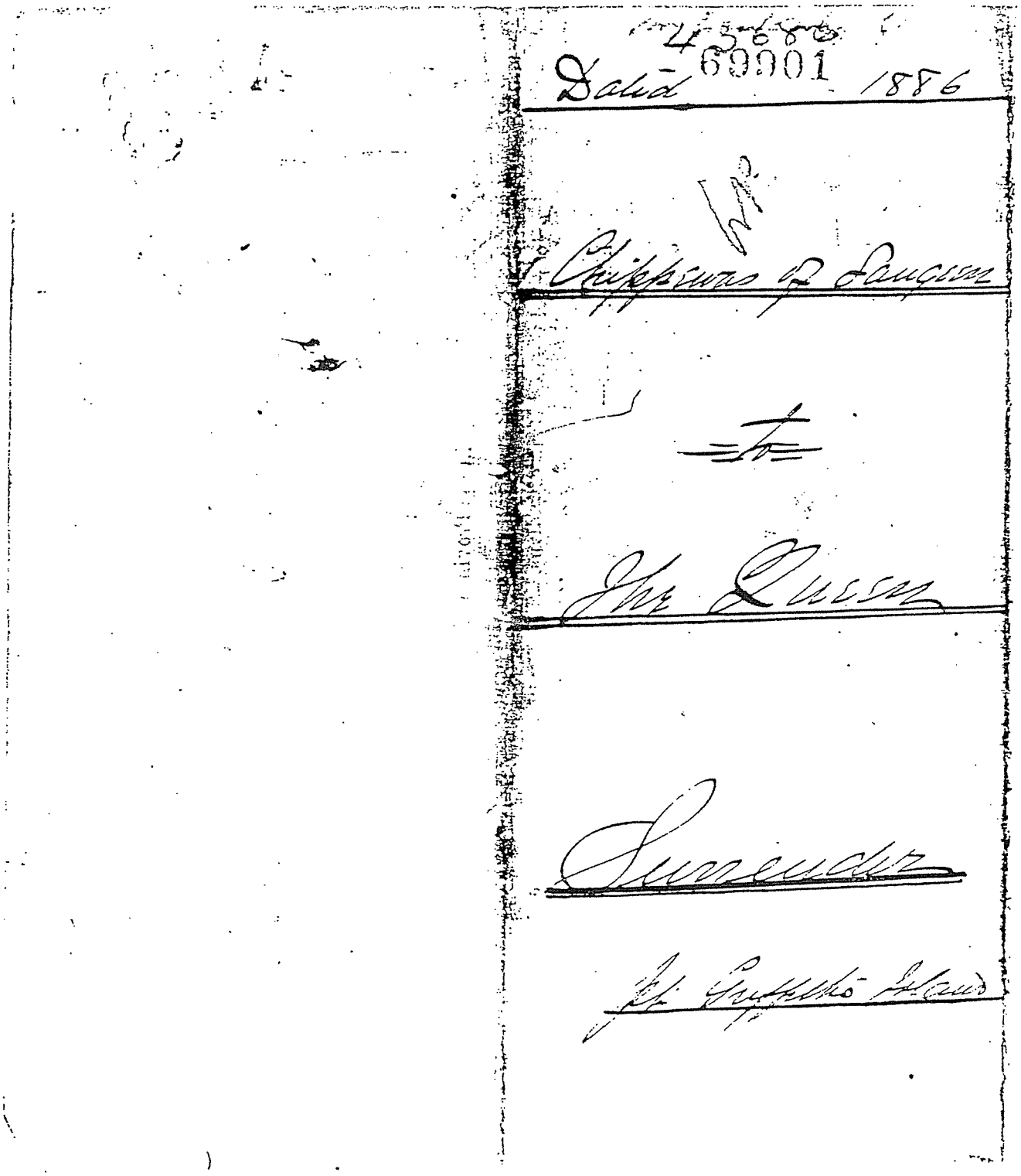
Sworn before me by the deponents, J. W. Jermyn and Fredk. Lamorandière, at the Village of Martin, in the County of Bruce, this 15th day of July, A. D. 1886.

J. W. JERMYN,
Indian Agent.

WM. BARRETT,
Junior Judge Co. Bruce.

Recorded 5th October, 1886.
Lib. 106. Folio 519.

L. A. CATELLIER,
Dep. Registrar-General of Canada.



Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of

The Chippewas of

Saugeen

resident on our Reserve

of Ontario in the Province and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being in ~~the~~ Griffith Island in the County of Grey and Province of Ontario containing by admeasurement Fifteen Acres be the same more or less and being composed of Part of Certain Parcels of Griffith Island aforesaid described as follows Commencing at a post Planted at the Edge of the Lake on the West Side of the Island at a point South Eighteen Degrees West Magnetically Fifteen Chains and Fifty Links from the Centre of the circular Pier Lighthouse there Thence South Eighty Degrees West Magnetically Six Chains and Ninety Six Links Thence South Seventeen Degrees East Magnetically Twenty Chains Thence North Eighty Degrees East Magnetically Six Chains and Eighty Links more or less to a post at the Water Edge of the Georgian Bay Thence following the Coast of the Island Northward to the Place of Beginning

Form No. 65.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to Sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale ~~_____~~ thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest and the interest thereof accruing from such investment shall be paid annually or semi-annually, to us and our successors in connection with the Chippewas of Rama ~~_____~~

AND WE, the said Chief and Principal men of the said the Chippewas of Rama ~~_____~~ do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the Sale and disposal of the said portion of Griffith Island ~~_____~~

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this 25th day of July in the year of Our Lord one thousand eight hundred and Eighty Five

Signed, Sealed and Delivered, in the presence of

Henry H. Maddaugh [illegible]

John Kadegan 2nd. Chief

John George

D Ross

C. Kalbaugh

John Kalbaugh

P. John 2

John G. Mason

J. C. James

J. Lawson

R. Dean

DOMINION OF CANADA,
Province of Ontario
County of Bruce
To Wit:

Personally appeared before me, Henry Madwayosh Ah Sangeen Indian Chief of Saugeen and James Telfer Conaway of Saugeen Agent

~~in the Province of~~ Indian

Ah Sangeen Madwayosh and Henry Eadie chief of the said Band of Indians. Eadie chief Indians

AND the said ~~Madwayosh~~ Conaway for himself saith:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Chippewas of Saugeen of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs,

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Madwayosh says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians, of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said Madwayosh on the 23rd. day of July 1886.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the Deponents Henry Madwayosh and James Telfer Conaway at the Village of Saugeen in the County of Bruce this 28th day of July A.D., 1886.

Henry H. Madwayosh
James T. Conaway
Indian Agent

In No. 66

Junior Judge of the County Co. of Bruce.

Dated 3 Oct 1856

Chief Seattle

his

Dr Lucien

Surveyor

KNOW all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of

The Chippewas of Rama

resident on our Reserve

of Ontario in the Province and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being in ~~the~~ Griffith Island in the County of Grey and Province of Ontario containing by admeasurement Eighteen Acres be the same more or less and being composed of that portion of Griffith Island aforesaid described as follows Commencing at a post driven at the edge of the bank on the shore of the Island at a point north Eleven degrees west Magnetically fifteen chains and seven links from the centre of the circular stone lighthouse from thence South Eighty degrees west Magnetically Six Chains and ninety one links thence South Six degrees East Magnetically thirty chains thence south Eighty degrees East Magnetically Six chains and Eighty links more or less to a post at the waters Edge of the Georgian Bay thence Following the coast of the Island Northerly to the place of beginning

Form No. 65.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to Sale the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale ——— thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest and the interest money accruing from such investment shall be paid annually or oftener annually to us and our descendants for our connection with the Chippewas of Lake

AND WE, the said Chief and Principal men of the said the Chippewas of Rama ——— do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the Sale and disposal of the said Lands of Grape Island

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this Fifth day of July in the year of Our Lord one thousand eight hundred and Eighty Six

Signed, Sealed and Delivered, in the presence of

Fred'k Ramsbottom

Abner Elliott

Wm Hayes

James Dorsan

John Kinney

Charles Jones

David Elliott

Joseph Aitkinney

Frank Hadyon

Paul Johnston

Solomon Jones

DOMINION OF CANADA,
Province of [illegible]
County of [illegible]
To Wit:

Personally appeared before me, J. W. Jennyn of the Village of Cape Croker in the Province of Ontario Indian Agent and Fred'k Lamorandiere chief of the said Band of Indians.

AND the said J. W. Jennyn for himself saith :—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Chippewas of Cape Croker of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs,

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Fred'k Lamorandiere says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians, of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said J. W. Jennyn

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is the only chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the Deponents J. W. Jennyn and Frederick Lamorandiere at the Village of Wiarton in the County of Bruce this 15th day of July A.D., 1886.

J. W. Jennyn
Indian Agent
Fred'k Lamorandiere

Wm Dawson
Junior Judge C. Bruce

m No. 66

Copy to Minutes of Council 24 Aug 1886
Supt Gen Ind Affairs " " "
Dr Ly Geo Marshall 1906. " " "
M Ly 24 April 1911 " " "

On a memorandum dated 10th August 1886. from the Hon. the Minister of Public Works for the Superintendent General of Indian affairs submitting Surrenders herewith, made by the Chippewas of Saugeen and by the Chippewas of Nawash on the 5th and 28th July 1886, respectively, of their joint interest in Sixteen acres of Griffiths Island, in the Georgian Bay. and stating that the Department of Marine has applied for the said land as a site for a Light house,

The minister submits for acceptance by Your Excellency in Council the Surrenders in question which were made at a full meeting of each of the Bands in accordance with,

with the provisions of the Law and were duly attested in the manner required thereby.

The Minister recommends that the Lands covered by the aforesaid surrenders be transferred to the Department of Marine upon payment for the same at the rate of $5.^{xx}_{00}$ per acre, being the rate agreed upon between the Department of Indian Affairs and the Department of Marine.

The Committee concur in the foregoing recommendation and they submit the same for Your Excellency's approval.

Walter L. Langevin

app'd
14-8-50

No. 416A.

KNOW ALL MEN BY THESE PRESENTS, THAT WE, the undersigned Chief and Principal men of the Chippewas of Saugeen Band of Indians resident on our Reserve at Saugeen in the County of Bruce in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady The Queen, her Heirs and Successors forever, ALL AND SINGULAR, those certain parcels or tracts of land and premises, situate, lying and being in the Georgian Bay containing by admeasurement Three Thousand Three hundred and seventy acres be the same more or less and being composed of those certain Islands known as Hay and Griffiths, situate in the Georgian Bay at the entrance to Colpoy's Bay, Saugeen Peninsula.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to our credit and that of the Chippewas of Nawash in the proportion to which we are entitled and the interest thereon to be paid to the parties interested, annually or semi-annually.

AND WE, the Chief and Principal men of the said Chippewas of Saugeen Band fo Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said two Islands and the disposition of the moneys arising therefrom.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this Thirteenth day of April in the year of Our Lord one thousand eight hundred and Ninety Nine.

Signed, Sealed and Delivered, in the presence of JOHN SCOFFIELD *Indian Agent.*	THOMAS SOLOMON MANDOWAB	[L.S.]
	CEPHAS KAHBEEJE	[L.S.]
	DAVID ROOT	[L.S.]
	JOHN NASHKAWA	[L.S.]
	PETER HENRY	[L.S.]
	HENRY RITCHIE	[L.S.]
	ED. J. MADWASHEMIND	[L.S.]
	his JOHN x JAMES mark	[L.S.]
	his SIMPSON x QUAKEGESHIG mark	[L.S.]

DOMINION OF CANADA,
Province of Ontario
County of Bruce
To Wit:

Personally appeared before me, John Scoffield of the Saugeen Indian Reserve in the Province of Ontario, Indian Agent and Thomas Solomon Mandowab Chief of the said Band of Indians.

AND the said John Scoffield for himself saith:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Saugeen Indian Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Thomas Solomon Mandowab says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules; and held in the presence of the said

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a Chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the said John Scoffield and Thomas Solomon Mandowab Deponents at the Village of Port Elgin in the County of Bruce this 4th day of May A.D., 1899.

JOHN SCOFFIELD
THOMAS SOLOMON MANDOWAB

JAMES MUIR
Justice of Peace
County of Bruce

Recorded 6th July 1899
Lib. 150. Fol 615.

JOSEPH POPE
Dep: Registrar General of Canada.

No. 416B.

KNOW ALL MEN BY THESE PRESENTS, THAT WE, the undersigned Chief and Principal men of the Chippewas of Nawash Band of Indians resident on our Reserve at Cape Croker in the County of Bruce in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady The Queen, her Heirs and Successors, ALL AND SINGULAR, those certain parcels or tracts of land and premises, situate, lying and being in the Georgian Bay containing by admeasurement Three Thousand Three Hundred and Seventy acres be the same more or less and being composed of those certain Islands known as Hay and Griffiths situate in the Georgian Bay at the entrance to Colpoy's Bay Saugeen Peninsula.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to our credit and that of the Chippewas of Saugeen, in the proportion to which we are entitled, and the Interest thereon to be paid to the parties interested annually or semi-annually.

AND WE, the said Chief and Principal men of the said Chippewas of Nawash Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said two Islands and the disposition of the moneys arising therefrom.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this fifteenth day of May in the year of Our Lord one thousand eight hundred and Ninety Nine.

Signed, Sealed and Delivered, in the presence of JOHN MCIVER *Indian Agent*	W. B. MCGREGOR *Chief*	[L.S.]
	JAMES SOLOMON *Counciler*	[L.S.]
	PETER ELLIOTT *Counciler*	[L.S.]
	STEPHEN ELLIOTT *Counciler*	[L.S.]
	JOHN AKIWENS *Do*	[L.S.]
	ABNER ELLIOTT *Ex chief*	[L.S.]
	FRED K. LAMORANDIERE	[L.S.]
	W. WAUKAY SR x	[L.S.]
	J. P. WAUKAY x	[L.S.]
	DANIEL BLACK x	[L.S.]
	NOAH WILLIAMS x	[L.S.]

DOMINION OF CANADA,
Province of Ontario
County of Bruce.
To Wit:

Personally appeared before me, John McIver and Stephen Elliott of the Cape Croker Indian Reserve in the Province of Ontario Indian Agent and Councillor and W. B. McGregor Chief of the said Band of Indians.

AND the said John McIver for himself saith:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Cape Croker Indian Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Stephen Elliott & W. B. McGregor says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said John McIver Indian Agent

That no Indian was present or voted at such council or meeting who was not a habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a Chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the Deponents John McIver and W. B. McGregor and Stephen Elliott at the Reserve of Cape Croker in the County of Bruce this 20th day of May A.D., 1899
B. B. MILLER
Police Magistrate

JOHN MCIVER
Indian Agent
STEPHEN ELLIOTT *Councillor*
W. B. MCGREGOR

Accepted by the Governor in Council on the 6th June 1899
JOHN J. McGEE
Clerk of the Privy Council.

Recorded 6th July 1899.
Lib. 150. Fol. 612.
JOSEPH POPE
Dep: Registrar General of Canada.

Dated 1899

Chippewas of Sarnia

To

The Queen

Surrender

Hen. T. Griffiths
Solicitor for the

Nile. 9119

76. 1113

Duplicate.

Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of The Chippewas of Saugeen & Band of Indians — resident on our Reserve at Saugeen in the County of Bruce — in the Province of Ontario — and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, ~~that~~ Those certain parcels or tracts of land and premises, situate, lying and being in the Georgian Bay ~~in the County of — and Province of —~~ containing by admeasurement Three Thousand Three Hundred Seventy acres be the same more or less and being composed of those certain Islands known as Hay & Giff the Situate in the Georgian Bay at the Entrance to Colpoys Bay, Saugeen Peninsula.

Executed pursuant to Surrender accepted by Order in Council on the 12th June 1854

Clerk of the Privy Council

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to Sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to our Credit and that of the Chippewas of Nawash in the proportion to which we are entitled and the Interest thereon to be paid to the parties interested annually or semi annually.

AND WE, the said Chief and Principal men of the said Chippewas of Saugeen Band of Indians do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the Sale of the said two Islands and the disposition of the Moneys arising therefrom.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this [illegible] day of [illegible] in the year of Our Lord one thousand eight hundred and ninety [illegible]

Signed, Sealed and Delivered, in the presence of

John Scofield

Indian Agent

Thomas Solomon Brandonvale

Cephas Makheeje.

David Root

John Mashkawa

Peter Henry

Henry Antoine

Ed. J. Pratt-ashemind.

his
John X James.
mark

his
Simpson X Quakepeshig.
mark

DOMINION OF CANADA,
Province of Ontario
County of Bruce
To Wit:

Personally appeared before me, John Scoffield of the Saugeen Indian Reserve in the Province of Ontario Indian agent and Thomas Solomon Mandowah Chief of the said Band of Indians.

AND the said John Scoffield for himself says:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Saugeen Indian Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Thomas Solomon Mandowah says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a Chief of the said Band of Indians and entitled to vote at the said meeting or council.

Sworn before me by the said John Scoffield and Thomas Solomon Mandowah Deponents at the village of Port Elgin in the County of Bruce this 4th day of May A.D., 1899

John Scoffield

Thomas Solomon Mandowah

James Muir
Justice of Peace
County of Bruce

Form No. 66.

Dated 1899

Chippewas of Nawash

To

The Queen

Surrender

Hay Griffiths

Islands in the

Peninsula

76.1145

Duplicate -

(57)

210645

Know all Men by these Presents,

THAT WE, the undersigned Chief and Principal men of the Chippewas & Mawash Band & Indians -

resident on our Reserve at Cape Croker in the County of Bruce in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, ~~the~~ those certain parcels or tracts of land and premises, situate, lying and being in the Georgian Bay ~~in the County of~~ and ~~Province of~~ containing by admeasurement Three Thousand Three Hundred & Twenty acres be the same more or less and being composed of those certain Islands known as Hay and Griffith, situate in the Georgian Bay at the entrance to Colpoys Bay, Saugeen Peninsula.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to Sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the Sale ——— thereof, shall, after deducting the usual proportion for expenses of management, be placed to our Credit-and that of the Chippewas of Sauseen, in the proportion to which we are entitled and the Interest thereon to be paid to the parties interested, annually or Semi annually.

AND WE, the said Chief and Principal men of the said Chippewas of Rama Band Band of Indians do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the Sale of the Said two Islands and the disposition of the moneys arising therefrom.

3

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this Fifteenth day of May in the year of Our Lord one thousand eight hundred and Ninety five

Signed, Sealed and Delivered, in the presence of

John McIlwer

Indian Agent

W B McGregor Chief

James Solomon Councillor

Peter Elliott Councillor

Stephen Elliott Councillor

John Adams Do

Abner Elliott Councillor

Wm Hamondieu

W Yankay X

J P Yankay X

David Black +

Noah Williams +

DOMINION OF CANADA,
Province of Ontario
County of Bruce
To Wit:

Personally appeared before me, Stephen E. Elliott John McIver of the Cape Crocker Indian Reserve in the Province of Ontario, Indian Agent and W. B. McGregor Chief of the said Band of Indians.

AND the said John McIver for himself says:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Cape Crocker Indian Reserve of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said W. B. McGregor & Stephen Elliott says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said John McIver Indian Agent

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a Chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the Deponents John McIver Stephen Elliott & W. B. McGregor at the Reserve of Cape Crocker in the County of Bruce this 20 day of Aug A.D., 1899.

B Biffle
Police Magistrate

John McIver
Indian Agent
Stephen E. Elliott Councillor
W. B. McGregor

Form No. 66.

Copy & Indian Affairs (with original surrender) 4 June 1879

A

On a Report dated 27th May, 1879, from the Superintendent General of Indian Affairs, submitting herewith surrenders, in duplicate, made by the Chippewa Bands of Saugeen and Nawash, of Hay and Griffiths Islands, situated at the entrance to Colpoys Bay, Saugeen Peninsula, Ontario, in Order that the same - with the exception of sixteen acres of Griffiths Island sold in 1886 to the Department of Marine and Fisheries, - may be sold for their benefit, without any conditions as to occupation or improvement.

The Minister states that the surrenders have been authorized,

Executed

executed and attested in the manner required by the 39th Section of the Indian Act, and he recommends that the same be accepted by Your Excellency in Council, with a view to the islands covered thereby being sold, as above; and that the Original surrenders be returned to the Department of Indian Affairs, and the duplicates thereof Kept of Record in the Privy Council Office.

The Committee submit the same for Your Excellency's approval.

Respectfully

Submitted.

June. 6. 06

Minister.

No. 424.

KNOW ALL MEN BY THESE PRESENTS, THAT WE, the undersigned Chief and Principal men of THE SAUGEEN BAND OF INDIANS resident on our Reserve at Saugeen in the Township of Amabel in the County of Bruce in the Province of Ontario and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LADY THE QUEEN, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being in the Saugeen Indian Reserve in the County of Bruce and Province of Ontario being composed of that certain Road allowance known as The French Bay Road sixty six feet wide, situated in the Saugeen Indian Reserve, County of Bruce, Province of Ontario, and Dominion of Canada, Commencing at the road connecting the village of Southampton with the gravel road between the Townships of Arran & Amabel, and running from thence by various courses, North Easterly to the North boundary of the said Reserve, as shewn on a Plan of Survey made by Nathaniel E. Low, Ontario Land Surveyor, dated 30th November 1888, of record in the Department of Indian Affairs.

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to dedicate the same as a public highway.

AND WE, the said Chief and Principal men of the said Saugeen Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the dedication of the said highway.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals this eighth day of September in the year of Our Lord one thousand eight hundred and ninety nine.

Signed, Sealed and Delivered, in the presence of
JOHN SCOFFIELD

THOMAS SOLOMON MANDOWAB *Chief* [L.S.]
CEPHAS KAHBEEJE [L.S.]
JOHN NASHKAWA [L.S.]
JOSEPH KAHGEE [L.S.]
RICHARD NOON [L.S.]
his
JOHN x GEORGE [L.S.]
mark
his
FRANK x KAHGEE [L.S.]
mark
his
JOHN x JAMES [L.S.]
mark
his
THOMAS x NAGOIN [L.S.]
mark

DOMINION OF CANADA,
Province of Ontario
County of Bruce
To Wit:

Personally appeared before me, John Scoffield Saugeen Indian Reserve the Indian Agent of Saugeen Indian Reserve in the Province of Ontario and Thomas Solomon Mandowab Chief of the said Band of Indians.

AND the said John Scoffield for himself saith:—

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Chippawa Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

And the said Thomas Solomon Mandowab says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a Chief of the said Band of Indians and entitled to vote at the said meeting or council.

SWORN before me by the Deponents John Scoffield and Thomas Solomon Mandowab at the Village of Southampton in the County of Bruce this Eighth day of September A.D., 1899.
WILLIAM MCGREGOR *J.P.*

JOHN SCOFFIELD
THOMAS SOLOMON MANDOWAB

Accepted by the Governor in Council on the 30th Sept. 1899.
JOHN J. McGEE
Clerk of the Privy Council.

Recorded 30th October 1899
Lib. 148, Fol. 569.
P. PELLETIER
Acting Dep. Registrar General of Canada.

EXHIBIT “C”

This is Exhibit ..C..... referred to in the
affidavit of Randall Fairbee
sworn before me, this ..1st.....
day of ..August..... 20.13
.....
A COMMISSIONER FOR TAKING AFFIDAVITS

AGREEMENT

between

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF ENERGY AND INFRASTRUCTURE
(Hereinafter the "Minister")

and

THE SAUGEEN OJIBWAY NATIONS
(Hereinafter "SON")

(collectively, the "Parties")

WHEREAS a number of energy-related projects exist and others may be developed in the area that SON identify as Anishnaabekiing;

AND WHEREAS SON must be meaningfully involved in the planning, review and development of Projects that stand to affect SON Rights;

AND WHEREAS the Ontario Energy Board has given conditional approval for the construction of the Bruce to Milton Transmission Reinforcement Project in Anishnaabekiing;

AND WHEREAS resource assessment studies and provincial electricity planning initiatives have identified the potential for a number of Projects within Anishnaabekiing;

AND WHEREAS Ontario has passed the *Green Energy and Green Economy Act* and related programs and regulations to facilitate the development of renewable energy projects and supporting infrastructure, including a Feed in Tariff ("FiT") program administered by the Ontario Power Authority (the "OPA") and a Renewable Energy Approvals process;

AND WHEREAS the Crown recognizes and affirms its duty to consult SON with respect to any Projects or related Crown decision-making that might adversely affect SON rights in Anishnaabekiing, and to do so in ways that reflect the principles enunciated by the Supreme Court of Canada relating to section 35 of the *Constitution Act, 1982*;

AND WHEREAS the Parties wish to continue to build a new positive relationship to reflect and address SON concerns about existing and future Projects in Anishnaabekiing and allow for the development of future Projects in ways that are respectful of and accommodate SON Rights;

NOW THEREFORE the Parties agree as follows:

Definitions

1. In this Agreement,

    a. "Anishnaabekiing" means the territory that SON have traditionally used and occupied, including the waters that SON asserts as its Traditional waters, as illustrated in the map attached as Schedule "A;

    b. "SON" means the Saugeen Ojibway Nations, consisting of the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation;

    c. "Crown" means Her Majesty the Queen in Right of Ontario;

    d. "Energy Developer" means a proponent of a project contemplated by this Agreement;

    e. "Minister" includes any official acting under the Minister's authority;

    f. "SON Rights" means Aboriginal and Treaty rights and interests as decided in Supreme Court of Canada case known as "Haida Nation" including Aboriginal title, of SON in Anishnaabekiing, that are known to the Crown by way of assertion or otherwise;

    g. "Peninsula" means the area historically known in Treaty records of 1836 as the "Saugeen Peninsula" and now known as the Bruce Peninsula north of Highway 21, including a buffer zone around and immediately adjacent to the communal lands known as Saugeen First Nation #29 south from Jackson on Cty Rd #3 to the intersection with Cty Rd #40, west on Cty Rd #40 until highway 21 and west on concession road #4 to Lake Huron. The precise description of the zone to be determined by the Working Group as described elsewhere in this Agreement;

    h. "Projects" means energy-related projects that are proposed to be carried out within Anishnaabekiing, and that fall within one of the following categories:

        i. transmission projects that require a MOE Environmental Assessment ("EA") process under the *Environmental Assessment Act*; or

        ii. require a MOE renewable energy approvals ("REA") process under Ontario Regulation 359/09; or

        iii. other projects to which the Parties mutually agree this Agreement should apply.

Purposes of Agreement

2. This Agreement will be implemented to promote the following purposes:

    a. Establish processes and mechanisms to ensure appropriate and adequate consultation with SON and accommodation of SON Rights respecting the planning, approval and development of Projects; and

    b. Facilitate future Projects in Anishnaabekiing in ways that are respectful of and accommodate SON Rights and provide opportunities for SON to participate in the wealth generated from renewable energy sources within Anishnaabekiing; and

    c. To promote reconciliation by creating a renewed relationship of trust between SON and Ontario based on the honour of the Crown principle.

The Energy Working Group

3. The Parties will form an Energy Working Group (the "Working Group") within thirty (30) days of the effective date of this Agreement to oversee the implementation of the terms of this Agreement, and the co-ordination of related consultation process between SON, the Minister and third parties as described in this Agreement, or as may be agreed to by the Parties.

4. The Working Group will be composed of three (3) members appointed by each of SON and the Minister and an independent Chair jointly appointed by the Parties. The Parties will consult each other before making their respective appointments.

5. The Working Group will invite the participation of other subject-matter experts as members jointly agree are required with respect to the matters being considered.

6. Either Party may change the composition of its membership on the Working Group as required. Prior to making any such changes, a Party will give notice of its intention and the Parties will consult each other respecting the proposed change.

7. The Working Group will be responsible for the following:

    a) facilitating the implementation of this agreement, including:

        i. developing within ninety (90) days of the formation of the Working Group a plan for implementing the terms of this agreement and related budgets;

        ii. assisting the Parties in determining the scope and design of a Natural and Cultural Values Study on the Peninsula as described in this Agreement;

iii. determining the precise description of the buffer zone as set out in article 1(g) and reporting back to the Parties on the Working Group's recommendations in this regard.

b) assisting the Parties to resolve Project-specific issues, through the development and recommendation of mitigation strategies, problem-solving, facilitating discussions between the Parties and Energy Developers, dispute resolution and other processes as described in this Agreement;

c) reporting on and planning for the effective implementation of this Agreement, including:

i. assisting the Parties in carrying out a Review of the implementation and operation of this Agreement, making recommendations to the Parties on any amendments that may be required;

ii. assessing the implications of six (6) month reviews provided by the OPA relating to applications for Projects. In the case of the first six month review, scheduled to be completed no earlier than the end of 2010, the assessment will include the participation of representatives of the OPA to assist the members of the Working Group;

iii. reporting on Project development trends, changes in government policy or programs, including the FiT program, or other matters that may bear on the effective implementation of the agreement.

8. The Working Group shall develop its own terms of reference that shall include:

a) Principles and procedures that will aid in reaching consensus decisions and limit the need for a vote;

b) Rules with respect to:

i. quorum, provided that that quorum shall consist of a minimum of two (2) members from each of SON and the Crown,

ii. voting, provided that no voting shall take place unless an equal number of SON and Crown voting members are present,

iii. scheduling and holding of meetings of the Working Group, provided that such meetings shall be held at least two (2) times per year;

c) The role and use of an independent, non-voting Chair.

9. The Parties acknowledge that the Working Group is not the Crown for the purposes of this Agreement, and that, in order for the Working Group to be effective in carrying out its mandate under this Agreement, its members must:

a) Have the authority to carry out their responsibilities under this Agreement;

b) Be committed to acting expeditiously in carrying out Working Group responsibilities.

10. The Minister acknowledges that the Ontario government will have over-all responsibility for securing funding for any budget developed and approved by the Working Group relating to the implementation of the terms of this Agreement. The Parties acknowledge that there may be occasions where they may wish to co-operate in order to access certain types or sources of funding.

Processes for Projects in Anishnaabekiing

11. The Parties acknowledge that the development of Projects in Anishnaabekiing must be carried out with a commitment to mitigating adverse effects and impacts on SON Rights and accommodating SON Rights where required.

12. Energy Developers proposing to carry out Projects in Anishnaabekiing will adhere to the processes and procedures identified in this Agreement.

13. Nothing in this Agreement relieves Energy Developers from meeting any of the requirements of the existing REA or EA processes or any other related obligations they may have at law.

Early Notification and Engagement

14. The Parties acknowledge the requirement for early notice to SON of possible Projects and early engagement between SON and Energy Developers wishing to carry out Projects in Anishnaabekiing. To that end:

    a) SON will receive written notice of Projects from the Crown (e.g. MOE) no later than the time when the Director receives a project description and related requests under the REA regulation for any application in Anishnaabekiing; and

    b) Energy Developers proposing to carry out Projects in Anishnaabekiing will receive notice in writing from the Crown (e.g. MOE or the Renewable Energy Facilitation Office ("REFO"), as appropriate), advising them of the requirement for timely engagement with SON, that will include notice of other SON specific requirements for Project development as set out in this Agreement.

15. SON will receive notice from the OPA of transmission and other renewable energy-related Projects in Anishnaabekiing to which the OPA's Economic Connection Test ("ECT") is applied by means of delivery on a regular basis of each review of energy generation applications, such review now expected to be performed on a six (6) month basis. This notice will include assessment from the OPA on the implications of the ECT outcomes for future developments in Anishnaabekiing. For other transmission Projects, SON will receive notice from the Crown as the Crown becomes aware of them.

SON Engagement with Energy Developers

16. The Parties recognize that good faith engagement and negotiations resulting in agreements between SON and Energy Developers can be an effective mechanism to address SON concerns with respect to Projects.

17. The Parties anticipate that SON and Energy Developers will enter into protocol agreements or other appropriate arrangements that:

    a) establish and describe the relationship between SON and Energy Developers respecting the planning, design, review and development of the Project;

    b) address the transfer of information respecting Project design and assessment, and the role of SON in the review of information;

    c) set out the application of SON specific guidelines, expertise or knowledge relating to the assessment, design or development of Projects where appropriate;

    d) establish a commitment to negotiate impact mitigation and benefits agreements, including partnership agreements, where appropriate;

    e) provide necessary capacity funding for SON review of the Project or related matters.

18. The Parties expect that, where adverse effects and impacts have been identified, SON and Energy Developers will conclude agreements respecting impact mitigation and benefits.

Role of Working Group in Facilitating Agreement

19. Where an issue arises between SON and an Energy Developer respecting any matters addressed in Articles 17 or 18 of this Agreement, either Party may refer the matter to the Working Group to assist in resolving the issues.

20. The Working Group may assist SON and Energy Developers in developing measures to address:

    a) issues respecting the conclusion or content of a protocol agreement;

    b) quality, completeness or adequacy of an assessment of adverse effects of a Project;

    c) recommendations for additional studies or an independent review;

    d) capacity funding or funding for additional studies or review;

    e) practical mechanisms to achieve impact mitigation and benefits;

f) any other matter respecting the Project that falls within the scope of this Agreement.

21. If the Working Group reaches consensus on a proposed resolution, the Energy Developer will be informed of that resolution with the intent that the Energy Developer will comply with it. The Working Group will report back to the Parties in situations where the Energy Developer fails to comply with the proposed resolution.

22. If the Working Group is unable to reach a consensus on a proposed resolution, the Working Group will report back to the Parties. The Parties agree to take such steps as may be required to resolve the issue in the spirit of this Agreement.

The Peninsula

23. The Parties acknowledge that SON has expressed special concerns respecting possible energy developments on the Peninsula and recognize that special provisions and assurances are required to address those concerns.

Natural and Cultural Values Study

24. There will be a Natural and Cultural Values Study of the Peninsula and its adjacent waters that will have the following elements:

a) The scope of the Study will include historical, current and future aspects of:

i. SON uses of land, water and resources within the area for spiritual and cultural purposes,

ii. SON harvesting for both traditional and sustenance purposes, and commercial purposes,

iii. other economic purposes consistent with SON's historical reliance on the territory to support its culture,

iv. existing measures of environmental protection such as protected lands, wetlands,

v. natural heritage features;

b) The Working Group will be responsible for the design, scoping, commissioning and oversight of the Study;

c) SON will lead the scoping and design of the aspects set out in clauses 24(a)(i) – (iii);

d) To the extent possible, the Study will include relevant base-line information on natural resources that are available from existing sources, including Ontario and Federal government departments and agencies.

25. The Parties anticipate that the Natural and Cultural Values Study will be basis for SON future engagement with planners and Energy Developers and will help inform decisions respecting possible Projects within the area.

26. The Parties agree that the Natural and Cultural Values Study must be designed and carried out expeditiously with a view to completion within a reasonable length of time, with substantial progress being demonstrated when the Review of this Agreement occurs.

27. The Crown will be responsible for securing adequate funding for the Natural and Cultural Values Study.

Future Development on the Peninsula

28. The Parties recognize that time will be required to initiate and carry out the Natural and Cultural Values Study and prepare for informed participation in planning and development decisions as they relate to Projects on the Peninsula. .

29. The Parties acknowledge that recent Ontario announcements respecting future transmission line expansion planning and projects do not include transmission line expansion on the Peninsula, and specifically, does not include a planned project referred to as the "Bruce Enabler" line.

30. In the event that any future decision is made respecting the need or economic viability of transmission expansion on the Peninsula, the Parties agree to convene, for the purposes of this Agreement, a consultation process to address the matter, including consideration of:

    a) the findings of the Natural and Cultural Values Study;

    b) special measures to mitigate adverse effects or impacts on SON Rights;

    c) Project development that is respectful of SON Rights and consistent with the Purposes of this Agreement.

Traditional Waters

31. The Parties acknowledge that energy developments in waters involve different approval mechanisms and bodies than energy development on land. SON will receive notice of a possible Project in their Traditional waters at the time that the Crown receives an application for site release from an interested Energy Developer. Prior to any government decision which would permit renewable energy development in SON Traditional waters, the Parties agree to establish a consultation process to address the matter, including consideration of:

    a) The findings of the Natural and Cultural Values study as they might be relevant to a proposed Project in SON Traditional waters;

b) A determination of adverse effects or impacts on SON Rights;

c) Special measures to mitigate adverse effects or impacts on SON Rights.

Peninsula and Traditional Waters

32. Upon receiving notice from an Energy Developer that it is proposing to carry out a Project within the Peninsula or SON Traditional waters, the Crown (e.g. MOE or REFO, as appropriate), shall provide written notice to the Energy Developer advising it of the special provisions of this Agreement relating to the areas.

Nuclear Projects in Anishnaabekiing

33. SON has expressed concern about the history, current operations and future of the Bruce Nuclear site. The Parties agree that the resolution of these issues is complex and will require the participation of multiple parties, including SON, Ontario, Canada, Bruce Power, Ontario Power Generation and the Nuclear Waste Management Organization based on their respective authorities and roles.

34. The Parties recognize that a consultation and accommodation process is the appropriate mechanism for addressing the future of nuclear projects and facilities in Anishnaabekiing and that the process may include consideration of concerns relating to existing Projects.

35. The Minister agrees to be a party to a consultation and accommodation process established between SON, Canada and other federal agencies around the future of nuclear projects and facilities in Anishnaabekiing, focused on those matters for which Ontario has jurisdiction, responsibilities or a role in decision-making.

Cumulative Effects

36. SON has expressed concerns regarding the cumulative effects of existing and future Projects in Anishnaabekiing and the impact they may have on SON Rights. The Parties agree that identification, quantification and analysis of these effects is complex but important, and that no processes are currently in place to address the matter.

37. The Parties agree to explore, through the Working Group, practical ways to address the concerns set out in the preceding paragraph, and develop a strategy to further the Parties' understanding of what cumulative effects studies in Anishnaabekiing might entail. The Parties agree to work together to identify and attempt to secure necessary resources and opportunities for this exploratory work.

Review of Agreement

38. The Parties agree to initiate a Review of the operation and implementation of this Agreement within one (1) year from its effective date, or sooner upon the mutual agreement of the Parties, to do the following:

a) Assess this Agreement's success in achieving its purposes;

b) Determine amendments to ensure its effective operation and implementation;

c) Evaluate the effectiveness of the Working Group including on-going need for an independent Chair;

d) Assess the progress of the Natural and Cultural Values Study;

e) A progress report on the exploratory work undertaken under article 37.

f) Undertake an analysis of adequacy of measures to encourage SON financial participation, including measures under the FiT program, and other financial participation measures.

39. The Working Group will prepare a report and recommendations in this regard for consideration by the Parties. Upon receipt of the report, the Parties agree to negotiate amendments to the Agreement at the request of either Party.

General Matters

40. The Parties will act in good faith to give force and effect to this Agreement and will consult with one another in the development of mechanisms to do so and in particular, SON undertakes to obtain approval for this agreement in accordance with all legal requirements including those contained in the *Indian Act*, and the Minister undertakes to bring this matter to Cabinet for ratification so that this Agreement is legally binding and enforceable.

41. The Parties agree that confidentiality of information provided by either Party and not otherwise publicly known is of the essence to full and productive implementation of this Agreement, and each Party therefore agrees to maintain the confidentiality of the information and of subsequent discussions and actions, within the Parties and members of the Working Group, and not disclose the information or positions taken by the other Party in the course of such discussions or other actions to the extent that the discussions are on-going or this Agreement, including any amended version of this Agreement, remain in force and effect.

42. The Parties acknowledge that the Crown carries any applicable duty under section 35 of the *Constitution Act, 1982*, to consult with SON with respect to potential adverse effect of the Projects and, where appropriate, accommodate. The Parties acknowledge that accommodation may be in various forms and may be made by or through the Crown, Energy Developers or other entities.

43. This Agreement is not intended to address current litigation.

44. Nothing in this Agreement is intended to limit or prejudice any claim that SON may have or assert in the future based on s.35 of the *Constitution Act, 1982* or otherwise, or any position that the Crown may take in respect thereto, nor shall this Agreement limit or prejudice SON or the Crown with respect to positions it or they may

eventually take respecting the Projects or related matters in the absence of any signed agreement between the Parties.

On behalf of Her Majesty the Queen in Right of Ontario ("H.M.Q.") as represented by the Minister of Energy and Infrastructure

I have the authority to bind H.M.Q.

The Honourable Gerry Phillips
Minister of Energy and Infrastructure

Signed this 14 day of Jan. 2010

On behalf of the Saugeen Ojibway Nations

I have the authority to bind the Chippewas of Nawash Unceded First Nation

Chief Ralph Akiwenzie

Signed this 14 day of Jan. 2010

I have the authority to bind the Chippewas of Saugeen First Nation

Chief Randall Kahgee

Signed this 14 day of Jan. 2010

EXHIBIT “D”

This is Exhibit ..D..... referred to in the
affidavit of ..Rodell Kaisee.....
sworn before me, this ....15th.....
day of ....August..... 20..13...

A COMMISSIONER FOR TAKING AFFIDAVITS

AGREEMENT
TO ESTABLISH A JOINT REVIEW PANEL
FOR THE DEEP GEOLOGIC REPOSITORY PROJECT BY ONTARIO POWER GENERATION INC. WITHIN THE MUNICIPALITY OF KINCARDINE, ONTARIO

BETWEEN

THE MINISTER OF THE ENVIRONMENT
-And-
THE CANADIAN NUCLEAR SAFETY COMMISSION

PREAMBLE

WHEREAS the Minister of the Environment has statutory responsibilities pursuant to the *Canadian Environmental Assessment Act*;

WHEREAS the Commission has statutory responsibilities pursuant to the *Nuclear Safety and Control Act* and to the *Canadian Environmental Assessment Act*;

WHEREAS Ontario Power Generation Inc. has applied to the Commission to seek approval to prepare a site and construct a deep geologic repository;

WHEREAS the Project would be carried out within the area that the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation (collectively referred to as the SON) identify as Anishnaabekiing, the specified territory they identify that they have traditionally used and occupied;

WHEREAS the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation have expressed concerns that the Project might adversely affect potential or established Aboriginal rights, title or Treaty rights they assert in that area;

WHEREAS the Minister and the Commission acknowledge that a duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal rights, title or Treaty rights and contemplates conduct that might adversely affect it;

WHEREAS an environmental review of the Project by a Joint Review Panel is an important source of information about effects the Project may have on the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation's potential or established Aboriginal rights, title or Treaty rights, and would therefore support ongoing consultations between the Crown and Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation related to the Project;

WHEREAS the Project is within the jurisdiction of the Commission under the *Nuclear Safety and Control Act* and requires an environmental assessment pursuant to the *Canadian Environmental Assessment Act*;

WHEREAS the Commission is the sole responsible authority for the Project pursuant to the *Canadian Environmental Assessment Act*;

WHEREAS the Project requires a licence(s) pursuant to the *Nuclear Safety and Control Act*;

WHEREAS the Commission has recommended, in accordance with paragraph 21(2) (b) of the *Canadian Environmental Assessment Act*, that the Minister of the Environment refer the Project to a review panel;

WHEREAS the Minister of the Environment has referred the Project to a review panel in accordance with section 29 of the *Canadian Environmental Assessment Act*;

WHEREAS the Parties to this Agreement have determined that a review of the Project by a joint review panel will ensure that the Project is reviewed in a manner that will provide for an effective and efficient environmental assessment and regulatory process;

AND WHEREAS the Minister of the Environment has determined that a joint review panel should be established pursuant to subsection 40(2) of the *Canadian Environmental Assessment Act* to consider the Project;

NOW THEREFORE, the Parties hereby establish a Joint Review Panel for the Project in accordance with the provisions of this Agreement and the Terms of Reference attached as an Appendix to this Agreement.

1. DEFINITIONS

In this Agreement:

"**Aboriginal group**" means a community of Indian, Inuit or Métis people that holds or may hold Aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*;

"Agency" means the Canadian Environmental Assessment Agency;

"CEAA" means the *Canadian Environmental Assessment Act*;

"Commission" means the Canadian Nuclear Safety Commission;

"Environment" has the same meaning as set out in section 2 of the CEAA;

"Environmental Effect" has the same meaning as set out in section 2 of the CEAA;

"Environmental Impact Statement" means the document that the proponent will prepare in accordance with the Environmental Impact Statement Guidelines issued by the Parties pursuant to Part II of the Appendix to this Agreement.

"Federal Authority" has the same meaning as set out in section 2 of the CEAA;

"Follow-up program" has the same meaning as set out in section 2 of the CEAA;

"Intervenor", means a person appearing at a Joint Review Panel Hearing pursuant to rule 18 of the *Canadian Nuclear Safety Commission Rules of Procedure*, a person participating as an intervenor in a Joint Review Panel Hearing pursuant to rule 19 of the *Canadian Nuclear Safety Commission Rules of Procedure* or a person who establishes an interest to participate in the Joint Review Panel Hearings by way of a written submission and/or an oral presentation;

"Joint Review Panel" means a Joint Review Panel established through this Agreement;

"Joint Review Panel Agreement" means this Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. within the Municipality of Kincardine, Ontario, and the attached Appendix;

"Joint Review Panel Hearing" means the public hearing process followed by the Joint Review Panel to hear information and evidence required for the Review;

"Joint Review Panel Report" means a report which sets out the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and a summary of any comments received from the public in the course of the Joint Review Panel Hearings;

"Jurisdiction" has the same meaning as set out in subsection 40(1) of the CEAA;

"Licence Application" means the documentation filed by the Proponent under the NSCA for a Site Preparation and Construction Licence for the Project;

"NSCA" means the *Nuclear Safety and Control Act*;

"OPG Inc." means Ontario Power Generation Inc.;

"Parties" mean the signatories to this Agreement;

"Project" means the preparation of a site for, and the construction, operation decommissioning and abandonment of, a deep geologic repository on the existing Bruce Nuclear Site within the Municipality of Kincardine, Ontario to store low- and intermediate-level radioactive waste as more fully described in Part I of the Appendix to this Agreement;

"Proponent" means OPG Inc.

"Public Registry" means the Canadian Environmental Assessment Registry established under section 55 of the CEAA, to facilitate public access to records relating to the environmental assessment of the Project;

"Responsible Authority" has the same meaning as set out in section 2 of the CEAA and for this Project is the Commission;

"Review" means the assessment by the Joint Review Panel of the environmental effects of the Project to be conducted pursuant to the CEAA and the consideration of the Licence Application under the NSCA to determine whether the Project will pose an unreasonable risk to the health and safety of persons, the environment and national security; and,

"SON" means the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation who collectively identify themselves as the Saugeen Ojibway Nation, who have asserted claims in the area as represented by the Chiefs of the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation.

2. ESTABLISHMENT OF THE JOINT REVIEW PANEL (JRP)

2.1 A process is hereby established to create a Joint Review Panel (JRP) that will:

a) Constitute a review panel pursuant to sections 40, 41 and 42 of the CEAA for the purposes of carrying out an environmental assessment of the Project; and

b) Constitute a panel of the Commission, created pursuant to section 22 of the NSCA, for the purposes of the review of the Licence Application pursuant to section 24 of the NSCA.

2.2 Nothing in this JRP Agreement shall be construed as limiting the ability of the JRP to have regard to all considerations that appear to be relevant pursuant to section 24 of the NSCA and to include a consideration of the factors set out in sections 16 and 16.1 of the CEAA.

3. CONSTITUTION OF THE JOINT REVIEW PANEL

3.1 The JRP will consist of three members. Two members will be appointed by the President of the Commission with the approval of the Minister of the Environment.

3.2 The Minister of the Environment will propose to the President of the Commission a candidate as a third member of the JRP who may also serve as a temporary member of the Commission.

3.3 Upon approval by the President of the Commission of a candidate as a third member of the JRP who may also serve as a temporary member of the Commission, the President of the Commission will recommend to the Minister of Natural Resources that the Minister of Natural Resources recommend the proposed candidate to the Governor in Council for the appointment of that proposed candidate as a temporary member of Commission.

3.4 If appointed by the Governor in Council as a temporary member of Commission, the selected candidate will then be appointed by the Minister of the Environment as a member of the JRP.

3.5 The members of the JRP are to be unbiased and free of any conflict of interest in relation to the Project and are to have knowledge or experience relevant to the anticipated environmental effects of the Project.

4. CONDUCT OF THE REVIEW

4.1 The JRP shall conduct the Review in accordance with the Terms of Reference attached as an Appendix to this JRP Agreement in a manner that:

a) Discharges the requirements set out in the CEAA;
b) Permits it to obtain the information and evidence required for it to consider the Licence Application under the NSCA; and,
c) Permits it to obtain information and evidence about the adverse effects the project may have on potential or established Aboriginal rights, title or treaty rights as identified to the JRP by the SON and enables it to bring any such information and evidence to the attention of the Minister of the Environment and the Responsible Authorities for the Project in support of consultation between the Crown and the SON.

4.2 The JRP shall have all the powers and duties of a review panel described in section 35 of the CEAA.

4.3 As a panel of the Commission, the JRP shall also have the powers and duties of the Commission described in section 20 of the NSCA and the Rules of Procedure.

5. SECRETARIAT

5.1 A Secretariat will be formed consisting of professional, scientific, technical or other Agency and Commission personnel necessary for the purposes of the Review.

5.2 The Secretariat will provide information to the JRP orally and in writing during the JRP Hearings.

5.3 The personnel who comprise the Secretariat shall not be considered to be Intervenors.

5.4 The Commission will provide its offices for the conduct of the activities of the JRP and the Secretariat.

5.5 The Secretary of the Commission, or his designate, will act as Secretary to the JRP and as co-manager of the Secretariat.

5.6 The Agency shall appoint a panel manager as co-manager of the Secretariat.

6. RECORD OF THE REVIEW

6.1 Subject to section 55 and subsections 35(4), and 35(4.1) of the CEAA, the Public Registry will include all submissions, correspondence, hearing transcripts, exhibits and other information received by the JRP and all public information produced by the JRP relating to the Review.

6.2 The internet site component of the Public Registry will be maintained by the Secretariat during the course of the Review in a manner that provides for convenient public access, and for the purposes of compliance with sections 55 to 55.5 of the CEAA.

6.3 A project file will be maintained by the Secretariat during the course of the Review in a manner that provides for convenient public access, and for the purposes of compliance with sections 55 and 55.4 of the CEAA. This project file will be located in the offices of the Secretariat.

7. JOINT REVIEW PANEL REPORT

7.1 On completion of the assessment of the Project, the JRP will prepare a JRP Report.

7.2 The JRP will convey the JRP Report in writing in both official languages to the Minister of the Environment who will then publish the report.

7.3 The JRP will take a course of action with respect to section 37 of the CEAA and may also, as a panel of the Commission, make a decision with respect to the Licence Application pursuant to section 24 of the NSCA.

8. OTHER FEDERAL DEPARTMENTS AND JURISDICTIONS

8.1 At the request of the JRP, federal authorities having specialist information or knowledge with respect to the Project shall make available that information or knowledge in a manner acceptable to the JRP.

8.2 Subject to article 8.1, nothing in this JRP Agreement shall restrict the participation of a Jurisdiction by way of submission to the JRP.

9. PARTICIPANT FUNDING

9.1 Participant funding for the Review will be provided and administered by the Agency pursuant to the Participant Funding Program.

10. AMENDING THIS JOINT REVIEW PANEL AGREEMENT

10.1 The terms and provisions of this JRP Agreement may be amended by written memorandum executed by both the Minister of the Environment and the President of the Commission.

10.2 Subject to section 27 of the CEAA, upon completion of the Review, this JRP Agreement may be terminated at any time by an exchange of letters signed by both Parties.

The Honourable Jim Prentice
Minister of the Environment

Michael Binder
President, Canadian Nuclear Safety Commission

APPENDIX

Terms of Reference for the Review

Part I - Project Description

Pursuant to paragraphs 15(1) (b) and 15(3) (b) of the CEAA, the Minister of the Environment is proposing that the scope of the project include the site preparation, construction, operation, decommissioning, and abandonment of the project components and activities proposed by OPG Inc. as described in *Deep Geologic Repository for Low and Intermediate Level Radioactive Waste – Project Description.* The long-term management of used nuclear fuel under the mandate of the Nuclear Waste Management Organization is not within the scope of this project.

The physical works for this project include both surface facilities and underground facilities. Surface facilities could include two permanent buildings, plus any buildings required for ancillary facilities. The principal structures of the surface facilities expected are:

- Receipt/Access Building: this building could contain facilities for underground access by ramp or shaft. If access is by shaft, this building is expected to have a hoist/headframe/cage. If access is by ramp, this building would include ramp access. This building is likely to have facilities for staff, as well as the heating ventilation and air conditioning equipment. Low- and intermediate-level waste could be received at this building and may be staged for transfer to the deep geologic repository. This building may also be used for transfer and removal of excavated rock during construction activities; and
- Ventilation Shaft Headframe Building: this building may provide cover for the ventilation shaft, exhaust fans, sampling/monitoring devices, a hoist and mechanical/electrical systems.

Underground facilities would likely include the following:

- Ramp or Main Shaft: the main shaft would be excavated using drill and blast or other methods. The ramp would be tunnelled into the rock. Either the ramp or the shaft would be used to bring materials and waste into the deep geologic repository;
- Ventilation Shaft: the ventilation shaft would be used to route air and provide emergency egress. This shaft would be excavated by drill and blast, raise bore, or other methods;
- Underground Tunnels: these tunnels would provide access from the underground receipt area to the operational level;
- Emplacement Rooms: these rooms would provide the storage space needed for the low- and intermediate-level waste, a volume estimated as 160,000 m^3; and

- Operational Level Office, Amenities and Maintenance Areas: these may be constructed adjacent to the main shaft/ramp and possibly used for servicing underground equipment, or serve as a distribution point for services.

The physical works also consist of the site infrastructure, and would include such things as power, a sanitary sewer system, a potable water system, a storm water system, a subsurface drainage system, a construction laydown area, access roadways, fencing, waste rock storage and associated roads, security and roadways for linking the deep geologic repository to the existing Western Waste Management Facility.

The undertakings in relation to the physical works to be considered for the purposes of this assessment are site preparation, construction, operation, decommissioning and abandonment phases of the project. The following describes activities expected to be undertaken for each of these undertakings and include:

Site Preparation:

Clearing a portion of the proposed site (approximately 15 hectares are wooded) and development of roads to provide site access.

Construction:

Construction of surface facilities, the shaft or ramp, the ventilation shaft, and the underground excavation of tunnels and an initial set of emplacement rooms. Construction would also result in storage of rock on the Bruce site.

Operation:

Operational activities include transfer of low- and intermediate-level radioactive waste from the Western Waste Management Facility and waste emplacement in the deep geologic repository and any sealing of emplacement rooms during the operating period. The operational phase may also include construction campaigns for additional emplacement rooms.

Decommissioning:

Decommissioning activities includes activities such as dismantling the equipment, sealing the repository and access ways and decontamination and demolishing the surface facilities.

Abandonment:

Although there are no activities associated with abandonment, the long term performance of the facility must conform to the Commission's Regulatory Policy P-290, *Managing Radioactive Waste*.

Part II - Components of the Review

1. Within 30 days of the close of the public comment period regarding the draft Environmental Impact Statement Guidelines, the Minister of the Environment shall, following consultation with the President of the Commission and after taking into account the comments received by the public, the SON and other Aboriginal groups, issue the Environmental Impact Statement Guidelines.
2. The Parties shall require the Proponent to prepare the Environmental Impact Statement (EIS) in accordance with the Environmental Impact Statement Guidelines issued by the Minister.
3. Upon receiving the Environmental Impact Statement (EIS), and provided that the JRP has been struck and that participant funding pursuant to s. 58(1.1) of the CEAA has been awarded, the JRP will have a period of up to 14 days to announce the commencement of the EIS public review and comment period and to issue instructions and a timetable for the review that will include opportunities for public comment.
4. A maximum six (6) month period is provided for review and analysis of the EIS followed by a one (1) month period for the JRP's consideration of the comments received on the sufficiency of the EIS to proceed to the JRP Hearing phase. This seven (7) month time period is in addition to any time required by the proponent to respond to any information requests from the JRP.
5. At any time following submission of the EIS to the JRP, during the EIS public comment and review period, or in considering of any comments received during or following the public comment period, the JRP may request any additional information it deems necessary from the Proponent.
6. The JRP shall schedule and announce the start of the JRP Hearings once it is satisfied that the proponent's EIS and any additional information has adequately responded to the EIS Guidelines.
7. The JRP shall provide public notice of the JRP public hearings 90 days prior to the start of the Hearings.
8. Written comments obtained pursuant to the EIS public review and comment period shall be made public on the Public Registry.
9. At the request of the JRP, the Secretariat shall provide written and oral professional, scientific, technical or other assessment to the JRP.
10. The JRP may secure the services of additional independent experts to provide information on and help interpret technical and scientific issues and issues relative to community knowledge and Aboriginal traditional knowledge.
11. The JRP shall hold the Hearings within the Municipality of Kincardine and elsewhere as it deems appropriate.
12. The JRP shall deliver its Report to the Minister of the Environment within 90 days following the close of the Hearings. Paper and electronic copies of the report will be provided upon request. Copies will also be available on the Internet.

Part III – Procedure

1. The JRP will issue directions on procedures in accordance with the CEAA, NSCA and the provisions of the JRP Agreement. The directions on procedures will include the JRP's procedures for the review process including the conduct of the EIS review, communication with the JRP, hearing procedures and/or any other matter the JRP deems appropriate. The JRP may issue separate public hearing procedures prior to the hearings.
2. The JRP may consult with the public prior to finalizing its directions on procedures.
3. The JRP Hearings will be conducted in accordance with the CEAA, NSCA and this Agreement and will ensure that opportunities are provided for timely and meaningful participation by the public, the SON, and other Aboriginal groups; that technical sessions are scheduled for specific matters of concern; and, that Aboriginal and traditional knowledge is appropriately considered.
4. For the purposes of CEAA or the NSCA, the JRP Hearings shall be public unless the JRP is satisfied after representations made by a witness that specific, direct and substantial harm would be caused to the witness or specific harm to the environment by the disclosure of the evidence, documents or other things that the witness is ordered to give or produce, or that information to be presented involves national or nuclear security; the information is confidential information of a financial, commercial, scientific, technical, personal or other nature that is treated consistently as confidential and the person affected has not consented to the disclosure; or the disclosure of the information is likely to endanger the life, liberty or security of a person.
5. The JRP public hearing procedures will establish timelines for presentations to the JRP. Each presentation may be followed by a question and answer period led by the JRP, followed by questions from other Intervenors.
6. Questions will be directed through the JRP Chair who may subsequently allow a participant to put questions directly to the presenter. Where a person does not adhere to the procedures and the direction of the JRP Chair, the JRP Chair will have the authority to refuse to permit further questioning from that person.
7. The JRP Chair may limit or exclude questions or comments that fall outside the mandate of the JRP, are repetitive, irrelevant, or immaterial.
8. The JRP Chair may limit discussion that exceeds the time limits established by the JRP procedures.

Part IV – Scope of the Environmental Assessment and Factors to be Considered in the Review

1. The Review will include a consideration of the following factors listed in paragraphs 16(1)(a) to (d) and in subsection 16(2) of the CEAA:

a) The environmental effects of the Project, including the environmental effects of malfunctions, accidents or malevolent acts that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects that have been or will be carried out;
b) The significance of the effects referred to in (a);
c) Comments from the public that are received during the Review;
d) Measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
e) The purpose of the Project;
f) Need for the Project;
g) Alternatives to the Project
h) Alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
i) Measures to enhance any beneficial environmental effects;
j) The requirements of a follow-up program in respect of the Project;
k) The capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and,
l) The consideration of community knowledge and Aboriginal traditional knowledge.

Part V – Scope of Assessment of the Application for Licence to Prepare Site and Licence to Construct

Pursuant to section 24 of the NSCA and its regulations, the JRP process will include consideration of:

- Whether the applicant is qualified to perform the activity to be licensed; and,
- Whether in carrying on that activity the applicant will make adequate provisions for the protection of the environment, the health and safety of persons and the maintenance of national security and measures required to implement international obligations to which Canada has agreed.

Santina Centelleghe

From: <bellcanada@startconference.com>
Date: Thursday, November 03, 2011 12:41 PM
To: <scentelleghe@pstlaw.ca>
Subject: Conference summary report Nov 03 2011 10:01:05 AM Eastern Time

The following is a summary of your recently completed conference call.

Moderator: Mr. Alex Monem
Call Date: 11/03/2011
Billing Code: 888

Note: All times in this report are in Eastern Time. Change Billing Code

Telephone #	Dial Out	Start	End	Duration(min)
5198244120	N	10:01:05 AM	10:14:05 AM	13
4169162989	N	10:02:27 AM	12:04:27 PM	122
5197972781	N	10:03:00 AM	10:53:00 AM	50
5195344614	N	10:04:22 AM	12:04:22 PM	120
5198244120	N	10:13:29 AM	12:04:29 PM	111
5197972781	N	10:54:10 AM	12:04:10 PM	70
			Total Minutes:	**486**

For more information, call 1 800 667-3678 / 1 416 203-7016 or email conferencingcustomercare@bell.ca

$290.95

EXHIBIT "E"

This is Exhibit ....E..... referred to in the affidavit of ..Rodell Kahsea..... sworn before me, this .....15th..... day of ....August..... 20.15.

A COMMISSIONER FOR TAKING AFFIDAVITS

SUBSTANTIVE COMMERCIAL FISHING AGREEMENT

BETWEEN:

THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

-AND-

SAUGEEN FIRST NATION

(Collectively, the "Saugeen Ojibway Nation" or "SON")

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE
MINISTER OF NATURAL RESOURCES
("MNR")

PREAMBLE

WHEREAS on August 23, 2011, the Parties entered into a Framework Agreement in which the Parties agreed to binding goals, principles, objectives and mutual commitments that are to be implemented in a Long Term Substantive Commercial Fishing Agreement;

AND WHEREAS the Parties continue to respect and reaffirm these same goals, principles, objectives and mutual commitments as they enter into this Long Term Substantive Commercial Fishing Agreement;

NOW THEREFORE, the Parties agree as follows:

INTERPRETATION

Definitions

The following definitions apply in this Agreement:

"the Bays" means those parts of the waters that are known as Owen Sound and Colpoys Bay in Lake Huron;

"Colpoys Bay" means all waters that are inside the solid line running from Gravelly Point on a line of sight through Skinner's Bluff on the map attached in Schedule C – Fishing in the Waters ("Schedule C");

"Compliance Protocol" means the protocol established between SON and MNR to ensure compliance with this Agreement as set out in Schedule E – Compliance ("Schedule E");

"Framework Agreement" means the Agreement entered into by the parties on August 23, 2011, and attached as Schedule A – Framework Agreement ("Schedule A");

"Owen Sound" means all waters that are inside the solid line running from Vail's Point to Pyette Point on the map attached in Schedule C;

"TAC" means the total allowable catch for a species set out in Schedule D – Total Allowable Catch and Data Exchange ("Schedule D");

"the Waters" means those parts of Lake Huron that are inside the area that is shaded with hatch marks on the map attached as Schedule B – The Waters ("Schedule B"); and

"Working Group" means any group established by the Governance Committee pursuant to this Agreement or the Framework Agreement, for which the Terms of Reference are set out at Schedule F – Terms of Reference for Working Groups ("Schedule F").

THE AGREEMENT

1. Purpose

1.1. The purpose of this Agreement is to implement the commitments made by the Parties in the Framework Agreement to enter into a Long Term Substantive Commercial Fishing Agreement.

1.2. The Parties agree to implement the commitments identified in paragraph D of the Framework Agreement as an important step in their constructive ongoing and harmonious relationship.

2. Nothing to Abrogate or Derogate Rights

2.1 Nothing in this Agreement shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal or treaty rights of the SON as recognized and affirmed in section 35 of the *Constitution Act*, 1982.

2.2 This Agreement is without prejudice, and shall not be relied upon by either Party in a judicial or quasi judicial proceeding, except for the enforcement of this Agreement.

3. Scope

3.1 This Agreement does not define Aboriginal or Treaty rights. It is intended to provide for the sustainability of fish, the support of the SON commercial fishery and the safety for all on the waters.

3.2 This Agreement applies to all species of fish that are caught for commercial purposes by the SON commercial fishers in the Waters.

3.3 This Agreement does not address SON's fishing for food, social or ceremonial purposes, and nothing in this Agreement shall be construed so as to apply to such fishing.

4. Fishing

4.1 The SON will designate, in accordance with SON's own practice, those members who may engage in commercial fishing under this Agreement ("SON Commercial Fishers").

4.2 SON Commercial Fishers who fish or engage in other activities under this Agreement will comply with the terms of this Agreement, including Schedule C and Schedule D.

4.3 SON Commercial Fishers will recommence fishing in the Bays starting 60 days after this Agreement comes into force, and shall continue thereafter according to Schedule C.

4.4 In each year, SON agrees that SON Commercial Fishers will not catch more than the TAC for each species for which the TAC has been established.

4.5 The TAC for the Waters for lake whitefish is set out in Schedule D.

4.6. In order to ensure the sustainability of the resource, the TAC Working group shall recommend to the Governance Committee no later than June 15 in each year an appropriate TAC for lake whitefish, and any other species for which it is of the view that TAC should be established, for Zones 1, 2 and 3, as described in Schedule B.

4.7 Where no TAC is set for a species, either Party may ask the Governance Committee to consider the issue of whether TAC should be set for that species and, if so, what process should be adopted.

4.8 If the Governance Committee decides that TAC should be set for the species, Schedule D shall be amended in accordance with paragraph 9.2 of this Agreement to reflect this change.

4.9 If no TAC has been set for a species, there is no limit on the weight of that species that may be caught.

5. Data Exchange

5.1. In order to ensure the sustainability of the fishery, to ensure the Parties' mutual responsibility for fisheries assessment work and to assist the TAC Working Group, the Parties agree to exchange fisheries data in accordance with paragraph 5 and the protocol set out in Schedule D.

5.2 MNR agrees to exchange annual Lake Huron lake-wide harvest data from commercial fishers that are not SON Commercial Fishers and, to the extent it is available, from recreational fishers in accordance with Schedule D.

5.3 SON agrees that SON commercial fishers shall report to SON their daily catch for all species and their fishing effort, including location of catch, gear type and the length of time nets were set in the water in accordance with Schedule D.

5.4 SON agrees that the information provided by SON Commercial Fishers to SON under paragraph 5.3 shall be shared with MNR in accordance with the process set out by the Governance Committee in accordance with Schedule D.

5.5 As directed by the Governance Committee, both Parties agree to provide any other information that may be helpful to the TAC Working Group at the end of fishing for that year.

6. Compliance

6.1 The Parties agree to follow the Compliance Protocol as set out in Schedule E.

7. Funding

7.1. The Parties recognize that in order to implement this Agreement, prudent, fair and reasonable funding is necessary for the work that is to be collaboratively undertaken under this Agreement.

7.2. The Parties agree to work together through the Governance Committee to finalize annual work plans and budgets by March 15.

7.3. MNR will provide SON up to $850,000 over a five-year term of a new substantive commercial fishing agreement. This sum to be provided as follows:

- Year 1: $250,000 for April 2012 – March 2013 (subject to deductions made in accordance with the MOU signed by the parties on February 23, 2012)
- Year 2: $180,000 for April 2013 – March 2014
- Year 3: $170,000 for April 2014 – March 2015
- Year 4: $150,000 for April 2015 – March 2016
- Year 5: $100,000 for April 2016 – March 2017

7.4. The funding set out in paragraph 7.3 will be provided in accordance with a Transfer Payment Agreement entered into by the parties.

7.5. If the Governance Committee recommends a project that will be valuable to the parties but for which there is insufficient funding under paragraph 7.3, both parties shall exercise best efforts to attempt to locate funding, including support in kind and funding from initiatives provided by other agencies, in order to contribute to those projects.

8. Implementation of Goals, Commitments and Obligations: The Governance Committee

8.1. The Governance Committee established under the Framework Agreement is continued, and will serve as a mechanism for ensuring there is collaboration in the governance and implementation of this Agreement.

8.2. The Governance Committee will continue to act in accordance with Part II of the Framework Agreement, with necessary modifications.

8.3. The Governance Committee will meet at least quarterly.

8.4. The Governance Committee shall undertake the following non-exhaustive list of matters:

a) Direct and approve the development of a work plan and budget for each year in order to implement the commitments set out in this Agreement.
b) Identify and use best efforts to pursue other funding as necessary.
c) Establish TAC and amend Schedule D accordingly.
d) Seek the participation of the federal government, or other agencies or ministries in the implementation of this Agreement.
e) Review any recommendations made by the Stocking, TAC, Communication/ Education and Economic Development Working Groups or any other Working Groups, and implement them as agreed.
f) Seek to resolve disputes that arise in respect of the interpretation, application or implementation of this Agreement.
g) Deal with any other matters as determined by the Governance Committee.

8.5 The Governance Committee, or a working group directed to do so, shall prepare a report (not exceeding 5 pages) no later than March 31, 2014 with respect to the experience of the Parties in implementing this Agreement that identifies the progress made and any challenges. If the report identifies a lack of progress in fulfilling the commitments and objectives of this Agreement attributable to a shortfall in funding provided under paragraph 7.3, the Governance Committee shall seek to resolve the issue. If the issue cannot be resolved by the Governance Committee, it will refer the matter to the Minister of Natural Resources for

consideration of possible ways to resolve the issue in accordance with the spirit and intent of this Agreement.

9. Schedules

9.1. The Parties agree that the Schedules to this Agreement form part of the Agreement.

9.2. The Parties agree that although this Agreement may only be amended on the agreement of the Parties in accordance with paragraph 12.3, the Schedules to this Agreement may be amended from time to time by decision of the Governance Committee.

10. Continuation of Work begun under the Framework Agreement and Dispute Resolution

10.1. The Dispute Resolution process established under paragraph IV of the Framework Agreement is continued with necessary modifications and will serve as a mechanism for addressing disputes under this Agreement.

10.2. The Working Groups established by the Governance Committee pursuant to the Framework Agreement are continued and the terms of reference are attached as Schedule F.

11. Other Provisions

11.1. A summary of the terms of the Agreement may be agreed upon and provided to interested third parties, or as part of communication and education efforts agreed to by the Governance Committee.

11.2 The Parties agree that on the date that this Agreement comes into force, it and the Framework Agreement will not be confidential, despite paragraph V (A)(1) of the Framework Agreement.

12. Term of the Agreement

12.1. This Agreement comes into force and effect on the day it is signed by both Parties.

12.2. This Agreement shall be in force and effect for a term of 5 years from the date that it comes into effect and shall terminate at the end of its term, unless the Parties agree otherwise.

12.3. This Agreement may be amended by written agreement duly executed by the Parties.

13. Termination and Notice

13.1. This Agreement may be terminated:

a) by mutual consent, as recommended by the Governance Committee; or,
b) by either Party, 30 days following the delivery of notice in writing, which shall be delivered by mail, fax or email, to the Minister of MNR, or the 2 Chiefs of SON.

13.2 Despite paragraph 13.1, where notice has been provided under 13.1(b), the Parties will, within the 30 days of the delivery of the notice of termination, meet in a mediated forum in an effort to resolve any dispute leading to the notice of termination.

13.3 Notice that may be required under this Agreement, other than a notice of termination, shall be in writing and shall be delivered by mail, fax or email to the representatives of the parties that are on the Governance Committee.

NOW HEREIN THE PARTIES AGREE TO THIS AGREEMENT:

SIGNED
in the presence of:

Witness

Date Jan. 24/13

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Natural Resources
per:

Honourable Michael Gravelle
Minister

Date JAN 24 2013

SIGNED
in the presence of:

Witness

Date Feb 21, 2013

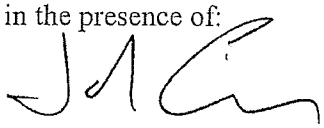
Saugeen First Nation
As represented by: Chief Randall Kahgee

Chief Randall Kahgee

Date Feb 21 2013

I have authority to bind the Saugeen First Nation.

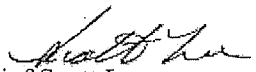
SIGNED
in the presence of:



Witness

Feb 25, 2013
Date

Chippewas of Nawash Unceded First Nation
As represented by: Chief Scott Lee



Chief Scott Lee

FEB 25TH 2013
Date

I have authority to bind the Chippewas of Nawash Unceded First Nation.

Schedule A – Framework Agreement

05/07/2011 3:37:14 PM
Draft for Ratification
Version July 5, 2011

FRAMEWORK AGREEMENT

BETWEEN:

THE CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

-AND-

SAUGEEN FIRST NATION

(Collectively, the "Saugeen Ojibway Nation" or "SON")

-AND-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE
MINISTER OF NATURAL RESOURCES
("MNR")

(Together the "Parties")

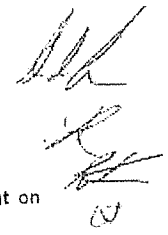
WHEREAS the Saugeen Ojibway Nation ("SON") has sustained itself historically by engaging in fishing for commercial, cultural, ceremonial, and subsistence purposes;

WHEREAS the relationship between SON and the Crown is marked and governed by Treaties, Promises, and Proclamations including Treaty 45 ½, Treaty 72 (1854), Treaty 82 (1857), and the Imperial Proclamation of 29 June 1847;

WHEREAS as expressed in *R v. Jones and Nadjiwon* (1993) 14 O.R. (3d) 421 (Ont. Prov. Ct.) SON's aboriginal and treaty rights to fish for commercial and ceremonial purposes were recognized and protected under Section 35 of the *Constitution Act*, 1982

WHEREAS the Parties have been working together through commercial fishing agreements since June 2000;

AND WHEREAS the Parties agree that the purpose of this Framework Agreement is to have the Parties, on a Government to Government basis, enter into a long-term Substantive Commercial Fishing Agreement by October 31, 2011 as an important step in their constructive, ongoing and harmonious relationship in order to continue the process of reconciliation.



NOW THEREFORE the Parties enter into this Framework Agreement on the following terms and conditions:

I. GOALS, PRINCIPLES, OBJECTIVES, AND COMMITMENTS

A. GOALS

The Goals the Parties intend to reach through this Framework Agreement are as follows:

a. To create a constructive, ongoing and harmonious, long-term relationship between SON and MNR by reaching agreements regarding the fishery and the waters defined in a long term Substantive Commercial Fishing agreement.

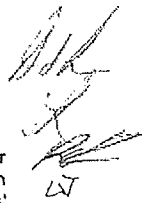
b. To accomplish this long term relationship, the Parties will engage in good faith to implement this Framework Agreement and the commitments made herein. The results of the implementation of and work under this Framework Agreement will be the basis for a long-term Substantive Commercial Fishing Agreement arrived at through good faith negotiations, mutual commitments and shared obligations.

c. The Parties understand that this Framework Agreement, and any Substantive Commercial Fishing Agreement that results, are part of a continuum of building and maintaining a new and positive relationship.

B. PRINCIPLES

The Principles that shall govern this Framework Agreement are as follows:

a. New Relationship: Willingness and commitment to forge a new relationship based on the Principles below, recognizing the past but seeking to build a more positive and beneficial future for the parties.



b. Mutual Respect: Willingness and commitment to listen to and hear each other and to act honourably and in good faith toward each other, including through meaningful recognition of the Parties' perspectives, constraints, values, and culture.

c. Mutual Understanding: Willingness and commitment to understand each other's cultures, responsibilities and limitations.

d. Mutual Participation: Willingness and commitment to create and implement mechanisms that achieve further participation between the Parties in decisions about commercial fishing in the waters that will be defined in a long-term Substantive Commercial Fishing Agreement.

e. Mutual Accountability: Willingness and commitment to create and implement mechanisms to ensure that the Principles and provisions of this Framework Agreement are carried out in their spirit and intent.

f. Mutuality Requires Balancing: Acceptance of the fact that there are many parties who hold interests in the waters around the Bruce Peninsula and their interests must be considered in any long-term Substantive Commercial Fishing Agreement between the Parties.

C. OBJECTIVES

The objectives of this Framework Agreement are:

a. To cultivate an improved relationship between the Parties through the establishment of meaningful processes, committees, and working groups in which SON has the capacity to participate;

b. Through those processes, committees, and working groups to provide for the implementation of collaborative initiatives that improve the mutual understanding and cooperativeness between the Parties for the sustainable management, and use of the fishery, that respects the Principles above; and,

c. To use best efforts to ensure that economic development, and capacity building is created and exists for SON and its members, while giving appropriate consideration to other interests in the fishery.

D. MUTUAL COMMITMENTS

SON and MNR agree that they share the following commitments:

1. Protection, conservation and sustainability of the resource;

2. That mutual trust and respect will be established by the implementation of meaningful processes to develop proposals, pursuant to this Framework Agreement, for inclusion in a long-term Substantive Commercial Fishing Agreement regarding:

   a. Mutual economic benefits for the parties;
   b. Capacity for SON;
   c. The setting of TAC based on sound scientific principles;
   d. Monitoring and enforcement;
   e. Implementation and governance of a long-term Substantive Commercial Fishing Agreement;
   f. The impact of stocking programs in the waters to be defined in a long-term Substantive Commercial Fishing Agreement;
   g. The Bays and other areas of fishing activity as agreed to by the parties;
   h. Communications and public education; and
   i. Such other issues as the Governance Committee may determine appropriate in the circumstances.

3. Engagement of the Federal Crown, and any other agency or ministry in a long-term Substantive Commercial Fishing Agreement or as agreed to herein;

4. Consideration of the interests of third parties in the waters to be defined in a long-term Substantive Commercial Fishing Agreement;

5. The Parties, in working toward a long-term Substantive Commercial Fishing Agreement, will use their best efforts and be guided by the principles and commitments listed above. In so doing the Parties agree to:

i. Identify and communicate with each other about issues of concern;

ii. Address those issues in a manner consistent with the Principles animating this Framework Agreement in a collaborative way; and

iii. Where there is a disagreement between the Parties and after reasonable efforts, they are unable to reach agreement, the matter will be referred to Dispute Resolution as set out below.

II GOVERNANCE AND IMPLEMENTATION

This Framework Agreement and the mutual commitments made herein will be governed by the following:

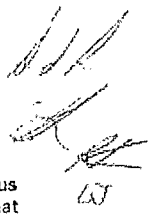
A. Governance Committee

1) A Governance Committee comprised of four representatives of SON and four representatives of MNR will be established. At least two of the representatives of SON will be the Chiefs of SON and of the four representatives of MNR, one shall be an Assistant Deputy Minister (ADM) of MNR. Quorum of the Governance Committee is two representatives from each Party with at least one Chief and one ADM

2) The Governance Committee will supervise, discuss and work collaboratively to meet the objectives, commitments and goals of this framework agreement set out herein.

3) The Governance Committee will work together on seeking the engagement of the Federal Crown, and any other agency or Ministry as agreed to herein, or in a long-term Substantive Commercial Fishing Agreement.

4) The Governance Committee will, as soon as practicable, establish budgets, work plans and working groups with sufficient resources to recommend proposals for inclusion in a long-term Substantive Commercial Fishing Agreement that address the commitments outlined in Section I-D of this Framework Agreement.



5) The Governance Committee will make decisions on a consensus basis that reflects the approval of both Parties. Where that consensus cannot be reached, the matter may be referred to Dispute Resolution as set out below.

6) The Governance Committee may agree upon the attendance of experts or advisors at its meetings from time to time.

B. Working Groups

1) The work of any Working Group may be combined, restricted or modified as the Governance Committee sees fit;

2) The Governance Committee will appoint representatives and if necessary advisors to the Working Groups, subject to agreement on funding;

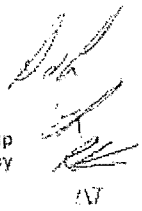
3) Each Working Group will have joint chairs composed of a representative of each Party. The joint chairs will prepare agendas for Working Group's meetings;

4) The Working Group representatives for each Party will be given a copy of the Working Group records of each Working Group meeting and the work completed;

5) Each Working Group will complete the work set out in the approved work plan and shall meet in accordance with the approved work plan, and more often as required to complete the work set out in the work plan;

6) The quorum for any Working Group meeting is two Working Group representatives for SON and two for MNR, providing that notice of such meeting was sent at least one week in advance to all such representatives;

7) Each Working Group will make decisions on consensus as between the Parties through their Working Group Representatives. If consensus cannot be reached, then the matter will be referred to the Governance Committee;



3) Each Party may replace and appoint its Working Group representatives at anytime. The Parties agree that consistency and continuity in representatives and advisors are important.

III. TIMEFRAMES

1) The Parties will use best efforts to enter into a long-term Substantive Commercial Fishing Agreement by October 31, 2011.

IV. DISPUTE RESOLUTION

1) Disputes that arise in interpretation, application or implementation of this Framework Agreement are to be resolved by a meeting of the Governance Committee.

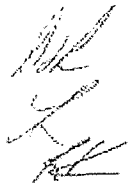
2) If, after reasonable efforts, the Governance Committee cannot resolve the dispute or matter in issue, it will be referred to a mutually appointed facilitator or mediator to assist the parties in resolving the dispute or matter in issue.

V. GENERAL PROVISIONS

A. WITHOUT PREJUDICE AND CONFIDENTIAL

1) This Framework Agreement and the work here under including the negotiation of a long-term Substantive Commercial Fishing Agreement will be conducted on the basis that they are confidential to the Parties and without prejudice.

2) In particular, the Parties agree that any documents shared in the negotiations shall be shared on a without prejudice basis and shall be kept confidential. The Parties acknowledge that such documents are subject to applicable access to information and privacy legislation, but nothing in this Agreement shall be construed as a requirement of any Party to make available information that is by law privileged or exempt from disclosure under the Freedom of Information and Protection of Privacy Act or otherwise.



B. TERMINATION

1) This Framework Agreement may be terminated:

(i) By mutual consent;

(ii) By either Party where in its reasonable opinion the Goals, Principles, Objectives or Commitments of the Framework Agreement are not being met; and then only after resort to facilitation or meditation which shall take place within thirty days of notice by one Party to the other of its opinion.

C. NON-DEROGATION

1) Nothing in this Framework Agreement shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal, or treaty rights of the SON as recognized and affirmed in section 35 of the *Constitution Act, 1982.*

D. FUNDING

1) The Governance Committee will, with input from Working Groups as required, develop a work plan and budget for the work to be undertaken under this Framework Agreement

E. BINDING

1) This agreement is binding upon the Parties and their successors.

NOW HEREIN THE PARTIES AGREE TO THIS FRAMEWORK AGREEMENT:

SIGNED
In the presence of:

Witness

Date:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Natural Resources

per:

Honourable Linda Jeffrey
Minister

Date:

SIGNED
In the presence of:

Saugeen First Nation
As represented by: Chief Randall Kahgee

Witness

Chief Randall Kahgee

Date:

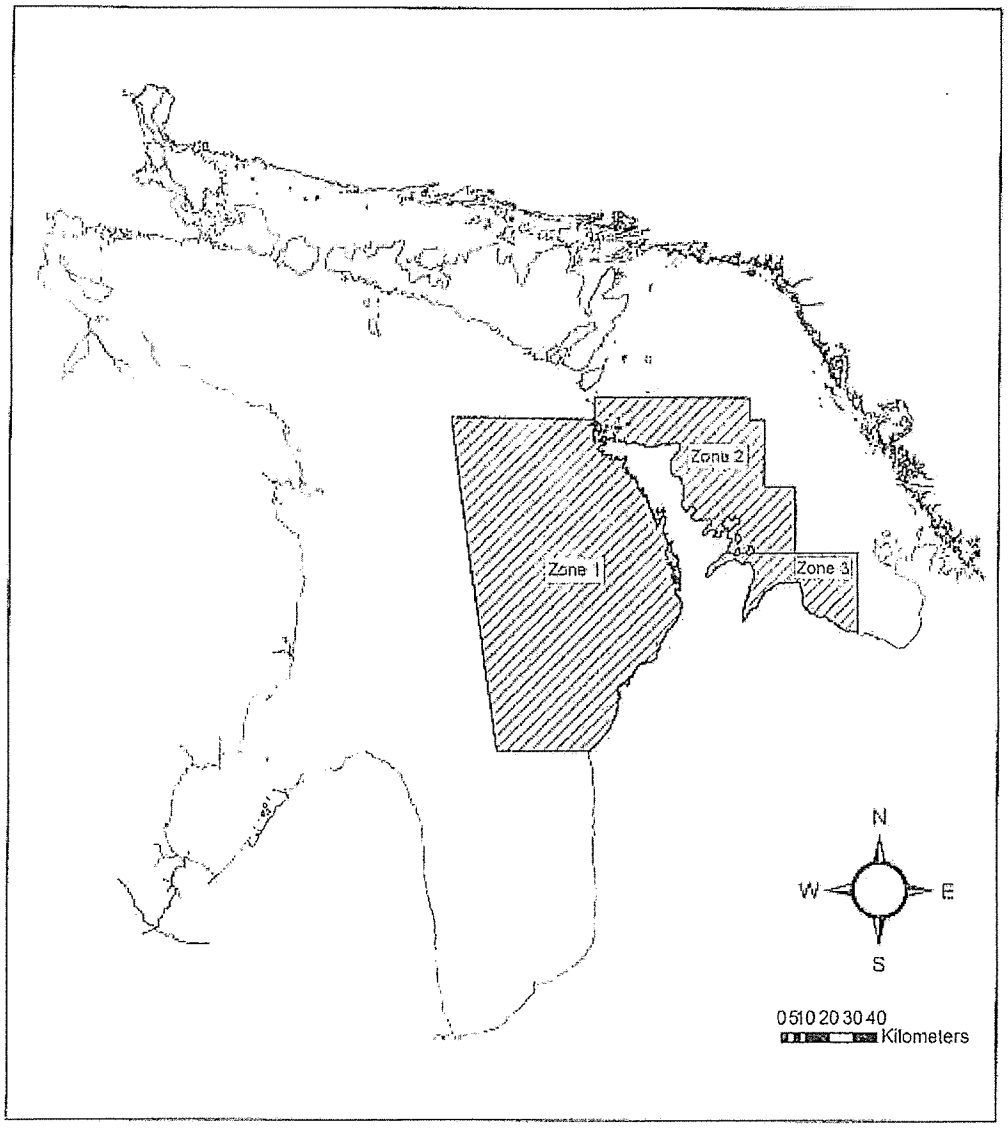
Date:

SIGNED
In the presence of:

Chippewas of Nawash Unceded First Nation, as represented by: A/Chief Scott Lee

I have authority to bind the Saugeen First Nation.

Schedule B – The Waters



Schedule C - Fishing in the Waters

1. In this Schedule, references to lines are references to lines drawn on the map attached at the end of this Schedule.

2. The following provisions apply to fishing in the Waters under this Agreement.

3. Where there are special provisions that apply to fishing in the Bays, those provisions are set out below; and if they are inconsistent with other provisions in this Schedule, they shall prevail.

4. In Owen Sound, no commercial fishing will occur in the waters at the end of the Bay that are inside the red line drawn perpendicular to the shore line from Balmy Beach to the other shore.

5. In Colpoys Bay, no commercial fishing will occur in the waters at the end of the Bay that are inside the red line that is drawn continuous from the road at the Government Dock to the southwest shore of Colpoys Bay.

6. 60 days after the Agreement comes into force, SON commercial fishing will recommence in the waters between the dotted lines and the solid red lines.

7. During 2012 and 2013,

    a. the Parties will jointly monitor activities in the waters described in paragraph 6 in order to determine how SON commercial fishing and other uses of those waters can occur safely at the same time; and
    b. SON will identify areas in the waters described in paragraph 6 that are of particular importance to SON fishers. .

8. SON and MNR will collaborate to prepare communications and public education materials about this agreement and about SON's commercial fishing activities and the importance of commercial fishing to the community to support SON commercial fishing and other uses of the waters occurring safely at the same time.

9. The information gathered under paragraph 7 shall also be provided to the Governance Committee.

10. In October 2013, the Governance Committee shall meet to consider the results of the joint monitoring activities described in paragraph 7 to determine whether there are any public safety, commercial fishing safety or other issues that need to be considered and addressed, and whether changes to this schedule need to be made regarding SON's fishing in the Bays.

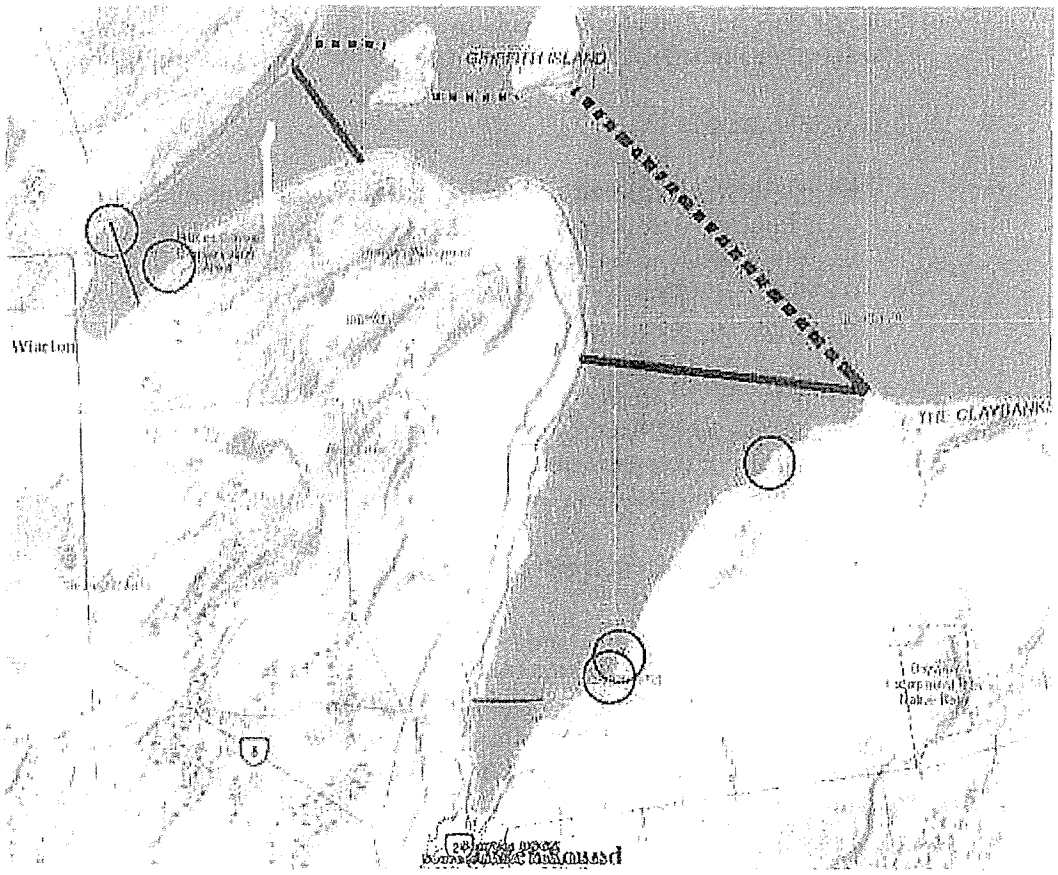
11. In 2014, SON commercial fishing will continue in the waters described in paragraph 6 unless otherwise agreed to by the Governance Committee .

12. Until the Governance Committee has had an opportunity to consider recommendations of the Stocking Working Group regarding the impacts, if any, of commercial fishing near the mouths of rivers or streams, during March, April, October and November, SON will make best efforts not to set nets or to target other species for commercial catch within a 1 kilometre radius of the mouth of Bothwells Creek, Colpoys Creek, Waterton Creek, Keefers Creek and Gleason Brook, as illustrated on the attached map.

13. All SON nets will be marked with a buoy according to SON standards and shall also have a pole and flag so as to be clearly visible to all vessel traffic.

14. SON commercial fishers shall use nets with a mesh size of 4.5 inches or greater for the purpose of fishing lake whitefish in the Bays, unless otherwise agreed by the Governance Committee.

15. Nets in the Bays shall be a maximum height of 50 meshes and a maximum length of 300 meters.



Schedule D – Total Allowable Catch and Data Exchange

Data Exchange for the purpose of developing TAC

1. The following data is provided by one party to the other solely for the purpose of developing TAC. In the event the data provided by one party is to be used for a different purpose, there will be a discussion with that party, or with the Governance Committee if necessary, before it is used for that purpose.

2. The following data from the previous calendar year's fishery will be exchanged annually no later than the last day of February of each calendar year.

3. MNR will provide the following fisheries data to SON:

    i. commercial harvest data from Lake Huron
    ii. offshore index netting data
    iii. recreational harvest data from Lake Huron, to the extent it is available
    iv. other data relevant to the setting of TAC that is requested by SON and is available

4. SON will provide the following fisheries data to MNR:

    i. commercial harvest data from the SON commercial fishery
    ii. offshore index netting data
    iii. other data relevant to the setting of TAC that is requested by MNR and is available

Process for Adjusting TAC on an Annual Basis

1. The parties and the TAC Working Group will follow the process set out below in order that the TAC Working Group may develop a timely annual recommendation on TAC to the Governance Committee:

    a. Improved data that reflects quality assurance and quality control will be shared by the parties with each other by the end of February
    b. SON and MNR representatives will analyze and model that data, using their preferred methods
    c. The TAC Working Group will meet in May to exchange the models used by the parties (including analysis, modelling technique and model output), thereby enabling constructive review by the parties
    d. The analysis and modelling will then be discussed with SON harvesters, councillors and senior managers
    e. SON and MNR will communicate each party's preliminary analysis and options for TAC with SON harvesters, councillors, senior managers and other parties

f. All relevant information will be provided to the TAC Working Group with the goal of making a joint recommendation on TAC to the Governance Committee by June 15
   i. If consensus on TAC is reached, the TAC Working Group will share its recommendation with the Governance Committee
   ii. If consensus on TAC is not reached, the SON and MNR representatives will provide their separate advice on TAC to all members of the Governance Committee

g. By the end of June, the Governance Committee will meet to consider and decide TAC based on the recommendation by the TAC Working Group or the advice received from SON and MNR representatives on the TAC Working Group

h. The Governance Committee shall amend this Schedule to reflect its decision with respect to TAC.

2. The TAC Working Group shall make annual recommendations to the Governance Committee on ways to strengthen the science behind fisheries stock assessment in order to support decisions on TAC by the Governance Committee. These recommendations will include identification of any key uncertainties to be addressed by the TAC Working Group in the subsequent year and any proposed actions, deliverables, deadlines and budget. The Governance Committee shall consider those recommendations.

Total Allowable Catch for the Waters

1. SON and MNR agree that the Waters shall be divided into the following zones for the purpose of this Agreement and the establishment of TAC, based on the assessment:

   Zone 1 is the area shown by the hatched marks on the map set out below.

   Zone 1 is described as follows: Inside a line beginning at the intersection of the water's edge on the eastern shoreline of Lake Huron (Main Basin) and the parallel of latitude 44°05'N; thence northerly along the western shoreline of mainland Bruce County to its intersection with the parallel of latitude 45°15'N; thence west along that parallel of latitude to its intersection with the line of longitude 81°45'W; thence north along that line of longitude to its intersection with the parallel of latitude 45°20'N; thence west along that parallel of latitude to its intersection with the International Boundary between Canada and the United States of America; thence southerly along that International Boundary to its intersection with the line of latitude 44°05'N; thence east along that parallel of latitude to the place of beginning.

   Zone 2 is the area shown by the hatched marks on the map set out below.

   Zone 2 is described as follows: Inside a line beginning at the intersection of the parallel of latitude 45°25'N and the line of longitude 80°55'W; thence south along that line of longitude to the parallel of latitude 45°20'N; thence east along that parallel of

latitude to the line of longitude 80°50'W; thence south along that line of longitude to the parallel of latitude 45°05'N; thence east along that parallel of latitude to the line of longitude 80°40'W; thence south along that line of longitude to the parallel of latitude 44°50'N; thence west along that parallel of latitude to the water's edge at Colpoys Bay; thence northerly and easterly and westerly along that water's edge to the parallel of latitude 45°15'N being at the northwestern extremity of the Bruce Peninsula; thence west along that parallel of latitude to the line of longitude 81°45'W; thence north along that line of longitude to the intersection of the parallel of latitude 45°25'N; thence east along that parallel of latitude to the place of beginning.

Zone 3 is the area shown by the hatched marks on the Map set out below.

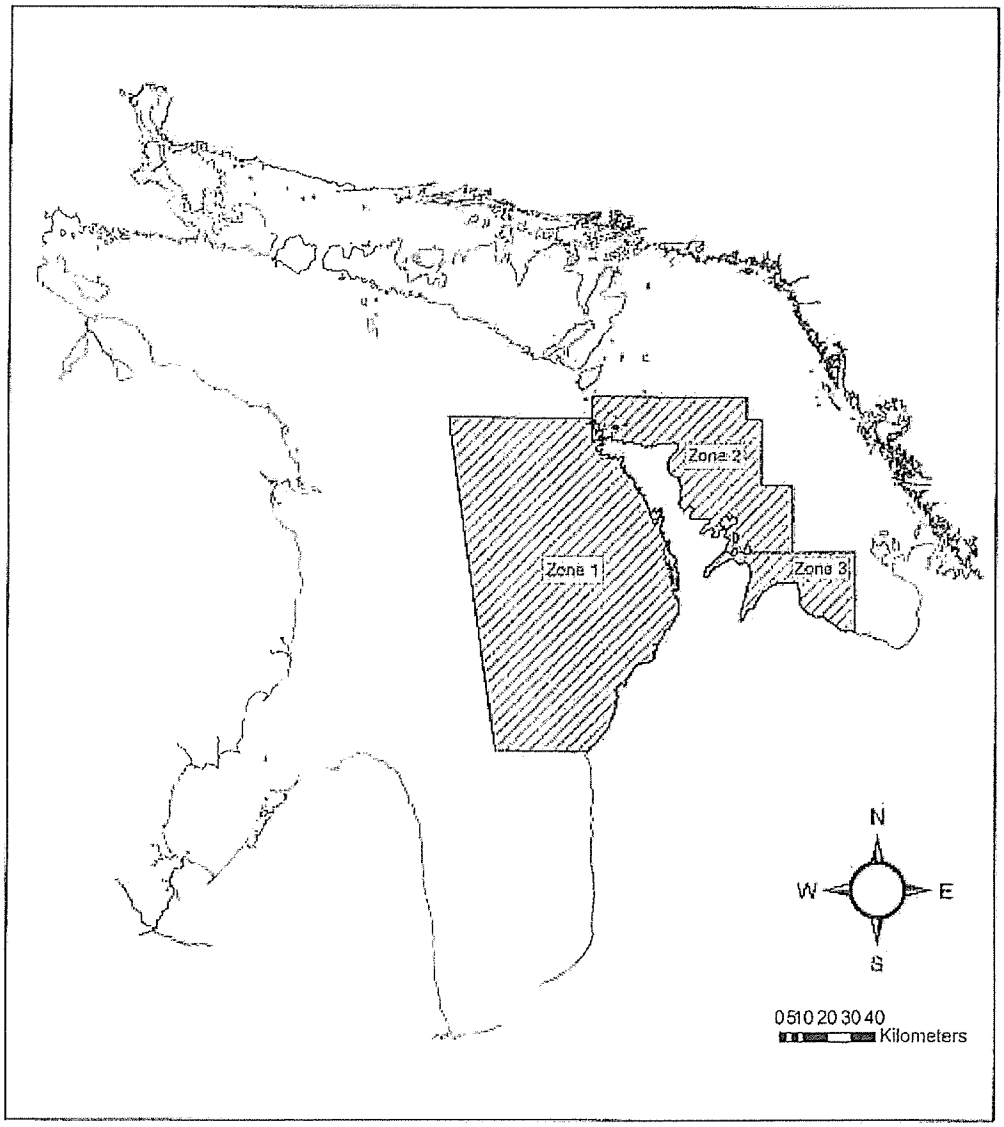
Zone 3 is described as follows: Inside a line beginning at the intersection of the parallel of latitude 44°50'N with the line of longitude 80°20'W; thence south along that parallel of longitude to the water's edge of southern Georgian Bay; thence westerly along that water's edge to the line of latitude 44°50'N in Colpoys Bay; thence east along that parallel of latitude to the place of beginning.

2. With respect to the establishment of TAC, there will be consideration of the status of biological fish populations, with associated distribution of the populations prior to the determination of TAC in the Waters.

3. Quantities of fish are expressed in round weight and in kilograms and represent the maximum quantity that can be taken in aggregate by all persons designated to fish by SON in the Waters.

4. The following is the TAC for 2012:

Species	Zone 1	Zone 2	Zone 3
Lake whitefish	292, 287	55,292	48,901


Zone 1
Zone 2
Zone 3
N
W
E
S
0 5 10 20 30 40
Kilometers

Schedule E – Compliance

1. Compliance is a joint responsibility of the Parties, and the Parties agree to promote a cooperative compliance regime through collective efforts to identify and resolve compliance issues and concerns. The following is the Compliance Protocol that the Parties agree will, in accordance with their own mandates, govern joint compliance under this Agreement.

A. Compliance Protocol

a. *General Provisions*

2. SON agrees that any person authorized to fish by SON ("SON Commercial Fishers") will be monitored by SON in order to ensure compliance with this Agreement.

3. SON and MNR shall agree to a process for joint patrols, inspections and monitoring to ensure compliance with this Agreement.

4. The Parties will annually provide each other with statistics of their enforcement activities in the waters.

5. Each Party will have a designated compliance representative who is authorized and readily available to deal with compliance issues under this Agreement, and will inform the other party who is its representative.

6. If SON or MNR becomes aware that a person is not fishing in accordance with this Agreement, SON or MNR agree to immediately notify the other Party's designated compliance representative and the Parties will follow the steps set out in this Schedule.

7. MNR will, in accordance with its mandate, continue to enforce the *Fisheries Act*, the *Ontario Fisheries Regulations* or other relevant legislation in respect of persons other than SON fishers within the waters.

b. *Potential Violations*

i. Potential Violations by Persons other than SON Commercial Fishers

8. Where SON is of the view that a possible violation of the *Fisheries Act*, the *Ontario Fisheries Regulations* or other relevant legislation by a person other than a SON Commercial Fisher interferes with fishing under this Agreement, SON may bring it to the attention of MNR. If so, MNR will, in a manner consistent

with its statutory obligations and its enforcement policies, investigate the allegation within 30 days and shall inform SON:(i) what compliance action, if any, was taken and why; or,(ii) where no action was taken, the reason why not.

9. Despite paragraph 8, if a possible violation is serious because it raises concerns such as a risk to safety, the potential for conflict with other users or serious interference with the ability of SON Commercial Fishers to fish under this Agreement, MNR will investigate the allegation as soon as it is practicable to do so.

ii. Potential Violations by SON Commercial Fishers

10. Within 30 days of becoming aware or being informed that a SON Commercial Fisher may not be fishing in accordance with this Agreement, SON agrees to investigate the allegation, in accordance with its own practices, and inform MNR:(i) what compliance action it has taken; or,(ii) that compliance action was not required and why.

2. Dispute Resolution

11. Where either Party disagrees with a compliance action or the failure to take compliance action with respect to an alleged violation of this Agreement, the issue may be referred to the Governance Committee for resolution.

12. If the Governance Committee does not resolve a compliance issue within 30 days of the matter coming before it, or if the Parties agree that there has been a failure to abide by the terms of the agreement and SON has been unable to effect compliance, MNR may exercise its discretion to take enforcement action under appropriate legislation such as the *Ontario Fishery Regulations*, 2007.

13. The Parties may refer significant compliance issues that cannot be resolved by the Governance Committee for Dispute Resolution in accordance with paragraph 10 of the Agreement.

3. Exemption: Imminent Threats

14. Despite these provisions on joint compliance, if a SON Commercial Fisher is engaged in an activity that MNR believes poses an imminent threat to human health and safety, or an imminent threat to the sustainability of the resource, MNR may, immediately take action that MNR considers necessary to mitigate the threat and shall immediately inform SON of that action, but will otherwise follow the process as set out above.

15. Despite these provisions on joint compliance, if SON believes that the activities by a person who is not a SON Commercial Fisher will damage SON property or pose an imminent risk to the health and safety of SON Commercial fishers or the SON fishery SON may, in addition to any provision of this Agreement, take appropriate legal action, but will otherwise follow the process as set out above.

Schedule F – Working Group Terms of Reference

1. Capacity and Economic Development Working Group
2. Expert Facilitation Regarding TAC Determination Working Group
3. Expert Facilitation Regarding Fish Stocking Working Group

TERMS OF REFERENCE
CAPACITY AND ECONOMIC DEVELOPMENT WORKING GROUP

I. MANDATE AND PURPOSE

WHEREAS this Working Group ("WG") was established by the Governance Committee on July 5, 2011 pursuant to Section II(A)(4) of the Framework Agreement to be entered into between SON and MNR.

WHEREAS the WG is to be guided by the terms of reference set out herein and develop detailed proposals and processes in a strategic and business plan through which the capacity needs of SON can be met so that SON can derive a greater economic benefit in the resource by trying to establish a vertically integrated commercial fishery.

II. COMPOSITION OF THE WORKING GROUP 1

The WG is combined of the following members:

OMNR	SON	MAA
David de Launay	Paul Jones	Deborah Richardson
Mark Elsey	Lorne Mandawoub	Pam Wheaton
	Jake Linklater	Lars Eddy

III. TERMS OF REFERENCE

The terms of reference for the Working Group are as follows:

1. To facilitate and complete through a Request for Proposal (RFP) a community based strategic plan for the SON fishery including goals, objectives and time lines for consideration and approval by the Governance Committee.

1 Alternates may be designated by the WG.

2. Commissioning, through a Request for Proposal (RP), a Business Plan, that will set out what is required for SON to derive greater economic benefits from the fishery including, but not limited to, the following:

    i. The equipment requirements of SON;
    ii. The cold storage requirements of SON including access to ice making for SON;
    iii. Processing of fishing;
    iv. Marketing of fish;
    v. Distribution of fish to the market;
    vi. Methods in which the revenues of SON fish may be enhanced;
    vii. Employment and training;
    viii. The costs necessary to address the capacity needs of SON in an economically viable and self-sustaining commercial fishery.

3. To identify the required government or non-governmental agencies necessary to support and implement these terms of reference.

4. To identify the required capital resources required to prepare the strategic and business plan for implementation for consideration by the Governance Committee.

IV. TIMELINES

5. The WG will develop a work plan pursuant to these terms of reference by the end of July, 2011 for consideration by the Governance Committee.

6. The WG will make best efforts to deliver the strategic and business plan by December 31, 2011.

Terms of Reference for

Expert Facilitation Regarding TAC Determination Working Group

SON-MNR Commercial Fishing Agreement

October 13, 2011

BE IT RESOLVED that the Governance Committee Agrees as follows:

I. PREAMBLES

WHEREAS the Saugeen Ojibway Nation ("SON") and the Crown in Right of Ontario represented by the Ministry of Natural Resources ("MNR") ("The Parties") have entered into two five year agreements to provide for the regulation and management of the commercial fishing activities of SON in a collaborative framework;

AND WHEREAS on July 5, 2011, the parties entered into a Framework Agreement to assist the parties in negotiating a long term substantive commercial fishing agreement;

AND WHEREAS the Governance Committee ("GC") has established a working group to make recommendations for a process for the determination of total allowable catch ("TAC") for the SON commercial fishery for consideration by the GC in accordance with Section D2(c) of the Framework Agreement;

AND WHEREAS the Parties wish to take a mutually respectful and collaborative approach to decision-making about TAC for the SON commercial fishery and that on October 13, 2011 the GC set the 2011 SON TAC and the timelines for these terms of reference as set out in Schedule "A";

AND WHEREAS the Parties wish to engage in facilitated technical discussions to assist them to resolve issues relating to the appropriate application of scientific methods in support of the determination of TAC for the SON commercial fishery;

AND WHEREAS the Parties currently disagree as to, among other things, the appropriate way to address uncertainties about fish population discrimination, population modelling, and risk assessment methodology as they relate to the determination of TAC for the SON commercial fishery.

II. DIRECTION AND OBJECTIVES

1. Upon appointment and retainer of the Facilitator, SON and MNR shall forward briefing packages to the facilitator and to each other within 3 weeks of the date of the facilitator's appointment, and no later than December 15, 2011 as set out in Schedule "A";

2. The TAC working group shall meet as soon as practicable pursuant to the directions given under these Terms of Reference after the exchange of documents set out above and review by the facilitator;

3. The TAC working group will:

    a. Meet, with the assistance of the facilitator, as set out below, to make recommendations for a process for the determination of TAC for the SON commercial fishery, including identifying areas of consensus and disagreement on the process by which TAC can be set for the SON commercial fishery, for consideration by the GC that may be included in a long term substantive commercial fishery including recommended work plans, time lines, and the resource requirements for any contemplated or recommended processes;

III.FACILITATED PROCESS – SPECIFIC TERMS OF REFERENCE

4. SON and MNR have agreed to engage an independent expert (the "expert facilitator") in accordance with the following terms of reference:

(i)The Parties shall jointly select the expert facilitator based on, a) his or her expertise in the area of natural resource management and neutral facilitation, and b) his or her independence from the Parties and neutrality with respect to the Parties' positions on the issues;

(ii)The expert facilitator shall convene and chair up to four days of meetings, which may be held by telephone or video conference, between the Parties to address concerns about the appropriate application of scientific methods used by both parties in making sound and informed determinations of TAC for the SON commercial fishery;

(iii)The meetings chaired by the expert facilitator and all communications relating to those meetings shall be confidential and, as provided in paragraph 7 below, without prejudice to the

Parties' legal rights and in accordance with the Framework Agreement signed by the Parties;

(iv) SON and MNR shall each send no more than three technical experts to participate in the facilitated meetings who shall make a serious effort in good faith to expeditiously identify the gaps between their positions on TAC issues, and to explore whether consensus is possible as to acceptable means of bridging those gaps to support informed and effective collaboration between them. MNR may send one observer to any facilitated sessions as may the Saugeen Ojibway First Nation and the Chippewas of Nawash First Unceded First;

(v) The expert facilitator shall perform the following roles and tasks in relation to paragraph 2 above:

a) review in advance of any facilitated meeting, the briefing packages forwarded by the parties as set out in Section II(1), above;

b) prepare, in advance of any facilitated sessions, a draft agenda designed to assist the participants to identify clearly their views on each of the issues, any consensus between the parties and to address any identified differences in their views constructively and collaboratively;

c) chair the facilitated meetings with a view to assisting the participants to reach consensus on all issues where possible, and to identify clearly any remaining significant differences between the participants' views on issues; and

d) to provide a written report to the Parties (of up to three pages single-spaced on each issue) within two weeks of the final facilitated meeting, that:

i) identifies areas of consensus between the participants on the issues;

ii) Identifies significant differences in the participants' final views on the issues;

iii) where significant differences remain between the participants' views on the issues, to provide the expert facilitator's own non-binding views on the need for, and the nature and scope of any further action that would be required to help reach consensus on a particular issue; and

5. If the facilitated meeting(s) do not result in consensus on an appropriate science-based approach, to assist the expert facilitator in making his or her report each Party shall provide the facilitator, within one week after the facilitation, with a submission of up to three single-spaced pages, setting out its views on how each of the issues should be resolved in order to permit sound, collaborative decision-making by the Parties.

6. Subject to paragraph (a), the Parties agree that, unless they subsequently agree in writing otherwise, neither the facilitator's report referred to in paragraph 3(4)(d), nor any other information exchanged or communication made in the course of the facilitation may be tendered as evidence in any court or quasi-judicial proceeding or otherwise used outside of the negotiation process;

(a) Information that is already publicly available, or that has been created exclusively by one Party independent of the facilitation and the negotiations between the Parties, may be used by that Party in any forum or proceeding.

7. The expert facilitator will not voluntarily disclose to anyone other than the Parties, anything said or done during the facilitation, nor any documents submitted during or for the facilitation including the facilitator's report referred to in paragraph 5(iii), without the written consent of both Parties. The expert facilitator shall not be called as a witness by any Party in any proceeding.

8. The fees and reasonable expenses of the expert facilitator shall be paid by MNR, which will engage the facilitator as an independent contractor on terms consistent with these Terms of Reference.

9. The parties agree that time is of the essence in meeting the objectives and directions of these terms of reference.

DATED AT TORONTO THIS THE 13TH DAY OF OCTOBER, 2011

Chief Randall Khagee
Saugeen Ojibway First Nation

Tracey Mill
Assistant Deputy Minister
Ministry of Natural Resources

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

"SCHEDULE A"

I. 2011 SON TAC AS AGREED BY OMNR/SON GOVERNANCE COMMITTEE

Area	TAC for Whitefish
Georgian Bay West	36,722 Round Kilograms
Georgian Bay South	65,000 Round Kilograms
Main Basin East	292,287 Round Kilograms

The areas are those set out in the map as attached in Schedule "B".

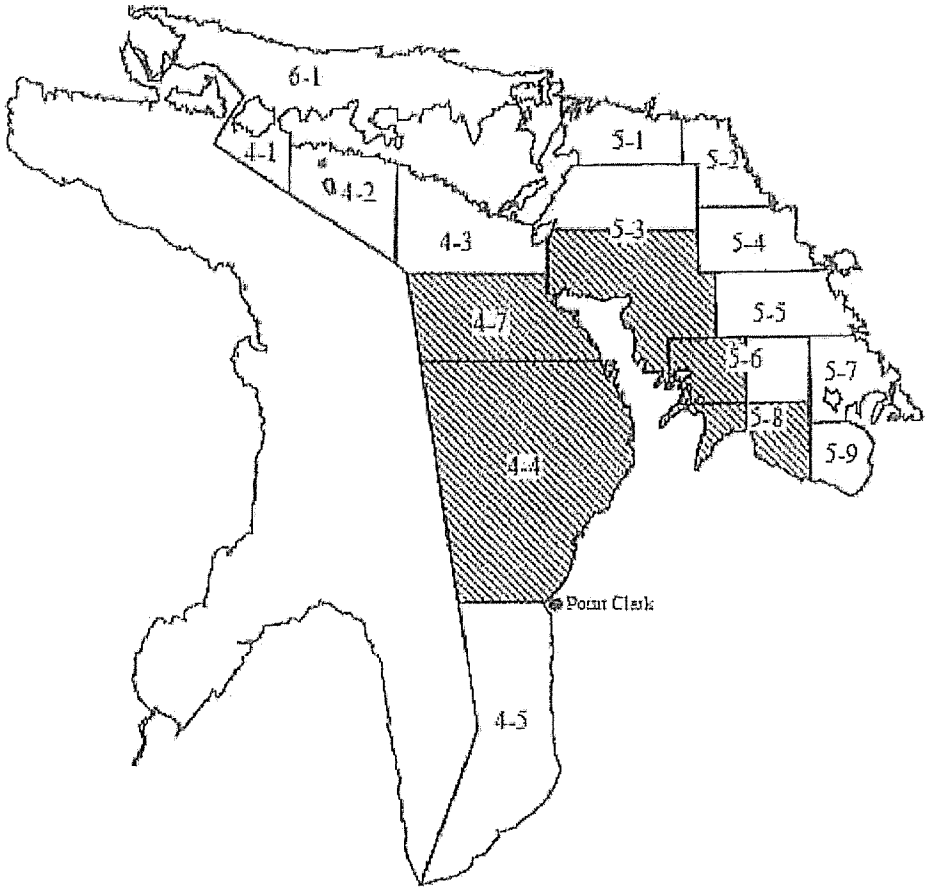
II. TIMELINES FOR FACILITATED TAC DETERMINATION WORKING GROUP

The TAC working group shall exchange information between themselves and the facilitator pursuant to these terms of reference no later than December 15, 2011.

The TAC working group shall comply with these terms of reference and deliver its recommendations contemplated herein no later than January 31, 2012 for consideration by the GC.

5

Schedule ~~A~~ B – Map 1



Waters available to Saugeen Ojibway fishers subject to paragraph 9 and the other terms of this Agreement

Terms of Reference for Expert Facilitation Regarding Fish Stocking Working Group SON-MNR Commercial Fishing Agreement

BE IT RESOLVED that the Governance Committee Agrees as follows:

I. PREAMBLES

WHEREAS the Saugeen Ojibway Nation ("SON") and the Crown in Right of Ontario represented by the Ministry of Natural Resources ("MNR") ("The Parties") have entered into two five year agreements to provide for the regulation and management of the commercial fishing activities of SON in a collaborative framework;

AND WHEREAS on July 5, 2011, the parties entered into a Framework Agreement to assist the parties in negotiating a long term substantive commercial fishing agreement;

AND WHEREAS SON has expressed concerns about the implementation, objectives and effects, if any, of Fish Stocking in Lake Huron and Georgian Bay on SON's commercial fishery;

AND WHEREAS the Governance Committee ("GC") has established a working group to engage in facilitated technical discussions to assist them to a) identify areas of outstanding ecological concern, if any, relating to the objectives, implementation and effects of Lake Huron fish stocking programs, and b) provide recommendations for processes by which these areas of outstanding ecological concern could be effectively addressed for consideration by the GC; and

AND WHEREAS these Terms of Reference will assist the parties in addressing, based on the principles of mutual trust and respect, any disagreements in respect of fish stocking in the waters of Lake Huron in a substantive commercial fishing agreement.

II. DIRECTION AND OBJECTIVES

1. Upon appointment and retainer of the Facilitator, SON and MNR shall forward briefing packages to the facilitator as directed and agreed to by the Governance Committee;

2. The Fish Stocking working group shall meet as soon as practicable pursuant to the directions given under these Terms of Reference after the exchange of documents set out above and review by the facilitator

The Fish Stocking working group will, with the assistance of the Facilitator, as set out below:

- Review the available information in relation to objectives, implementation and effects of Lake Huron fish stocking programs;
- Identify areas of outstanding ecological concern, if any relating to the objectives, implementation and effects of Lake Huron fish stocking programs;
- Recommend the appropriate application of scientific methods by which these areas of outstanding ecological concern could be effectively addressed for consideration by the Governance Committee; and
- Address any other issues raised by the parties during the facilitated discussions consistent with the Framework Agreement.

III. FACILITATED PROCESS – SPECIFIC TERMS OF REFERENCE

3. SON and MNR have agreed to engage an independent expert (the "expert facilitator") in accordance with the following terms of reference:

(i) The Parties shall jointly select the expert facilitator based on, a) his or her expertise in the area of natural resource management and neutral facilitation, and b) his or her independence from the Parties and neutrality with respect to the Parties' positions on the issues;

(ii)The expert facilitator shall convene and chair up to a maximum of four days of meetings, which may be held by telephone or video conference, between the Parties to address the items outlined in section 3;

(iii)The meetings chaired by the expert facilitator and all communications relating to those meetings shall be confidential and, as provided in paragraph 7 below, without prejudice to the Parties' legal rights and in accordance with the Framework Agreement signed by the Parties;

(iv) SON and MNR shall each send no more than three technical experts to participate in the facilitated meetings who shall make a serious effort in good faith to expeditiously identify the gaps between their positions on fish stocking issues, and to explore whether consensus is possible as to acceptable means of bridging those gaps to support informed and effective collaboration between them. MNR may send one observer to any facilitated sessions as may the Saugeen First Nation and the Chippewas of Nawash First Unceded First;

(v) The expert facilitator shall perform the following roles and task in relation to paragraph 2 above:

a) review in advance of any facilitated meeting, the briefing packages forwarded by the parties as set out in Section II(1), above;

b) prepare; in advance of any facilitated sessions, a draft agenda designed to assist the participants to identify clearly their views on each of the issues, any consensus between the parties and to address any identified differences in their views constructively and collaboratively;

c) chair the facilitated meetings with a view to assisting the participants to reach consensus on all issues where possible, and to identify clearly any remaining significant differences between the participants' views on issues; and

d) to provide a written report to the Parties (of up to three pages single-spaced on each issue) within two weeks of the final facilitated meeting, that:

i) identifies areas of consensus between the participants on the issues;

ii) identifies significant differences in the participants' final views on the issues;

iii) where significant differences remain between the participants' views on the issues, to provide the expert facilitator's own non-binding views on the need for, and the nature and scope of any further action that would be required to help reach consensus on a particular issue, if any;

5. If the facilitated meeting(s) do not result in consensus on an appropriate science-based approach, to assist the expert facilitator in making his or her report each Party shall provide the facilitator, within one week after the facilitation, with a submission of up to three single-spaced pages, setting out its views on how each of the issues in or related to section 3 could be resolved for consideration by the Governance Committee as to how to effectively address areas of outstanding ecological concern as part of any substantive commercial fishing agreement.

6. Subject to section 4(v)(a), the Parties agree that, unless they subsequently agree in writing otherwise, neither the facilitator's report referred to in section 4(d), nor any other information exchanged or communication made in the course of the facilitation may be tendered as evidence in any court or quasi-judicial proceeding or otherwise used outside of the negotiation process;

(a) Information that is already publicly available, or that has been created exclusively by one Party, independent of or for the purpose of facilitation and the negotiations between the Parties, may be used by that Party in any forum or proceeding

7. The expert facilitator will not voluntarily disclose to anyone other than the Parties, anything said or done during the facilitation, nor any documents submitted during or for the facilitation including the facilitator's report referred to in section 4(d), without the written consent of both Parties. The expert facilitator shall not be called as a witness by any Party in any proceeding.

8. The fees and reasonable expenses of the expert facilitator shall be paid by MNR, which will engage the facilitator as an independent contractor on terms consistent with these Terms of Reference. SON's participation on the Working Group will be expensed as part of the negotiation support funding provided by OMNR.

9. The parties agree that time is of the essence in meeting the objectives and directions of these terms of reference.

10. As minuted in the Governance Committee meeting of November 15, 2011, the total budget for the stocking working group is $8,300 of which $5000 is for expert facilitation.

DATED AT OWEN SOUND THIS THE 24th DAY OF APRIL, 2012

Chief Randall Kahgee
Saugeen Ojibway First Nation

Tracey Mill
Assistant Deputy Minister
Ministry of Natural Resources

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

EXHIBIT “F”

This is Exhibit ...F.1..... referred to in the affidavit of ..Donald Keeshig..... sworn before me, this .....15th..... day of .....August..... 20.13.
.....
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 94-CV-068772CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Cross-Examination of **DONALD KEESHIG**, on his affidavit herein, taken before Lynn Zinn, Certified Court Reporter, at the Band Council Chambers, Cape Croker, Ontario, on the **5th day of December, 2002.**

- - - - - - - - - - -

APPEARANCES:

H.W.R. Townshend, Esq. for the Plaintiffs
G.N. Penner, Esq. for the Defendant, Attorney General
P. Lemmond, Esq. for the Defendant, The Queen

Also sitting in:

Ms. K. Mann (Researcher for Saugeen Ojibway First Nation)
Ms. R. Thomas (videographer)

explained it. Okay.

BY THE REPORTER: Was that an answer?

THE DEPONENT: Because -

220. MR. LEMMOND: Q. Yes, sorry, Mr. Keeshig, I have to be aware of this also, we have to make sure that we verbalize our responses for the record, so -

A. Yeah.

221. Q. - it'll be caught on the transcript, yes or no. So is that a yes, that -

A. Would you repeat that again?

222. Q. So you disagree with the proposition that your people weren't here to 200, 300 years ago, at least, in part, on the basis of having looked at this book and having it explained to you by Clair Anderson. Is that correct?

A. Mm..hm..

223. Q. Okay.

A. There's more to - There's more to it than what Peter knows about us here, yeah.

224. Q. Okay. Now I'm just going to move along a little bit here.

A. Is it proper for me to add a little more on some of these things?

MR. TOWNSHEND: If you think you need to add more to fully answer the question, please do so.

THE DEPONENT: Yes, I -

225. MR. LEMMOND: Q. Yes.

A. Our graveyards, like I'm speculating, but I won't be wrong too - I won't be too far wrong. Our

graveyards are - since Cape has been moved from Owen Sound to here, to establish the Reserve here, the graveyards wouldn't be any older than what the Reserve is, but since I retired from work I have found graves that are ancient. And that's before the Reserve really was established here. I have asked - more or less I suggested to the Council and Chief here that they should find out how old them - them graves are because I know they're very old, very old. That would tell us - that could help us tell how old - how long people have been in this area, the Bruce Peninsula.

226. Q. Mr. Keeshig, have you - have you told anyone else about these graves? For example, archaeologists -

A. Yes.

227. Q. - and universities and -

A. They have - I forget his name - Dave, can you help me on this?

DAVE: I think it's Bill Fitzgerald. Bill Fitzgerald.

MR. JONES: Fitzgerald, yes, I took him up there.

228. MR. LEMMOND: Q. And has there been any archaeological work done on -

A. No.

229. Q. - the graves?

A. No.

230. Q. Okay. I'm just going to -

A. But I was involved with the one that he had - he had checked out across the Bay from here, the

in Colpoy's Bay is known as a government dock, and the one in Howdenvale is government, or was.

490. Q. Are there private docks on the Reserve? People build their own docks?

A. You know, just walk-on, like -

491. Q. Small docks?

A. Small, for your - you know, it's like - Yeah. But they think those are built any place.

492. Q. So as far as you know though, off the Reserve the only docks are government docks?

A. That, I don't know. Since this fishing dispute was on, I - I've been asked, I've been challenged and I'm - There was - could have been rough times in hotels and all that when the things like that have come up. The easiest way for me to get out of it is, 'I'm not a fisherman; don't ask me these questions'.

MR. PENNER: Those are all my questions. Thank you. Mr. Townshend may have a question for you.

MR. TOWNSHEND: We'll just go off for a minute.

(OFF THE RECORD DISCUSSION)

(RESUMED)

RE-DIRECT BY MR. TOWNSHEND:

493. Q. Mr. Keeshig, when Mr. Lemmond was asking you about the tunnel story, you said it wasn't the only story that linked to ancient times. Is there -

Are there more stories you'd like to tell us about that?

A. Not ancient ones, not that I know of. Well there is, but I don't know if that corresponds with that. Like, when you start talking about the Escarpment that's going towards Tobermory, eh, there's caves where my people used to camp - go in and camp.

494. Q. Okay.

A. And I guess my grandfathers' names are in them caves where they would stop and rest because they must always travel by boat around the Great Lakes. Well, in fact, I know; my grandmother told me that they -they travelled the Great Lakes on big sailboats. As I say again, I'll probably get home and remember, 'Oh, heck, I should have told them this one and all that', eh, but actually I don't know any - any fantastic stories. That's about the biggest one I know, is that - that tunnel.

495. Q. Okay.

A. And it's just like when you open your mouth, you get into something bigger, eh. That's the funny thing about that tunnel, like that was just a story until I seen - I seen that they call it a pop-up where the land met like this and they build that tunnel and you could see it winding its way to Tobermory. And recently, I meet people from Tobermory. We - They don't know me - They know me now, since I named a boat up there and then this tunnel now and told me the stories about the islands up that run across to Tober - to Manitoulin Island

where there's kind of - a few had called it the markers, monuments that the native people put up years ago. So they travelled. They travelled all through there, eh, and used them islands. They even made channels on one island, I think it's nickname for that island is Horse Island. Fitz Jimmer Island I believe is on the map - Fitz - Fitz Jiverman, I think is the name of that island. Does anybody know that island? It starts with a "Z", Zimmerman - Zimmerman Island. But the elders called it the Horse Island.

496. Q. Okay.

A. And there's a channel. They was telling me that my grand - his grandfather told him that was built there by Indians years ago.

497. Q. Good.

A. Probably by hand. That's - They used the island, if it's storming on that side they'd go across there safely, eh, back and forth; fish on that side or fish on that side, whichever the quiet water was. Other than that, I don't know too much about - As I say, I - All I think I should have told is fine. I just wonder if anybody tried to go in that tunnel now how far they'd get. It's - It's quite a site when you look at it through them pictures. But when you say that, 10,000 years ago that's what it looked like. Now it'd be pretty well soaked up by water now, wouldn't it. Maybe. We should try it sometime. So what - what else have you got there?

MR. TOWNSHEND: I have no further questions. So thank you very much for coming here and - and spending so much time with us.

MR. KEESHIG: Yeah, it's -

- - - - -

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.

Bonnie Van Geene, C.C.R., Transcriber
Certified Court Reporter.

LEGAL REPORTING SERVICES

* * * Photostatic copies of this transcript are not certified and have not been paid unless they bear the original signature of Bonnie vanGeene, and accordingly are in direct violation of Ontario Regulations 587/91, Courts of Justice Act, January 1, 1990.

This is Exhibit F2 referred to in the affidavit of Randell Fraser sworn before me, this 15th day of August 20 13
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No.: 94-CO-508726CM

ONTARIO SUPERIOR COURT OF JUSTICE

COURT COPY

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Examination of **DONALD PETER KEESHIG**, before trial under Rule 36, taken before Bonnie Bilawey, Certified Court Reporter, at the Day's Inn in Owen Sound, Ontario, on the 13th day of September, 2002.

- - - - - - - - - - -

APPEARANCES:

H. W. R. TOWNSHEND, Esq. for the Plaintiffs

ALSO SITTING IN: Ms. K. Mann (Researcher for Saugeen Ojibway First Nations
Mr. R. Thomas (Videographer)

A. At the school eventually.

48. Q. Now, I'd like to ask you some questions about the early history of your people. Do you have a story about a tunnel across the water?

A. Yes. I - in fact, my story will be heard on the Discovery channel sometime, I was told, in October. I don't know how to start this one but it just - it's a story that I had heard from different people. First time I heard it, I believe it was the year of - the early part of the 60s.

49. Q. Who did you hear it from?

A. A cousin of my dad's. They were first cousins and he - he was alone. He come and lived next door to where I live now, and he befriended my family because I was always away working.

50. Q. What was his name?

A. Lawrence Keeshig. He was great company for my family when I was away. I used to be away months and weeks. And you want to hear that story that he told me?

51. Q. Yes, please.

A. Well it all started, the usual thing is when you have a few drinks and start telling stories, and he brought that up, that there was some sort of a tunnel up around Tobermory some place. He didn't say exactly where it was. And then he says what he had heard, he said, was a person from this side went into that tunnel to see how far it went and he went on and on; and supposingly about halfway some place there, he met a person coming from the

other way. And he - they talked, and then they exchanged some things that they had to take back and tell the people where they come from that they had met somebody from the other side. That means, I guess, what it means is that tunnel was from Tobermory to Manitoulin Island. And then I thought when I heard it, it's just a story. And I imagine a lot of people that told that story - he wasn't the only one - I've heard it here and there from different people - and I believe they all said it's just a story. But it was this year - this year, or last year that people from Tobermory that run the - oh, what did you - underwater experiments, like taking pictures of the bottom of Georgian Bay; and I don't know how it come to be, I think it was my daughter, Lenore, that works up there that asked them to come down and show us the bottom of the Georgian Bay. And that's when some of our people told them about this tunnel. So this spring, I believe it was this spring - I believe it was May that we - Dave McLaren and I went up there to see - and they showed us more of the lake bottom. And I was in there for awhile, and then Dr. Steven - I don't know - I don't remember his last name, said "I'm so glad to see you. I have something to show you that corresponds with the story your people told about a tunnel." And he asked one of the people there that run the - run the pictures, to show me this - this mound, looks like a mound. And it goes from Tobermory to Manitoulin Island, and that's -

they claim that's what - there was no water about 10,000 years ago. You could walk from Tobermory to Manitoulin Island. So he says "Would that be what your people are talking about?" I was - I don't know how I would say this? It amazed me to think how many years has this - how many centuries has this story been told, generation after generation. And it just - I just thought wow, is this the real thing? Now, that mound the way they explained it to me is - they call it a pop-up. And I guess the earth comes together like this and it mounds up like that. So that's as much as I know about that story, and I can't add any more to it than that.

52. Q. Thank you very much. I'd like to move to a period in time that's later than that but still quite a long time ago, and ask you to talk about relationships between different tribal groups, and especially the Pottawatomi who came from Wisconsin. When they arrived in the Bruce Peninsula, how - how were they accepted by the people here? Were there difficulties, if you could talk about that, please?

A. I don't think there was any difficulties. Now, I'm - I'm much too young to know that, but we were always told that our - some of our ancestors were Pottawatomi. That's the white way of saying that. We could say they're more - more for Indian purposes, we say boodwewniniwak, and that's the people that look after fire, or the fire people. And as far as I know, they intermixed Ojibway and Boddawatmi(sic) when they got to Owen Sound. That's

This is Exhibit F3 referred to in the affidavit of Randall Kayes sworn before me, this 15th day of August 2013
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 94-CQ-50872CM

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Cross-Examination of **EDWARD LOUIS JOHNSTON**, on his affidavit herein, taken before Bonnie vanGeene, Certified Court Reporter, at The Day's Inn, in Owen Sound, Ontario, on the **5th day of November, 2002.**

- - - - - - - - - - -

APPEARANCES:

H. W. R. TOWNSHEND, Esq. for the Plaintiffs

G. N. PENNER, Esq. for the Defendant, Attorney General

P. LEMMOND, Esq. for the Defendant, The Queen

Also sitting in:
Ms. K. Mann (Researcher for Saugeen Ojibway First Nation
Mr. R. Thomas (videographer)

believe that that might be the family affiliation?

A. No, I don't. I have - I have no idea.

16. Q. Thank you, Mr. Johnston. And as I understand it, you've identified Marten on the basis of a connection through your mother's father?

A. That's right.

17. Q. And do you know if it's typical, in either Pottawatomi or Ojibway society, to have your clan identified on the basis of your mother's line?

A. No, I don't. It followed the male.

18. Q. Thank you, Mr. Johnston. I'm going to turn from some general background to some more specific historical events. Now firstly, do you know at what point in time Pottawatomi may have arrived in this area?

A. No, I have no idea but I should imagine it was well before 1812.

19. Q. And on what basis would you imagine that it was before 1812?

A. Because I've read of a person named Nowokwit and when I was speaking to you and giving evidence in September I had crossed over two names and Nowokwit was the brother of my great-great grandmother and was living here in Ontario.

20. Q. And you indicated that you read him. What did you specifically read?

A. I read Walter Johnston's account of - of the family - family line.

21. Q. And -

A. It's - That's the last one I've seen.

chief for a number of years. That is, your grandfather was a chief?

A. Both.

149. Q. They were both -

A. Both chief for a number of years.

150. Q. I think you mentioned today also that you were a councillor yourself?

A. At one time, yes, I was.

151. Q. Do you remember when that was?

A. Oh, no, possibly '85 and '86, I'm not really sure what - what year it was.

152. Q. So it was a year or two that you were a councillor?

A. Yes. Two years, I believe.

153. Q. Now you were also asked a question back in September whether you recalled your grandfather speaking of hunting and fishing farther afield from the Reserve and you answered, "Yes, quite often".

A. Yes.

154. Q. And you specifically referred to an area known as Halfway Rock and this is the northern Reserve, the hunting reserve up there which was around Willow Creek.

A. Yes.

155. Q. Can you describe more specifically where that is in relation to the Reserve or in relation to the Bruce Peninsula itself?

A. It's on the - as you're travelling up the Peninsula, in that area I'm not sure whether it would be - would be to the northeast of Highway 6

and Willow Creek is - runs across the highway there and I believe that the Reserve is two and a half miles square, two and a half miles by two and a half miles, and it was reserved to both the Saugeen, Chippewas of Saugeen and Chippewas of Nawash.

156. Q. So is this in the northern part of the Peninsula?

A. Yes, it's in the northern part of the Peninsula. Now -

157. Q. Near the tip?

A. Lindsay - Lindsay Township? I'm not sure what the - what township it is up there, Lindsay, I believe.

158. Q. But towards the northern tip of the Peninsula?

A. Yes.

159. Q. And then you said that they would camp at various places along the shores?

A. That's right.

160. Q. Why would they camp at various places as opposed to the same place, for example?

A. Well it'd depend on where we were hunting. We often camped on - on Lake Emmett and we often camped on Lake George and we often camped down around Halfway Rock.

161. Q. What would determine where you would camp?

A. Wherever the people wanted to hunt was primarily - that was primarily the way you would determine where they were going to camp.

162. Q. So you're specifically talking about hunting now so you'd be more -

A. Well that's -

163. Q. - in -

A. - primarily what we were doing was - was hunting in that area.

164. Q. I think you mentioned hunting and fishing.

A. Yes, hunting and fishing. We often fished there.

165. Q. These are the internal lakes?

A. The internal lakes and out on the - on lake - or Georgian Bay, I guess, would be up in that area.

166. Q. So it'd be a matter of convenience then where you would camp?

A. More or less, yes.

167. Q. Now we know that you've been interviewed before about some of the history of the Ojibway people-

A. Yes.

168. Q. - in this area, and 1998 has been specifically referred to, and other occasions. Can you recall specifically the other occasions when you've been interviewed about history?

A. Other being asked to go down to speak to some of the schools. I was down to Mildmay last - two weeks ago to speak to the children in the school.

169. Q. Who asked you to participate in that?

This is Exhibit F.4 referred to in the affidavit of Randall Iceses sworn before me, this 15th day of August 20 13
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 94-CQ-50872CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
THE CORPORATION OF THE COUNTY OF GREY,
THE CORPORATION OF THE COUNTY OF BRUCE, THE
CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA,
THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA,
THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and
THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Cross-Examination of **FRANK SHAWBEDEES** under Rule 36, pursuant to the Rules of Civil Procedure, on behalf of the Plaintiffs herein, taken before Lynn Zinn, Certified Court Reporter, at the Day's Inn, in Owen Sound, Ontario, on the **4th day of December, 2002.**

- - - - - - - - - - -

APPEARANCES:

H. W. R. Townshend, Esq.,	for the Plaintiffs
G. N. Penner, Esq.,	for Defendant, Attorney General
P. Lemmond, Esq.,	for the Defendant, The Queen

Also sitting in:
Ms. Katherine Mann (Researcher)
Mr. R. Thomas (videographer)

A. Our first language is Indian, Ojibway or Pottawatomi or whatever you want to call it.

44. Q. So your evidence is that he would have spoken the same language that you speak today and he would have been - is it your evidence -

A. I never spoke English until I was ten years old. My first language was Indian, so was my grandparents.

45. Q. Do you know whether the language he spoke would have been readily understood by Ojibway who were already here?

A. I didn't ask him. More than likely. I understood him. My grandfather and my grandmother understood him.

46. Q. So just to clarify, your evidence is that he probably spoke the same language that you spoke in -

A. He spoke. I didn't say probably, did I?

47. Q. He did, okay. Thank you for clarifying that, Mr. Shawbedees. Okay, I just want to ask you a couple of more generalized questions about the broad historical background. Do you know at what point in time the Ojibway may have come to this area, that is, both Saugeen and Cape Croker?

A. Not really sure, but I can't give you the year, but as far as - we all know they've been here in Owen Sound before the displacement by the governments.

48. Q. Okay. And when would that have been? Just in rough figures, if you will, if you don't

know a precise date.

A. Oh, probably around about the 15-1600s. Maybe earlier.

49. Q. And what is the basis for your information? From who - who might have told you that in the past and in what circumstances? Can you recall broadly?

A. Your government's books and my - my people telling general stories or - since we didn't have a written language at that time, and if we did have a written language we would have probably had it in books.

50. Q. Okay. Can you recall specifically who may have discussed this with you in the past?

A. Oh, yeah.

51. Q. And who would that be?

A. That was Chief James Mason, Chief Alfred Thompson, my grandfather Isaiah Shawbedees, my grandmother, my great grandfather James Williams. There were many people. Some of them were from Sarnia, some of them were from Kettle Point, from Cape Croker.

52. Q. Okay. And can you recall in what sort of circumstances you discussed this with them? Would it be, for example, in the house sitting around maybe eating a meal or whatnot?

A. Oh, sometimes it was what they call - what you people now call 'pow-wows' which is a gathering, sometimes there was those. Sometimes there were religious camp meetings where people met

A. I believe it's 1847 that Queen Victoria wrote a letter to the people in this area giving them this land.

75. Q. Okay.

A. And not to be taken away from them again. But the Crown went ahead and done it, so people don't keep their word.

76. Q. Okay, I should probably be more specific in my language then. Outside of the specific reserves, at what point in time to the best of your knowledge, as a matter of what your elders have told you, did - at what point in time did Ojibway arrive in the broader geographical area, so we can define it as the Peninsula or maybe even a little bit larger, Southwestern Ontario?

A. I told you before, and I've told you this before, that there always has been people here. There may have been Odawa, there may have Pottawatomi, there may have been Ojibways, but they have always been here, and you -and that's when you asked me how long and I said probably in the 15-1600s, maybe further back. That's what I said. It's always been our territory.

77. Q. Now, Mr. Shawbedees, I'm wondering, in the stories that you've heard from your elders, have you ever heard anything discussed of wars with the Iroquois?

A. Yeah.

78. Q. And what is it that you were told about those wars?

262. Q. Okay, and if you could just remind me again, when did that take place, approximately?

A. I would almost say around 1500s thereabouts, the Three Fires Confederacy came to be. As I said, there's no calendars that I know of.

263. Q. Is it your understanding that in 1836 the Three Fires Confederacy was still in existence?

A. Oh, yeah.

264. Q. And in 1854?

A. Yeah, and they're still in existence today.

265. Q. And it still includes the Ojibway, the Pottawatomi and the Odawa?

A. Yeah, even today.

266. Q. Are some of the members of the Saugeen First Nation Odawa?

A. More than likely, but since there's a lot have been- a lot of intermarriages. Over 250 years coming now, you know, there's been a lot of intermarriages too here in Canada.

267. Q. So there may be some Odawa but you're not sure?

A. There has - there has to be.

268. Q. I see. And that would be true for Nawash too then, I suppose?

A. More than likely. I can't speak for Nawash. You'd have to talk to them.

269. Q. And in response to question - a question asked in September, and it was - specifically it was question 31, you said that your knowledge of the

And in the Peninsula area they'd be discussing the 1854, why that land was given up and we- we may have given up the inland but we never - we never included in our treaties the- the water or the bottom of the water.

363. Q. And why - why do you think that was the case, that you didn't - your people didn't give up the shores and the water?

A. Because their livelihood in the beginning was just on fishing too, till that was taken away.

364. Q. So that's - that's the stories or the story about the shores and the water as it relates to the treaty, but you said sometimes they might I talk about the shores and the water independently of the treaty?

A. Oh, yeah.

365. Q. So, for example, what might they have spoken about?

A. Oh, the river goes between this there, and now the government tells us that we only - we only have right of access to this amount of land on both sides of the high water mark of the crick, the river, the lakes, all lakes, in that- that fashion.

366. Q. Okay. Now in response to another question which was question 46 back in September, you said that your ancestors needed landing places on the shorelines.

A. Mm-hmm.

367. Q. So they decided to hang onto that

This is Exhibit F.5 referred to in the affidavit of Randall Kahsee sworn before me, this 15th day of August 20 13
A COMMISSIONER FOR TAKING AFFIDAVITS

COURT COPY

Court File No. 94-CO-50872CM

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Examination of **FRANKLIN SHAWBEDEES**, before trial under Rule 36, taken before Bonnie Bilawey, Certified Court Reporter, at the Day's Inn, in Owen Sound, Ontario, on the **13th day of September, 2002.**

- - - - - - - - - - -

APPEARANCES:

H. W. R. TOWNSHEND, Esq. for the Plaintiffs

G. N. PENNER, Esq. and K. McNeil, Esq. for the Defendant, Attorney General

P. LEMMOND, Esq. for the Defendant, The Queen

ALSO SITTING IN: Ms. Katherine Mann (Researcher for Saugeen Ojibway First Nations
Mr. R. Thomas (Videographer)

the water.

45. Q. So the concept that you've expressed is the shore is not being included in the Treaty, is that gchigabeek or gchigamiing?

A. Gaa wiikaa ngii bgidnaziimin iw titibew (sic) - we didn't give up the land mass or the shore. You may have to listen to the tapes over again.

46. Q. The thing I'm trying to get up - get at is when you say the shores weren't surrendered in English, and you're referring to a concept in Ojibway, and is there a place where you can say it started and stopped here, and this is the shore, or gchigabing or gchigamiing, or do you think of it that way?

A. No, we don't. The concept of feet, meters was strange to us. If you take a look at it, we had no concept of it. It's - you just set aside - you - or you kept what you felt you needed; and part of it is that they did need landing places so they decided to hang on to that property as we know it today.

47. Q. Now, do you recall your grandparents or great-grandparents, or parents, or yourself for that matter, fishing or hunting away from the Reserve? Where might you go?

A. You'd go to the river. You'd go to the Stoney - what is now known as Stoney Creek. You'd go out in the lake. And if need be, I can show you where some of the smoke houses were in Sauble Beach,

and they were owned by mostly three or four families that did, what I guess is known today, as commercial fishing because they used these fish to smoke them, to last them through the winter, and to barter with other areas in exchange for - it may be flour. It might be sugar. It might be salt, anything like that, but they were along the shore; and they needed places to land in order to take these smoke houses. There was the Kewaquoms had a smoke house. Kewageshigs had a smoke house; and up in Chief's Point area, I believe the - well on the islands, the Thompsons had a smoke house there too.

48. Q. How would people decide where to put these smoke houses?

A. You - In those days, you had no ice so you had to get 'em in there as fast you could; but there were certain areas that they set aside for themselves to build these smoke houses, and that's where they tried to get to. Some of the smoke house were built temporarily along the shore. I know my grandfather used to tell me that some of the guys used to go down to what is now known as Goderich, and my grandfather used to say .....(speaking in his native tongue) - 'We'll have to pick up some salt to preserve the fish to bring 'em home.' It may not have been the right kind of salt but it preserved the fish.

49. Q. Now I'd like you to tell us what you know, ask some questions about the role of the Indian agent, when there was one, and what - how

following summer. Some of them, we had to go underground because there was a law made that if we were caught doing ceremonies, if we were caught drumming, if we were caught singing, then we would be put in jail. As long as we sang church-orientated songs, we were okay, but our own was against the law. That letter was written, I believe it was in 1924, just shortly after the transference of Federal autonomy to the Provincial. So a lot of people went underground. They knew that the RCMP and the Indian agent wasn't going to be around at night time. So during the night, that's when they had their little celebrations. And then after awhile, about 1940s, 50s, they - some of my people began to call them camp meetings just to get around the legal aspect, but they still sang religious songs and so on; but that was another way to gather, to meet, not necessarily drumming, not necessarily singing our own songs, but just to gather and meet, relatives meeting, meeting other people. And as young people, if you thought we went there for a religious ceremony, forget it. We were out there looking for girls. And girls were out there looking for guys. And that's how inter-marriage happens between tribes, between communities.

61. Q. Okay, those are - we've covered the questions I had unless there's something that we've talked about that you have something else you'd like to say.

A. I guess the only thing I have left to

say is simply that, and I've said it earlier, that we as a people don't recognize that imaginary boundary that was put across there because we're on both sides of the Great Lakes, on all sides of the Great Lakes; and the United States does honour the Jay's Treaty, but Canada has never signed the Jay's Treaty, won't honour what the British Crown said they would do. And this was long before, I guess, Canada declared itself a Dominion, because as I understand it, they went to England and asked the Queen at the time to give them self-government, to be able to make their own decisions. And the Queen thought it was a good idea because they wouldn't have to go to The House of Lords or Parliament in England. And we would like the same thing, but one of these days that door - we keeping knocking on that door and it's going to fall down. The hinges ain't going to take it. We've been pounding on that door for 150 years or more. We may have given up some of our land but we never gave it all up. A lot of us right across the country have never given it all up, and yet laws are made for us to lose more and more. And I think it's about time that both governments gives us the respect that we deserve, if you expect some of us to respect your way of thinking. Remember - we did not know Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday. We did not know two feet, six inches, a meter in those days. We kept what our people thought they needed to survive. And the lake and the

fisheries are our survival. Resources, they've been depleted, but not by my people, but by other people. And we're only asking our fair share.

I went - I'll tell you a story. I went to Ottawa one day. There was a guy there talking about resources and how to manage them and everything else; and I'm sitting there with my feet up on the chair. I'm looking around, looking around, and the guy said "Are you listening?" I said "Yeah, I'm listening." He said "What are you looking around for?" I said "Holy mackerel, this is what my resources paid for, and I could only afford $6.00 pair of shoes from Giant Tiger." We had no resources. 150 years, 200 years. All we ask for, and all we've been asking for is fair treatment. Talk to us about changing the laws. Talk to us about changing any of your legislation. They said to change the Indian Act, they had a consultation. They never talked to me. Nobody called me. Nobody sent me a questionnaire, yet I can dig into my computer and come up with how many people answered this way, native, non-native, native, non-native. It says "Native, Maitis". Where did they go? They never asked me. And that's about it for me.

This is Exhibit F6 referred to in the affidavit of Randall Garrison sworn before me, this 15th day of August 2017
A COMMISSIONER FOR TAKING AFFIDAVITS

COURT COPY

Court File No. 94-CQ-50872CM

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Cross-Examination of **FREDERICK JONES**, on his affidavit herein, taken before Bonnie vanGeene, Certified Court Reporter, at The Day's Inn, in Owen Sound, Ontario, on the **5th day of November, 2002.**

- - - - - - - - - - -

APPEARANCES:

H. W. R. TOWNSHEND, Esq. for the Plaintiffs

G. N. PENNER, Esq. for the Defendant, Attorney General

P. LEMMOND, Esq. for the Defendant, The Queen

Also sitting in:
Ms. K. Mann (Researcher for Saugeen Ojibway First Nation
Mr. R. Thomas (videographer)

This is Exhibit ..F.7..... referred to in the affidavit of ..Randall Kahgee..
sworn before me, this ..15th..
day of ..August..... 2013.
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 94-CQ-50872CM

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE COUNTY OF GREY, THE CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS

Defendants

- - - - - - - - - - -

This is the Cross-Examination of **JOHN NADJIWON**, on his affidavit herein, taken before Bonnie vanGeene, Certified Court Reporter, at The Day's Inn, in Owen Sound, Ontario, on the **5th day of November, 2002.**

- - - - - - - - - - -

APPEARANCES:

H. W. R. TOWNSHEND, Esq. for the Plaintiffs

G. N. PENNER, Esq. for the Defendant, Attorney General

P. LEMMOND, Esq. for the Defendant, The Queen

Also sitting in:
Ms. K. Mann (Researcher for Saugeen Ojibway First Nation
Mr. R. Thomas (videographer)

442. Q. - the name Van Deusen came up quite a bit too.

A. Yeah, well now whether Van Deusen, whether he had any part of that or - far as I can recollect, he was just more or less a messenger as far as what they were saying.

443. Q. In response to another question from Mr. Townshend back in September you said that in the early part of the 1900s your people would fish right up close to the Peninsula and fished off what was the National Park now but what at the time was Halfway Rock.

A. That's right.

444. Q. Can you tell me who told you that story?

A. Yeah, Rasime Akiwenzie, my father-in-law-

445. Q. I see.

A. - told me that. Even my dad told me about how they used to fish on - all the way up - even on the west - west side and the east side of the whole Peninsula. Even like in Halfway - Halfway Rock, there's caves there at Halfway Rock, what they call the Degrotto, but in those caves the - the people who fished wrote their names on the walls, their gliphics were written in the walls, their names were in the walls and I witnessed - I've seen those names. The Keeshigs was one. Like my Uncle Bob, where it was - his names are in there and Alex Johnston, his name was written in there. They fished all the way up the - up the Peninsula.

This is Exhibit ...F.8... referred to in the affidavit of ...Rodell Cahsee... sworn before me, this ...15th... day of ...August... 2013...
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 94-CQ-50872CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
THE CORPORATION OF THE COUNTY OF GREY
THE CORPORATION OF THE COUNTY OF BRUCE,
THE CORPORATION OF THE MUNICIPALITY OF NORTHERN
BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF
SAUGEEN SHORES, and THE CORPORATION OF THE TOWN OF
GEORGIAN BLUFFS

Defendants

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This is the Examination before Trial of **JOHN NADJIWON**, under Rule 36 on behalf of the plaintiffs herein, taken before Lynn Zinn, Certified Court Reporter, and video-taped by Mr. R. Thomas, Videographer, at the DAYS INN, Owen Sound, Ontario, on the **12th day of September, 2002.**

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APPEARANCES:

R. Townshend, Esq., for the Plaintiffs
G. Penner, Esq., for the Defendant, Attorney General
P. Lemmond, Esq., for the Defendant, the Queen

A. Ojibway.

44. Q. And when did you learn English?

A. When I went to school.

45. Q. Now I'd like to take you to what you've been told or know about some of the early history of your - your people. You mentioned some of your ancestors coming from Wisconsin. What have you been told about them coming? Were they accepted? Were there problems when they came? Can you tell us about that, please?

A. Well they weren't - we were - they were accepted openly because at that particular time when they came and this was back in the native wars in this particular area from Red Bay down to Collingwood. They- we belonged to the - what is known as the Nations of the Three Fires: the Pottawatomi, the Odawa and the Ojibway. This is when the wars - the native wars in that particular area was occurring between the - the Mohawk and the Iroquois.

46. Q. Do you have a rough approximation of the time or in whose generation that would be?

A. That would be in about the early 1700s, late 16, 1700s.

47. Q. Can you explain the relation - you mentioned Three Fires, can you explain how the - the Pottawatomi, the Odawa and the Ojibway viewed each other in that context?

A. Well we viewed each other as allies because basically we spoke all the same language, so

This is Exhibit ...F 9... referred to in the affidavit of ...Rodell Kalsee...
sworn before me, this ...15th...
day of ...August... 20 13...
A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No.: 94-CO-50872CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and
THE CHIPPEWAS OF NAWASH FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
THE CORPORATION OF THE COUNTY OF GREY
THE CORPORATION OF THE COUNTY OF BRUCE,
THE CORPORATION OF THE MUNICIPALITY OF NORTHERN
BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF
SAUGEEN SHORES, and THE CORPORATION OF THE TOWN OF
GEORGIAN BLUFFS

Defendants

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This is the Examination before Trial of **ROSS JOHNSTON**, under Rule 36, on behalf of the plaintiffs herein, taken before Lynn Zinn, Certified Court Reporter, and video-taped by Mr. R. Thomas, Videographer, at DAYS INN, Owen Sound, Ontario, on the **12th day of September, 2002.**

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APPEARANCES:

R. Townshend, Esq., for the Plaintiffs
G. Penner, Esq., for the Defendant, Attorney General
P. Lemmond, Esq., for the Defendant, The Queen

or between Tobermory and Cabot's Head, they would go by sailboat and they'd land, I think it was called Pedwell's Landing, and they would walk from there into the Reserve for their hunting, but there was no fishing done up that way.

63. Q. Where would they stay when they were going up that way?

A. They would - if they got caught before dark, they would go ashore and wherever they happened to be and I guess they'd camp there wherever - wherever they happened to be.

64. Q. Now when would this be that we're speaking of now?

A. Before the automobile. This would be the late 1800s, I guess, in that area.

65. Q. And who did you hear about this from?

A. From my grandfather and my uncles.

66. Q. Can you talk about how your grandfather or your uncles thought about the shores?

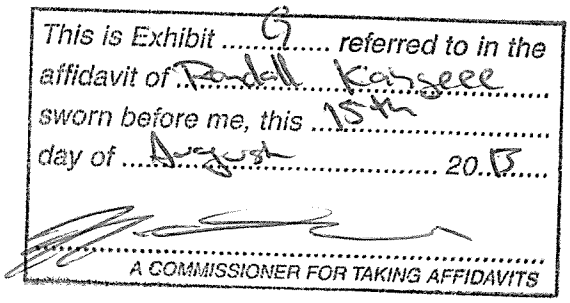
A. How they thought about the shores?

67. Q. What they thought about the shores? What they meant to them?

A. Well, I think they were aware of a thing that was called 'marine allowance.' However, I'm not too sure just whether or not that was what allowed them to stop and camp along the way. I suspect that's what it was though. This marine allowance is, I think, for all navigation to observe.

68. Q. I believe that covers the questions I

EXHIBIT “G”



AFFIDAVIT OF PAUL JONES

I, Paul Jones, of the Saugeen Ojibway Nation, **MAKE OATH AND SAY**:

1. I am a member of the Saugeen Ojibway Nation, which is comprised of the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation, known collectively as "the SON" or "SON".

2. This affidavit sets out, for the Joint Review Panel ("the Panel"), the history of our people regarding our fishery including: our connection to it; our historic exclusion from it; its reclamation; and our efforts to preserve and protect, for current and future generations, both our fishery and the lands and waters upon which it depends.

3. The words of my father Fred Jones, a SON Elder who served in World War II, explain our connection to the lands and waters:[1]

> My elders told me that our land is sacred to all the Ojibway. Aishinaabek surround the Great Lakes. I heard stories of how the Ojibway used to have their sacred ceremonies on the Bruce Peninsula. When they had their sacred ceremonies they could hear the heartbeat of the earth – the wave at Lake Huron against the Bruce Peninsula.

4. This affidavit starts with a simple premise: our people have, since the arrival of the European, been under constant threat and encroachment. Our rights, and our connection to the lands and waters, have been ignored to the detriment of our people and our culture. We have been confronted with racism and violence because of our connection to the lands and waters.

5. Fishing is engrained in who we are as a people; it is integral to our culture and our belief systems. Because of its central place to SON, we have fought at every turn to protect the lands and waters that support our fishery. And we have had to fight against many threats. We fought against the encroachment of white settlers, who displaced our people to the detriment of our lands, our waters and who we are as a people. When the land was needed for agriculture by non-SON communities, our people were displaced. When our lands and waters were encroached upon by settlers, we were told that, despite the promises made by Canada, it was unable to intervene. When we protested our exclusion from the fishery, Canada and Ontario ignored us.

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[1] Personal Correspondence with Fred Jones, as cited in "Under Siege: How the People of the Chippewas of Nawash Unceded first Nation Asserted Their Rights and Claims and Dealt with the Backlash" Submissions to the Ipperwash Inquiry (December 2005) at p. 8. ["Ipperwash Submissions"] [Exhibit "A" of this Affidavit].

When we were successful in reclaiming our rights in 1993 in the landmark decision of *R. v. Jones and Nadjiwon*, we faced a backlash of racism and violence.

6. In many respects, and despite many actions of the government, including legislated exclusion of SON from our Traditional waters, which has eroded our commercial fishery over decades, we have persisted. We have fought for our rights. We have made huge efforts to protect the resource and, over the last two decades, we have successfully negotiated three successive fishing agreements with the Ontario government to protect and preserve our fishery, and to provide for a mechanism for the implementation and exercise of our rights.[2] We have also negotiated three other, separate agreements, which speak to and are designed to protect our rights. I discuss those agreements below at Section III "SON's Other Efforts To Protect the Fishery."

7. We are now beginning the daunting task, after 150 years of exclusion from our traditional waters, of rebuilding our commercial fishery to restore its place at the center of our economy and culture.

8. Our goal is to preserve our ability to live off our fishery, as our people always have. The fight for our inherent aboriginal and treaty rights has come at an enormous cost to our communities. But today, for the first time in our recent history, we believe we are on the road to rebuilding

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[2] A copy of the 2013 Substantive Commercial Fishing Agreement is annexed hereto as Exhibit "B". The 2000 and 2005 agreements, by their terms, are confidential.

our fishery because of 150 years of work and a newly signed 2013 Substantive Fishing Agreement that SON negotiated with the Province of Ontario. We are rebuilding our fishery primarily under the terms of that Agreement, while at the same time another arm of the Ontario government is seeking to bury nuclear waste within hundreds of meters from our waters and important spawning grounds.

9. Ontario Power Generation's ("OPG") Deep Geological Repository project ("the DGR") poses a significant new threat to our people, our lands, our waters and who we are as a people. It seeks to use the shore of our Traditional waters for a different purpose: not for agriculture, not for the benefit of non-native fishers, but rather to bury Canada's nuclear waste. The consequences of this Project are not known and, we are told, in many cases not even considered.

10. However, we believe, and have reason to believe, that the DGR could strike a fatal blow to our fishery. Burying nuclear waste at the shore of Lake Huron will stigmatize our fishery, will increase development within our territory, and will ultimately increase stressors on the waters of Lake Huron to the detriment of our commercial fishery and our connection to the lands and waters. Should the Panel approve OPG's plan, and the DGR is built, the decision will be irreversible and will change our territory forever.

11. I would ask that the Panel pay close attention to the history of our people and the documents that are attached to this affidavit. In particular, I would ask that you pay particular attention to the 2013 Substantive Fishing Agreement signed by MNR and SON, attached to this affidavit as Exhibit "B". The DGR, either by its stigma or by its construction and implementation, has the

potential to undo all of the commitments and obligations set out in this agreement by fundamentally undermining the aboriginal and Treaty rights of our people.

I. MY BACK GROUND

12. I am Annishnabec and a member of SON. I was born in 1955, and was raised in and have lived on Cape Croker (Nawash) for most of my life. Cape Croker has always been my home. I served in the Canadian Forces from 1973-1975. My service included a tour in Cyprus on a Peace Keeping mission in 1975.

13. After my time in the Canadian Forces, I became involved in fishing because I saw that my people were under constant threat of charges and exclusion from the fishery for simply exercising our rights.

14. I was elected as a band councilor in 1991 and have served on Nawash Band Council ever since. I am now the longest sitting councilor at Cape. During my time on council I have attended virtually every meeting, both with governments and our people, on issues that affect or touch upon our fishery. Those meetings total well in excess of 300 over the years.

15. As is set out below, I have always fought and advocated for the rights of SON – in particular those rights that relate to the fishery, and the lands and waters that support it. I have always considered it my obligation to protect our cultural values and connection to the fishery. The fishery and the lands are part of who I am. The lands and waters are inseparable from me as an Annishnabe person. My family and our oral histories have shaped me as an Annishnabe person. My family has conducted ceremonies on the waters and the ice when the water is covered. Our belief is that the waters, trees and lands all have spirits, and that these spirits are interconnected.

For example, when our people fish, we share in the catch. Our people watch the harvest. Our children see the fishermen return with their catch and share in the process. We have ceremonies to the creator for the lands and waters of which we are a part. Our feasts celebrate the fishery, and our connections to the waters and the lands that surround it.

II. THE HISTORY OF THE SAUGEEN OJIBWAY FISHERY

16. I have read OPG's description of our fishery. That description tells a stark and sad story – of a small and diminishing fishery. Maybe it is even intended to imply that this fishery is not worth protecting, or that its loss could be compensated easily. It is a typical attempt to understand and quantify a fundamental part of our culture in terms of western science and economy.

17. OPG's understanding of our fishery is impoverished. It fails to describe or understand the central role of our fishery in our culture and our economy. It fails to lay out the historical context that explains the current state of our fishery. It fails to tell the story of the hardships and constant struggles our people have faced to protect our right to fish. And it fails tell the story of the victories we have won in the courts and at the negotiating table, and the new future we have committed to with Ontario to restore our fishery to its central place in our culture and economy.

18. In this affidavit, I will tell the story of the SON fishery, and why the right for any SON member to go to the water to catch a fish to feed his or her family, or to make a living, is a right that cannot be assigned an economic value. Rather, it is fundamental to who we are as a people. That our fishery has survived the many threats made to it, and is now once again growing, is an incredible testament to the strength of our people and the role of the fishery in our lives and

culture. As the late Chief Akiwenzie said "it was only through sheer perseverance" that our right to fish has been recognized and protected for our future generations.

1. From Time Immemorial

19. Our people – the Ojibway (Chippewa) or Annishnabe – have fished, hunted and gathered within our Traditional Territory from time immemorial.[3] A copy of our Traditional Territory map is annexed hereto as Exhibit "C".

20. My father has taught me that we have a right to live on and survive off of the land. Since the arrival of the European, our people have been under threat of being separated from our lands and waters. These lands and waters are part of our belief system; they are not just "rights" which are inalienable to our people. This is engrained in our prayers to the creator in regard to the spirits in the lands and waters.

21. The anthropological evidence of the central importance of the fishery to our economy and culture is undisputed. It was well explained in the historic legal case of *R. v. Jones and Nadjiwon*

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[3] C. E. Cleland, "The Inland Shore Fishery of the North Great Lakes: Its Development and Importance in Pre-history" (1982) 47(4) American Antiquity 761; N. Ferris, Continuity within Change: Settlement Subsistence Strategies and Artifact Patters of the Southwestern Ontario Ojibwa A. D. 1780-1861 (M. A. Thesis, York University, 1989).

(discussed more in detail below). In referring to the anthropological evidence, Justice Fairgrieve observed:[4]

> The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. **The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became essential items.** The trade developed further with the growing population of settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.

2. Early Encroachment by Europeans and the Promises Made

22. For our ancestors and our Chiefs, the preservation of our fishery has always been a constant and singular concern. Commencing in the mid 1830s, the Province of Upper Canada sought the surrender of the Saugeen Territory. Even at this early stage, our people could see the growing threat to our use and reliance on the fishery posed by European encroachment. It was this

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[4] *R. v. Jones and Nadjiwon* (1993), 14 O.R. (3d) 421 (Ont. Prov. Ct.) at p. 14 of version attached to this affidavit [Exhibit "D" of this Affidavit]. See also Royal Commission on Aboriginal Peoples, "Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship" vol. 2 at p. 462.

encroachment and the long series of Crown actions and inactions in response that was the beginning of erosion of our rights and our fishery, notwithstanding promises to the contrary.

23. In 1836, as part of a broader process of assimilation policy, Lieutenant Governor Sir Francis Bond Head devised a plan to relocate our people to Manitoulin Island.[5] The treaty negotiations, our ancestors were told, were to ensure that our people would be "fortified against Encroachment of the Whites."[6]

24. Our people resisted these efforts. Chief Metigowob explained to us that, during the treaty negotiations, when they were asked to relocate to Manitoulin Island, the Saugeen Chiefs had informed Bond Head that our ancestors preferred to remain on the Saugeen peninsula as "there were many fish in that place."[7] Chief Metigwob told us that Bond Head responded as follows:[8]

> The Sahgeeng owned all the islands in the vicinity of that neck or point of land, he was about to reserve from them and that he would remove all the white people who were in the habit of fishing on their grounds.

25. Our people understood that the purpose of the treaty was to recognize and protect our right to continue fishing as we always had: not only for sustenance but to share, barter and trade. This is what we would now characterize as a commercial fishery. Historians who have studied this part

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[5] This issue is explored in great detail by Professor John Burrows in his P.HD thesis "Negotiating the Law: Traditions & Treaties on Manitoulin Island" [Exhibit "E" of this Affidavit]. See also M. Walters, *Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada,* (1998) 23 Queen's Law Journal 301 at para. 6 [Exhibit "F" of this Affidavit].

[6] Walters, *ibid.* at para. 6.

[7] "Statement of Metigwob, one of the Sahgeeng Chiefs, made in a General Council held at the River St. Clair on the 13th September 1836 respecting the surrender of the Sahgeeng Territory to the British Government." Six Nations Land Research Office, cat. No. 836-9-13-1.

[8] See Walters, *supra* note 5 at para. 12.

of our history have come to the same conclusion. Professor Mark Walters of Queen's University, Faculty of Law, explains:[9]

> Thus, Bond Head's oral statements about the Saugeen reserve were consistent with what he had written in relation to the Manitoulin reserve: native fishing rights were exclusive and non-native encroachment would be prevented. The significance of this promise arises from the larger context within which it was made. In the years preceding the treaty, non-native use of the Saugeen fisheries had increased and some confusion had arisen about the terms under which a non-native commercial fishing company operated from the fishing islands: the company had obtained both a licence of occupation from the Lieutenant Governor in council and a lease from the Saugeen chiefs in 1834 for use of islands. In light of this, treaty recognition of their exclusive rights to the islands and fisheries was important to the Saugeen chiefs. Furthermore, in the 1836 treaty no provision was made for payment for the surrender of the Saugeen territory. It may therefore be argued that the Crown's consideration was, in part, its promise -- conveyed orally by Bond Head -- to protect exclusive Saugeen possession of unsurrendered Ojibway fisheries. In short, very strong reasons exist to conclude that the 1836 treaty recognized exclusive rights of fishing.

3. Broken Promises & Exclusion

26. Many of the promises made to our people by the Crown at the time of the treaty were broken, including the promise that our fishing rights would be protected from encroachment. Our people could not tolerate this and took action early on. As Professor Walters notes:[10]

> In an effort to protect their territories, the Saugeen Ojibway sought further written confirmation of their rights, and in 1847 the imperial Crown issued a proclamation in the form of letters patent under the great seal of the province of Canada defining the Saugeen territory and confirming Ojibway title to it. This 1847 deed defined the boundaries of the Saugeen territory as:
>
> > all that tract of land lying on the shore of Lake Huron, and which is butted and bounded or otherwise known as follows: commencing at the mouth of the River Saugeen, thence . . . [a southern boundary line along the base of

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[9] *Ibid.* at para. 13.
[10] *Ibid.* at para. 14 [citations omitted].

> the Saugeen peninsula is described], bounded on the east, north, and west by Lake Huron, including any islands in Lake Huron within seven miles of that part of the main land comprised within the hereinbefore described tract of land

27. The Deed went on to declare that the Saugeen Ojibway:[11]

> ...forever shall possess and enjoy" the tract and its "rents, issues, and profits....without any hinderance whatever on our part, or on the part of our heirs and successors, or of our or their servants or officers.

28. Professor Walters and Justice Fairgrieve in *R. v. Jones and Nadjiwon*,[12] a landmark decision that I discuss in more detail below, both conclude what the SON has always known and maintained: reserves on the shores of Lake Huron, as well as the fishing islands and the lake bed under the waters, remained unceded. Indeed, the anthropologic evidence establishes that our people lived on the water as much as we lived on the land. However, despite treaty and letters patent, our exclusive fishing rights were disregarded and Ontario began leasing our lands and waters without our consent.[13] These represent specific actions by the Government of Ontario that would have the effect of eroding our rights and fishery.

29. In *Jones and Nadjiwon*, Justice Fairgrieve stated:[14]

> During the 1830s, the Saugeen continued to enter into arrangements directly with third parties for the leasing of their fishing islands by directors of the Huron Fishing Company, which were then affirmed by licences of occupation by the Crown. No licences of occupation were issued to confirm the arrangement in 1845 that the Saugeen chiefs made with one Cayley, whose name figured prominently in the documents from that period. Mr. Lytwyn, an historical

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[11] *Ibid.* at para. 15 citing Declaration by Her Majesty in favor of the Ojibway Indians respecting certain lands on Lake Huron (29 June 1847) NAC RG68, vol. LIBER AG. SPECIAL GRANTS 1841-1854, C-4158.
[12] *Supra* note 4.
[13] Walters, *supra* note 5 at para. 16.
[14] *Jones and Nadjiwon*, *supra* note 4 at p. 16.

> geographer called by the defence, gave his opinion that the colonial government could issue such licences in respect of Crown lands, but could not do so in relation to the Saugeen's fisheries because they had not been surrendered.

30. The historical evidence supports the conclusion that, from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area. When the Chief Superintendent of Indian Affairs visited the settlement the next year, he wrote:[15]

> The fishing is bountifully supplied and has attracted the notice of white people who annoy the Indians by encroaching on what they consider their exclusive right and on which they rely much for provisions.

31. The historical evidence also confirms the most basic and fundamental understanding of our people – that the 1836 treaty confirms and recognizes our exclusive right to the fisheries in our Traditional waters.[16]

4. Legislated Exclusion

32. Irrespective of the validity of the 1836 Treaty, one thing is certain: the promise that our fishing rights would be protected from encroachment was broken. As Professor Walters notes:[17]

> Notwithstanding the 1836 treaty, non-native use of Saugeen fisheries increased. A commission of inquiry on Indian affairs in 1844 observed in relation to the Saugeen fisheries that the "fishing is very productive, and has attracted the notice of the white people, who annoy the Indians by encroaching on what they consider their exclusive right..."

33. In 1857, ten years before confederation, the provincial legislature enacted the first statute regulating fishing in Upper Canada. No mention was made of our rights. Since confederation,

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[15] As quoted by Justice Fairgrieve in *Jones and Nadjiwon, ibid.* at p. 16.
[16] *Jones and Nadjiwon, ibid.* at p. 16.
[17] Walters, *supra* note 5 at para. 16, citing Canada, Legislative Assembly of Canada, Report on the Affairs of the Indians in Canada (22 January 1844) in Journals of the Legislative Assembly of Canada (1845), Appendix EEE, s. 2, II.15 at 43.

Canada has enacted successive fisheries legislation. None of this legislation mentions our rights and, as history demonstrates, the legislation was in fact used to exclude our people from the fishery to the benefit of others.

34. The effect of this legislative history upon our people was profound. In *Jones and Nadjiwon*, Justice Fairgreive noted:[18]

> What the evidence disclosed was a relentless, incremental restriction and regulation of the admitted aboriginal right, despite continuing protests, petitions, objections and resistance by the defendants' band. Much of the conflict appeared to have its source in the apparently inadvertent failure of the first Fishery Act to make any special provision for the treatment of native fisheries or existing treaty rights. The evidence documented as well a protracted intragovernmental policy clash between Fisheries and Indian Affairs. The former generally prevailed, and the fisheries came under increasingly stricter controls.

35. The legislation and enforcement efforts of Ontario (MNR) had real impact on our people. SON elder Donald Keeshig is quoted as saying:[19]

> I've been threated over hunting and fishing. The Conservation Officers and RCMP were always after us. There was no work here when I was young. You couldn't rely on fishing, because we weren't allowed to go very far from our reserve to fish. If we went beyond the "lines" set up by the MNR, they were ready to charge us and take our equipment from us. I remember our grandfathers used to sleep on the shore to watch over their seining nets. The MNR said it was against the law to use a seine net on our reserve. I always felt the MNR and the RCMP were our enemies…they were always after us.

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[18] *Jones and Nadjiwon, supra* note 4 at p. 18.

[19] Ipperwash Submisssions, *supra* note 1 at p. 34. The chronology of the assertion and protection of our rights is set out at pp. 38-45 [Exhibit "A" to this Affidavit].

36. Elder Keeshig, like many SON members, relied on fishing to make a living and to provide for his family. His ability to continue to do so was constantly under threat by the collective effect of the many government actions that separated our people from our fishery.

5. Reclaiming the Right: R. v. Jones and Nadjiwon

37. I have made much reference to the *Jones and Nadjiwon* decision for its summary of the SON's history. However, it is also important for the Panel to understand the circumstances that led the Chippewas of Nawash Unceded First Nation to challenge the MNR licensing system and the reasons for why *Jones and Nadjiwon* was decided as it was.

38. Prior to becoming a Nawash Band Councilor, I was part of the community-based movement to challenge our exclusion from the fishery. For years, our people were denied access to the fishery by a government that sought to protect the interests of recreational fishermen and the commercial interests of non-SON members. For example, while Ontario was setting quotas and putting in regulatory restrictions on SON members, it was issuing lucrative commercial licenses to non-native commercial fishermen.

39. Despite these efforts at excluding our people, we continued to fish as our people had done from time immemorial. As a result of our actions, criminal and regulatory charges were frequently laid against our people. Sometimes the charges were resolved or withdrawn. In some instances, our people were imprisoned. This cycle continued for decades.

40. By the end of the 1980s, our communities' frustration was palpable. We were facing exclusion from our waters and we were being prosecuted when we exercised our rights. For example, on October 13, 1989, Ross Forgrave, a Wiarton Justice of the Peace forced eleven Nawash fishermen, of the them the Chief of the First Nation, some of them elderly, to stand for 45 minutes as he lectured them about fishing over MNR quota. He portrayed them as thieves, greedily taking too many fish. He imposed fines totaling $ 32,000.00 plus jail time ($200 and 30 days for one fisherman, who caught 9 fish).

41. I recall being in court when the presiding Justice called our people "rapers and pillagers" for simply seeking to survive from our traditional territory and waters. To make matters worse, the quota allocated by MNR was not enough to feed members of our community, let alone support a commercial fishery, as was promised to us. I kept telling Joint Council, our governmental structure where the Chiefs of Nawash and Saugeen, as well as elected councilors, sit, that we had to fight for more fish and not accept the quota being imposed by MNR.

42. Eventually, the community had enough. A group of fisherman approached Joint Council urging that, rather than being under the constant threat of charge and imprisonment, we resolve our rights once and for all. We knew we would have to fight for our rights in a Canadian court. Although it was a long process to change the thought process of our people regarding the Canadian court system – which was considered simply an extension of our exclusion from our traditional waters – eventually there was community support for fighting to resolve our rights once and for all in a Canadian court.

A. The Charges against Howard Jones and Francis Nadjiwon: Settling Our Rights

43. The opportunity to do so arose in 1989, five years after the passage of Section 35 of the *Constitution Act*, 1982, when Chief Howard Jones and Francis Nadjiwon were charged with fishing without a license and the sale of lake trout in excess of that which was allocated to SON.

44. Upon learning of these charges, our Band Council made the brave and difficult decision to divert resources out of our community to assist Chief Howard Jones and Mr. Nadjiwon in their defence. The cost of the defending Chief Jones and Francis Nadjiwon was almost $500,000.00. Unfortunately, the Band Council could not afford to spend money to defend the fishery without diverting funds from health, education and infrastructure. The funds were diverted and, rather than go those areas, they were spent on litigation.

45. The trial was heard in Orangeville. I attended every day of it. Many fishermen and community members were also present.

46. I remember that on the eve of trial, Ontario made an offer to settle the matter. The offer was a marginal increase in the allocated quota. However, to our community, a marginal increase in quota was not the issue. We needed to have our rights to a fishery recognized and our people needed to be free to exercise those rights on a priority basis over all other considerations, save for conservation. The Band Council had already expended hundreds of thousands of dollars and the community had made it clear: we have an aboriginal and treaty right to a commercial fishery and those rights, if they were to be protected, needed to be affirmed under section 35 of the *Constitution Act*. The Government's offer was rejected and the trial proceeded

47. The trial was significant moment in the history of our people. It lasted some ten days and was based on thousands of hours of historical research. Both expert and community members testimony was given. It was as full a review of the history of our fishery as had ever been done.

48. On April 26, 1993, Mr. Justice Fairgrieve issued his decision recognizing what the SON community and our people always knew: we had both an aboriginal and treaty right to commercially fish within our traditional territory and that we had been excluded from our fishery for the benefit of others.[20]

49. In reaching his decision, Justice Fairgreive reviewed the extensive evidence presented at trial and emphasized the place our fishery held at the center of our economy and culture. He concluded that government actions which failed to recognize this reality were unconstitutional. His Honour stated:[21]

> When the lake trout quota was allocated in 1984, the evidence suggests that despite the fact that the band was the only commercial licence-holder covering an entire community, and despite the fact that the band's fishery was the only one in the area dependent on lake trout for its livelihood, the band was simply given an incidental quota, not a production quota, in the same way and of a similar magnitude as other individual commercial licence-holders. The evidence does not support a finding that any special regard was given to the nature of the band's fishery operation, quite apart from the question of any constitutional priority over other users.
>
> .....
>
> What should be stated, however, is that a high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an

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[20] See *Jones and Nadjiwon*, *supra* note 4 [Exhibit "D" to this Affidavit].
[21] *Ibid.* at pp. 26-27.

> enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s. 35(1) of the Constitution Act, 1982, particularly after the judgment of the Supreme Court of Canada in Sparrow, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.
>
> .....
>
> As a practical matter, the court cannot compel good faith or recognition of changed constitutional realities. All that can be done here is to state the conclusion that the quota restrictions do not meet current constitutional standards and are, accordingly, unenforceable against the defendants. The imposition of a prohibition against the purchase of lake trout from band members pending negotiations and a new arrangement which recognizes the priority of their aboriginal and treaty rights would, in my view, also be unconstitutional. It would also fail to reflect the high standard of honourable dealing which the public expects its government to take in respect of the rights of aboriginal people.
>
> Howard Jones and Francis Nadjiwon are found not guilty, and the charges are dismissed.

50. We won the case. Howard Jones and Francis Nadjiwon were found not guilty and SON's rights were recognized and affirmed under s. 35 of the *Constitution Act, 1982*. Ontario did not appeal the decision. It would, however, take SON another 7 years to come to conclude our first fishing agreement with Government to provide for a mechanism by which these rights could just begin to be implemented.

B. The Backlash to *Jones and Nadjiwon*: Violence and Racism

51. The legal victory was an instrumental step in putting an end to over 150 years of exclusion of our people from our fishery. However, the backlash from the non-SON public was swift and strong:[22]

- In the summer of 1995 a Nawash fishermen's boat was sabotaged and defaced with graffiti that read: "splake thief."

- Later in the summer, another fishermen, who had lost 2,000 yards of nets to someone who had them lifted them or cut free, reported his losses to the OPP. No one was apprehended. He was on the verge of bankruptcy but *he* was charged by the OPP for booby-trapping his nets in an effort to protect them.

- On August 5, 1995, about 75-100 angry anglers from the Grey-Bruce area marched on Yolanda Jones, a Nawash Band member who was selling fish at the Owen Sound open market with her daughters. The sportsmen and recreational fishermen were, at the time, protesting against our fishing in Owen Sound. The protest was led by Grey MPP Bill Murdoch and Parliamentary Assistant to MNR Minister Chris Hodgson. A scuffle broke out and Nawash supporters linked arms to bar the sportsmen from attacking the stall. One of the protestors threw a plastic bag with a rotting salmon onto the fish onto Yolanda's stall.

52. These are but a few of the many examples of the violence our people faced after Jones and Nadjiwon was decided. I lived these times, when our community members faced overt acts racism and violence. A complete description of the violence we faced is available in our submissions to Mr. Justice Linden in the Ipperwash Inquiry, which are excerpted in Exhibit "A" of this affidavit.

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[22] The backlash from the decision are fully detailed in SON's Ipperwash Submissions, *supra note* 1 at pp. 40-45 [Exhibit "A" to this Affidavit].

6. Protecting our People and our Rights: Negotiations with the Crown for a Fishing Agreement

53. While our people faced racism and violence following *Jones and Nadjiwon*, we also faced another obstacle: negotiating a fair and honourable agreement with the Crown that would provide a mechanism for the implementation of our rights, protect the resource and begin to reverse the effects of our fishery's historical decimation.

54. Over the last twenty years, I have attended hundreds of meetings to arrive at such an agreement. Indeed, looking back over the years, it is difficult to convey how difficult these negotiations were. We travelled far, we met with government officials, we wrote letters and we consulted with our people. We fought to obtain data to assess the fishery in Lake Huron, and we retained staff biologists in partnership with the University of Guelph to ensure that the fishery would be protected based on sound science. Most importantly, we sought to establish that which was promised: an exclusive commercial fishery of which we were the primary stewards.

A. The Initial Years After *Jones and Nadjiwon*

55. Following *Jones and Nadjiwon*, we continued to seek a peaceful solution to the acrimonious relationship between SON, the government and public by tabling a comprehensive strategy to develop public support, assess the impact of the stocking of non-indigenous species in our waters, and develop a co-management agreement with Ontario.

56. On August 15, 1995, MNR Minister Chris Hodgson met with SON. The Minister advised that the new government (elected in June 1995) was not interested in negotiating and concluding a co-management agreement and discussions came to an end. A new license was inevitable.

57. On June 24, 1996, Ontario issued an Aboriginal Communal fishing license to SON. It was rejected and our people continued to fish, once again exposing themselves to charges, and the seizure of their nets, fish and boats.

58. Sure enough, on June 24, 1997, MNR issued new charges against two SON fishermen. SON was forced back into court to expend resources to challenge the licenses, notwithstanding Justice Fairgreive's findings in *Jones and Nadjiwon.*

B. Initial Negotiations and the 2000 Agreement

59. SON continued to try to negotiate an agreement with Ontario while, at the same time, defending the new charges under the 1996 fishing license.

60. On July 30, 1997, SON secured a commitment from both the Federal and Provincial Governments to negotiate. The Honourable Mr. Justice Stephen Hunter acted as mediator in those discussions. This was a very difficult time. Charges were still pending against two SON fishermen. Our people questioned how we could negotiate with the very government that charged our fishermen and had imprisoned them in the past.

61. Our position was simple: while we did not need an agreement to fish, an agreement would stabilize our relationship with the Crown and bring some peace to our communities. It would also help us rebuild our fishery, reversing years of damage.

62. I personally attended, along with Chief Akiwenzie and other councilors from 1997-2000, well over two hundred meetings. During this three year period, the promise of *Jones and Nadjiwon* seemed to be slipping from our grasp. Nevertheless, through sheer determination and perseverance, we held on to the hope that we could conclude an agreement that would protect our people on the land and on the waters, and implement the right that was won in *Jones and Nadjiwon*.

63. On June 22, 2000, over 7 years after *Jones and Nadjiwon* was decided, SON signed our first agreement with MNR and Indian Northern Affairs Canada. While the agreement is confidential, it had the following key components:

- It more broadly defined the waters for SON fishing within our traditional territory, allowing for a broader SON commercial fishery than what had been allocated under the previous licensing scheme employed by MNR;
- It ensured that the fishery would be protected by the application of sound science to the setting of safe harvest limits in which SON was an active participant, and not a "stake-holder," in determining the quota that was allocated;
- It provided for a mechanism by which SON could better assess the fishery by providing for the exchange of data between SON and MNR, and by securing a funding mechanism for this exchange of data.

64. From SON's perspective, the protection of the resource was the continuing and primary obligation of the parties under the agreement. The secondary obligation under the agreement was to ensure that our people would benefit from the commercial fishery on a priority basis.

65. Although this agreement was an important first step, it was just a beginning. The 2000 agreement did not go far enough in protecting our rights and the resource and it did not provide the basis for us to rebuild our commercial fishery. To attain this, our people had to fight again, and endure more cost, insult and attack.

66. This SON experience was captured by Mr. Justice Linden, Commissioner of the Ipperwash Inquiry, in his final report:[23]

> Both before and after Jones and Nadjiwon the Saugeen Ojibway Nation approached the province to try to reach a co-management agreement concerning the commercial fishery in the waters around the Bruce Peninsula. In 1994, Ontario agreed to discuss co-management.
>
> Despite the concerted efforts of the Saugeen Ojibway Nation to educate the public about their treaty and Aboriginal rights, the summer and early fall of 1995 was marked by protests, violence, and vocal opposition from some members of the non-Aboriginal community to the commercial fishing rights of the Saugeen Ojibway Nation. The protests and violence included a march by nearly 100 people on an Aboriginal woman who was selling fish in the Owen Sound market. Aboriginal fishing boats and nets were vandalized, a First Nation-owned fishing tug was burned, and several members of the Saugeen Objibway Nation were assaulted in Owen Sound.

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[23] Report of the Ipperwash Inquiry, vol. 2 at 118-19, online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_Full.pdf.>

> In August of 1995, the new provincial government informed the Saugeen Ojibway Nation that it would not continue with the co-management discussions. Later, the government tried to unilaterally impose a new regulatory scheme under The Aboriginal Communal Fishing Licence Regulations, which the Saugeen Ojibway Nation resisted. The MNR continued to lay charges against Saugeen Ojibway Nation fishers for not adhering to the communal licenses.
>
> In 1997, the federal government appointed a judge to mediate the dispute between MNR and the Saugeen Ojibway Nation. In June 2000, seven years after the Jones and Nadjiwon decision recognized the Saugeen Ojibway right to fish commercially, the provincial and federal governments and the Saugeen Ojibway Nation signed the first Fishery Agreement to manage the commercial fishery in Lake Huron and Georgian Bay around the Bruce Peninsula. In July 2005, the Agreement was renewed for a further five years, including a protocol for how the parties will work together to ensure compliance and to exchange information about the commercial fishery.
>
> A First Nation should not have to experience what the Saugeen Ojibway Nation went through to reach a co-operative management agreement with Ontario. I recommend that the provincial government continue to work with First Nations and Aboriginal organizations in Ontario to develop co-management arrangements and resource-sharing initiatives.

67. The 2000 agreement was for a term of 5 years. It was the first step in repairing a badly damaged relationship and its main purpose was to create a peaceful environment in which SON could begin to implement its vision of our fishery and overcome 150 years of exclusion from it. In many ways, the 2000 agreement was both and end and a beginning: it ended the violence of the past, and it began to define SON's vision of the fishery for our people and the generations to come.

68. However, the 2000 agreement was not without compromise. In the interests of moving towards a better relationship with Ontario (with the ultimate goal of securing our rights for our people), SON agreed to refrain from exercising our rights within Owen Sound and Colpoys Bays ("our Bays" or "the Bays"), a contentious issue that I will return to further in this affidavit.

C. Negotiations Continue: The 2005 Agreement

69. Two years before the 2000 agreement was set to expire, SON and MNR began negotiating the next agreement. After lengthy negotiations, a second agreement was concluded on July 12, 2005. The 2005 agreement provided further stability and peace within our traditional territory, and increased the amount of safe harvest limits within our waters. It also confirmed and recognized an SON exclusive commercial fishery in the waters surrounding the Bruce Peninsula.

70. While the violence of the past subsided over the life of the 2000 and 2005 agreements, our fishermen continued to be excluded from our Bays and the agreement provided little in the way of economic development opportunities so that our people could earn a moderate livelihood. As the end of the 2005 agreement approached, SON Joint Counsel provided a renewed mandate to the SON negotiating team to remedy these deficiencies in a new, substantive, agreement that would provide a mechanism to implement the right for both the present and future generations.

71. In preparation for the re-negotiation of a new agreement, SON set out some fundamental principles that would guide its position:

- SON would exercise its aboriginal and treaty rights throughout its Traditional waters, including in Owen Sound and Colpoy Bays;
- The issue of the stocking of exotic species which are predators of the indigenous species we catch would be studied and addressed;
- Our people would derive greater economic benefit from the waters in order to sustain our connection to them and to invest in and protect our fishery and its historical place in our economy and culture;

- The agreement would be based on a Government-to-Government relationship based on mutual trust and respect;

- The agreement would contain binding commitments and obligations on both Government and SON to ensure that our fishery would regain its central importance to our economy and culture.

D. Renegotiation – The Initial Discussions: May 2010 – November 2010

72. In anticipation of the expiry of the 2005 agreement, SON and MNR agreed to extend the 2005 agreement to December 31, 2010 to allow for negotiations of a new agreement to commence. When the 2005 agreement expired on December 31 2009, it was extended by a Memorandum of Understanding to allow for negotiations of a new fishing agreement that would embody a new relationship with Ontario but also implement SON's vision for its fishery for generations to come.

73. The initial discussions were mediated by Professor Michael Coyle. While initial progress seemed positive, the talks broke down in November of 2010.

74. After the breakdown, SON had discussions with the very highest levels of the government of Ontario, including the Minister of Aboriginal Affairs, The Honourable Chris Bentley, and the Minister of Natural Resources, the Honourable Linda Jeffrey. During the meeting with Minister Jeffrey, she and our Chiefs made a renewed commitment to re-commence the negotiations with a new mandate. A Deputy Minister was given the lead on the negotiations and the Honourable Frank Iacobucci, a retired Supreme Court of Canada Justice, was retained to facilitate the renewed discussions.

E. The Framework Agreement Recognizing the Right and a Mechanism for Implementation

75. Following SON's meeting with Minister Jeffry, negotiations with MNR re-commenced in April 2011. They continued through to August 2011.

76. On August 27, 2011, SON and MNR executed a foundational Framework Agreement to assist the parties in negotiating a long-term substantive fishing agreement. A copy of the Framework Agreement is annexed hereto as Exhibit "G". I ask that The Panel review this document closely, paying particular attention to the mutual commitments and obligations relating to the SON fishery.

77. The Framework Agreement was a milestone in setting forward the vision for the SON fishery and our relationship with Ontario for generations to come. It contains several important principles:

- The agreement is based on a Government to Government relationship in which SON decision makers would sit directly with MNR decision makers;
- It created a Governance Committee comprised of SON and Ontario leadership to implement the objectives, commitments and responsibilities set out in the framework agreement; and
- It made commitments to deal with specific key issues including:
    i. Mutual economic benefits;
    ii. Capacity for SON to allow for reconciliation to continue;
    iii. The mutual setting of safe harvest limits based on sound science and not the unilateral allocation of quota under a licensing regime;
    iv. A commitment to study and address the impacts of MNR stocking programs in the waters of Lake Huron;

v. The sustainability of the fishery and the waters that support it; and

vi. The engagement of the Federal Crown.

78. The Framework Agreement committed the parties (SON and MNR) to a number of principles to guide the conclusion of a long term substantive fishing agreement. These principles include:

- A new relationship with a willingness to build a more positive and better future for the parties;
- Mutual respect created through a willingness to act in good faith and in a manner respectful of each other;
- Mutual participation in implementing mechanisms that achieve further participation by both parties in decisions about commercial fishing in the waters.

79. The Framework Agreement also contained important mutual commitments, paramount of which was the protection, conservation and sustainability of the resource.

80. Mutual trust and respect was to be established through meaningful negotiating processes, and through goals and principles that would be included in a long term agreement including:

- mutual economic benefits for the parties;
- capacity for SON;
- the setting of safe harvest limits (TAC); and
- SON fishing in Owen Sound and Colpoys Bays.

81. These commitments, obligations, responsibilities and principles set the stage for SON and MNR to negotiate a new agreement – one that built upon past agreements but would move far beyond them in order to provide for a better future for our people.

F. Negotiation of and Execution of the Long Term Substantive Fishing Agreement

82. After signing the Framework Agreement, SON and MNR re-commenced the negotiations to conclude a lasting and flexible substantive fishing agreement. These negotiations began in September of 2011. Over 50 meetings were held and, by June 2012, the parties had come to an agreement that was recommended for approval by SON leadership and the Ontario Government (referred to in the remainder of my affidavit as either "the 2013 Agreement", or "the Substantive Fishing Agreement" or "the Agreement").

83. On January 24, 2013, the Agreement was signed by The Honourable Minister Gravelle on behalf of Her Majesty The Queen in the Right of Ontario (MNR) and by Chief Randall Kahgee on behalf of the Saugeen First Nation. On February 21, 2013, the Agreement was signed by Chief Scott Lee on behalf of the Chippewas of Nawash First Nation.

84. The changes in the 2013 Agreement – notably that SON fisherman could now exercise their treaty and aboriginal rights to fish throughout our Traditional waters, including the Bays of Georgian Bay – became effective on April 26, 2013. As noted above, the 2013 Agreement is set out at as Exhibit "B" to my affidavit.

7. THE 2013 SUBSTANTIVE FISHING AGREEMENT – A VISION FOR A BETTER FUTURE

85. The Substantive Fishing Agreement is 40 pages in length. It incorporates and implements the commitments and obligations contained in the August 2011 Framework Agreement. It contains Schedules relating to:

- Incorporation of the Framework Agreement (Schedule "A")

- The waters covered by the agreement (Schedule "B");
- Fishing within the waters (Schedule "C");
- Total allowable catch and data exchange (Schedule "D");
- A compliance protocol for SON and non-aboriginal fishers (Schedule "E");
- Terms of reference for:
    - The Capacity and Economic Development Working Group
    - Expert facilitation for TAC Determination Working Group
    - Expert Facilitation Regarding Fish Stocking Working Group

A. The Contents and Purpose of the Agreement: Restoring the Commercial Fishery

86. The 2013 Agreement re-affirms the binding goals, principles, objectives and commitments contained in the Framework Agreement, the primary concern of which is the sustainability of the resource. Within the waters defined under the Agreement, SON has maintained an exclusive commercial fishery.

87. There are several key components to the 2013 Agreement:

(i) **Purpose**: The purpose of the agreement is to implement the commitments made by the parties in the Framework Agreement, which is based on a Government-to-Government structure.

(ii) **Scope**: Its scope is intended to provide for the sustainability of fish, the support of the SON commercial fishery and safety on the waters for all;

(iii) **The Waters**: The waters that are the subject matter of the 2013 Agreement surround the Bruce Peninsula, to the international border on the West Side and to Meaford on the South East Side. A copy of the map defining the waters is contained at page 23 of the

2013 Agreement. As the panel will see the proposed DGR sits in the middle of the waters defined by the agreement and within SON Traditional Territory.

(iv) **Governance Committee:** The Governance Committee oversees implementation of the agreement and ensures that the mutual commitments and obligations under it are kept and implemented. One mechanism through which this is accomplished is by the establishment of working groups with terms of reference.

(v) **Total Allowable Catch:** "TAC" is to be set based on sound science by consensus decision making of the Governance Committee based on a consideration of the biological status of the fish populations in Lake Huron prior to the establishment of TAC.

88. Below, I will address the work being done under the 2013 Agreement, and then I will discuss the aftermath and community backlash that came from its negotiation and execution.

B. The Work Being Done Pursuant to the 2013 Agreement

i. The Capacity and Economic Development Working Group

89. On July 5, 2011, the Governance Committee established the Capacity and Economic Development Working Group by terms of reference. The purpose of this working group, a collaborative effort between SON and Ontario, is to develop detailed proposals for a business development plan so that SON can derive greater economic benefits from the fishery through a vertically integrated fishery. This will be done through a Request for Proposal that will include identification of the following:

i. Equipment requirements of SON;

ii. Cold storage needs;

iii. Processing of fish;

iv. Marketing of fish;

v. Distribution of fish to the market;

vi. Enhancement of revenue for SON processed fish;

vii. Employment and training;

viii. Costs necessary to address the capacity needs of SON in an economically viable and self-sustaining commercial fishery.

90. In addition, the terms of reference required identification of the necessary agencies (governmental and non-governmental) to support and implement the terms of reference, and the necessary capital required for implementation of the business plan by the Governance Committee.

91. Two points need to be made about these terms of reference.

92. First, properly implemented over the long term, this economic working group can restore our fishery, undoing the effects of our historical exclusion, and make it a center piece of our economy, as it once was. Indeed, the historical decimation of our fishery continues to be felt today (and is reported by Ontario Power Generation ("OPG") in its Environmental Impact Statement, in terms of the current size of our fishery) and is reflected in the overall health of our on-reserve economies. Our fishing agreements with Ontario set out the foundation for SON, working with Ontario, to rebuild our fishery from the decades' long history of destruction caused by encroachment by European settlers and government actions. This long process of rebuilding is now beginning. Under the 2013 Agreement, for the first time, we can and will restore the fishery to its rightful place within our economy so that it will no longer be the case that only a few fishermen can survive from fishing, but rather that many SON members will be supported by our fishery, whether through catch, assessment, processing, marketing or distribution.

93. Second, it takes time to build and establish a fishery. The non-aboriginal fishery had 150 years to mature into a self-sustaining commercial fishery. SON did not enjoy that same advantage. We were excluded from our fishery. We are only now, under the 2013 Agreement, beginning to take the steps necessary to overcome the effects of this exclusion. As with the non-aboriginal fishery, this takes time, commitment and capital.

94. The Capacity and Economic Development Working Group has begun its work to develop detailed proposals for a business development plan aimed at building a strong, economical and vertically integrated fishery. As it stands, our fishermen mostly sell their catch "in round" – that is, without any processing or value added. This is the lowest value form of a fishery. The goal of the working group is to build up our fishery so that it can be the basis of a real economy and our people can make a real living from the fishery.

95. The Working Group has established an Request for Proposal for the development of the key components of new and vertically integrated fishery including: equipment needs for cold storage and processing; marketing; distribution; revenue enhancement models for processed fish; employment and training; and the development of business models to address capacity needs of SON to build an economically viable and self-sustaining commercial fishery.

96. We have already begun the work necessary to rebuild and modernize our commercial fishery. This has started from the bottom up. We began with the fishermen in both Saugeen and Nawash. We have held numerous "Community Fishing Meetings" in both Saugeen and Nawash, we have passed Joint Council motions to establish Foundation Principles for Territorial Economic

Development, and we have established a SON fishery committee and hired local youth to assist the committee in its work.

97. Efforts have already begun to acquire necessary equipment, from fishing nets purchased directly from Chinese and Taiwanese suppliers to new boats. We have begun work to price and plan for the construction of new fish processing plants, and we have and conducted research and modeling into the power, transportation and logistics needed to support this. We have considered business models that divide our fishery into four components: (1) whole fish, (2) smoked fish, (3) surimi (processed fish cake) and (4) vacuum packed. Our fishing committee has led planning on an inter-ministerial conference to bring all parties to the 2013 Agreement together in a broader forum to discuss issues related to business and economic development which could inform the development of an integrated SON commercial fishery vision and plan. We have taken advantage of programs such as the Business Retention & Expansion Program offered by the Ontario Ministry of Agriculture, Food, and Rural Affairs, and we have begun work to develop SON-specific marketing materials and strategies.

98. There are already concrete examples of how our efforts are starting to pay off. I will relay a personal example. Over the last year, I have built and made significant investments in a fish smoking facility at Cape Croker. I built a commercial grade smoke house, and purchased an industrial grade smoker and packaging equipment. In the last six months, I have been catching fish, or purchasing fish from our local fishermen, to smoke and sell. I am already processing and selling significant amounts of my smoked fish to local Nawash business people who resell it in their retail shops. In the short time I have been in operation, my business has grown tremendously and there is every indication that it will continue to do so.

99. I fear that the mere possibility of the DGR poses a threat to these positive developments, and to the efforts of SON and government to rebuild our commercial fishery. There is a danger that government, our people and others will not make the investment of time, effort and capital that has been committed to under the Agreement, and is necessary to rebuild our fishery. I worry that nobody will be willing to make these investments if they fear there will be no market at the end of the day for "fish from the nuclear waste dump." They will all see it as a bad investment, a waste of money. I fear that all our efforts will be wasted and our fishery will die out, rather than be rejuvenated.

ii. The TAC Working Group and Data Exchange

100. Other aspects of the agreement establish mechanisms that ensure that the resources will be protected and maintained so that it will continue to be able to support the SON fishery far into the future.

101. Of central importance to our people is the sustainability of the lands and waters that support our fishery. At one time, we were "allocated" a quota without consultation or regard to either our history, our aboriginal right or our treaty relationship with the Crown.

102. The TAC working group provides the mechanism by which safe harvest limits can be set through the establishment, by consensus of the Governance Committee, of total allowable catch in any given year. SON and MNR have differed over the process by which safe harvest limits can be set after annual harvest data is exchanged. Accordingly, the process is now facilitated to ensure that the best science is applied to the setting of safe harvest limits for consideration by the

Governance Committee. This is a crucial element of the Agreement as it assists our people in ensuring the sustainability of the resource.

103. Complementing the TAC working group is Schedule D of the Agreement, which provides for the process by which data will be exchanged for the purposes of establishing TAC. This includes a detailed protocol relating to commercial harvests within Lake Huron, index netting data and recreational harvest. In addition, Schedule D requires TAC to be determined based on key uncertainties, including the status of biological fish populations and their distribution in the waters. In this regard especially the DGR creates enormous uncertainty for TAC: What effect will construction have on the waters? On habitat? On aquifers during construction? On increased urbanization and the resulting increase in effluent and pollution? How is SON to address these uncertainties in setting safe harvest limits if the DGR is built?

iii. Fish Stocking Working Group

104. Over the objection of SON, Ontario has and continues to stock non-indigenous fish in our traditional waters. The purpose of this stocking is to support the non-native recreational fishery. The reason that SON has objected to the stocking of these species (such as salmon) is that they are not only predators of our preferred species (lake whitefish) but they consume many of the nutrients that lake whitefish require for their natural reproduction. In short, the stocking of non-indigenous species, in SON's view, has an adverse impact on the waters that sustain our fishery. The Fish Stocking Working Group, for the first time in history, will examine and address long standing SON concerns with respect to these stocking programs.

C. Public Reaction to the Substantive Fishing Agreement

105. The 2013 Substantive Fishing Agreement is the first one that has been made public. Properly implemented, it will restore our fishery to the center piece of our culture by protecting, by ensuring more SON members will participate in it and ultimately ensure that our connection to the waters for generations to come will be preserved. In the face of this agreement however, and its public release, we have faced yet another hurdle: another backlash to SON's exercise of its aboriginal and treaty rights.

i. The Aftermath of the 2013 Agreement

106. As I noted above, the 2013 Agreement was the first agreement to be made public: it was released on March 12, 2013. Public reaction was immediate. There was outcry and outrage over the Agreement in the local media, and by both federal and provincial politicians. On March 13, 2013, the Owen Sound Sun Times reported that Member of Parliament Larry Miller and Member of Provincial Parliament Bill Walker were "angered" by the agreement. After having reviewed the contents of the Agreement, MP Miller said he was "deeply disappointed" about aspects of the agreement that will "no doubt kill local sport fishing in [the] bays." MP Miller and MPP Walker were also upset about the funds provided under the agreement, stating that SON members were being paid to fish.[24] This public characterization is misguided; the money is for the assessment and sustainability of the fishery based on sound science.

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[24] "SON Gets Funding to Fish" Bayshore Broadcasting (March 13, 2013). A collection of the articles I reference in this paragraph and below are attached to this affidavit as Exhibit "H". "SON Gets Funding to Fish" is contained therein as Tab 1.

107. Online comments on the Owen Sound Sun Times website expressed outrage about MNR entering into agreements with SON in secret and jeopardizing sports fishing.[25] To make matters worse, MP Miller and MPP Walker issued a joint press release referring to the Agreement as an "insult."[26] They did not reference our treaty and aboriginal rights to fish within our Traditional Territory, nor did they discuss the history of exclusion of SON from the fishery. I heard that MP Miller reported that he heard from people who suggested violence in response to the agreement. Members of the public hosted meetings to express their "concern" over the agreement, organized protests and called for the agreement to be re-opened.[27]

108. As in 1993, we had concerns about the safety of our community members. Some of our members experienced backlash from the agreement – they were taunted at the docks and our children were taunted at school. We put the police, who are playing a role in ensuring that the implementation of the Agreement goes smoothly, on alert to protect our people and fishermen.

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[25] See the comments at the end of the article by Denis Langlois, "Miller Calls Fishing Agreement a Mess" Owen Sound Sun Times (March 14, 2013) and by Scott Dun, "Miller, Walker Condemn Payments to SON" Owen Sound Sun Times (March 14, 2013) [Exhibit "H" Tab 2]

[26] MPP bill Walker and MP Larry Miller, "Sports Fishers sold out by Ministry of Natural Resources: Response from MPP Walker and MP Miller" (March 12, 2013) [Exhibit "H" Tab 3]

[27] See "Important Announcement: Concerned Anglers to Host Session on Commercial Fishing Agreement" (April 20, 2013) ["Concerned Anglers Announcement"]; Dennis Langlois, "Small Turnout at Commercial Fishing Protest" Owen Sound Sun Times (April 26, 2013); Denis Langlois "Sports Anglers Want Fishing Agreement Reopened" Owen Sound Sun Times (April 27, 2013) [Exhibit "H" at Tab 4].

109. In response to the backlash from the agreement, Chief Kahgee and Chief Lee issued a press release defending our people and our rights. In that press release, the Chiefs wrote about our rights, the 2013 Agreement and its importance.[28]

110. Minister of Natural Resources David Orazietti also publically responded through a letter the editor sent to the Owen Sound Sun Times dated April 9, 2013, a copy of which is attached as Tab 6 of Exhibit "H".[29] Minister Orazietti confirmed what the SON has always known: that we have a treaty right to fish on the waters and that we were not obligated to enter into this agreement with MNR in order to exercise that right.

111. Despite the overwhelming negative public reaction by elected officials and the recreational fishing organizations, there were some non-SON individuals who spoke out in favour of the Agreement. Josh Choronzey of the Owen Sound Sun Times published an article commenting on the situation, which included a brief review of SON's rights and the history of the negotiations. Online, some commentators reminded critics that we had a proven right to fish – a right established by treaties and affirmed by Canadian Courts only 20 years prior.[30] Schools invited our Chiefs to educate teachers about SON's history and the agreement so that they could teach children in their classes about us and our rights.

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[28] Taking the High Road: The SON/MNR Fishing Agreement" (April 9, 2013) [Exhibit "H" Tab 5 to this Affidavit]
[29] David Orazietti, Minister of Natural Resources "Letters to the Editor – Both Commercial and Recreational Fisheries Can Exist" (April 9, 2013) [Exhibit "H" Tab 6].
[30] Josh Chronzey, "Some Context for Native Fishing Agreement" (March 14, 2013) Owen Sound Sun Times. online at <http://www.owensoundsuntimes.com/>. [Exhibit "H" Tab 7 to this Affidavit].

112. On April 22, 2013, Chief Kahgee, Chief Lee and Minister Orazietti participated in a ceremonial signing of the Agreement – reaffirming SON and MNR's commitments to the principles contained within it. A copy of their signatures in reaffirmation of the 2013 Agreement is attached to this affidavit as Exhibit "I". After the ceremony, Minister Orazietti repeated his already publically expressed opinion that SON did not need to enter into the agreement because of our treaty and aboriginal right to fish in our traditional territory.[31] Chief Lee commented on the importance of Minister Orazietti's statements about SON rights, stating that "We've never heard that kind of commitment, those kinds of acknowledgement of our rights."[32]

113. On that same day, a "peaceful protest" against the agreement was organized by non-native recreational fishers. In addition, some recreational fishing groups organized a "town hall style, non-confrontational information meeting"[33] for the following day, where calls were made for MNR to reopen the agreement.[34] Most recently, the Mayor of Georgian Bluffs has written to Minister Orazietti asking that the agreement be re-opened and amended.

114. The public outcry over the 2013 agreement was reminiscent of public reaction in 1993 to *Jones and Nadjiwon*. General threats of violence were made, although thankfully no one was injured or attacked. However, there are signs that we have moved forward. Non-SON individuals have stepped up in defence of our rights. Some members of the public have taken steps to learn about

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[31] Scott Dunn, "Minister, SON chiefs say fish deal a new chapter" Owen Sound Sun Times (April 22, 2013) [Exhibit "H", Tab 8].
[32] *Ibid.*
[33] Concerned Anglers Announcement, *supra* note 27 [Exhibit "H" Tab 4].
[34] Langlois "Sports Anglers Want Fishing Agreement Reopened, *supra* note 27 [Exhibit "H" Tab 4].

our history. Ontario has also publicly, for the first time, acknowledged our aboriginal and treaty rights in our traditional territory, confirming we are not required to enter into any agreement about the commercial fishery but rather are obligated to protect it.[35]

8. Summary – SON's Fight to Protect Its Fishery

115. Since the time of contact, and the beginning of the encroachment of settlers and industry on our lands and waters, our fishery has been under attack. Most recently, we have been criticized by elected officials for exercising our rights. We have had to make great efforts to protect our fishery, and who we are, from being wiped out entirely. Now we are facing the difficult task of rebuilding our fishery. We had hoped, and put our efforts into our Agreement with Ontario so that it could be the foundation of our effort to finally rebuild our fishery and restore it to its central place in our economy and culture. For example, we have created a business development office to work with Ontario and other agencies to create a vertically integrated fishery.

116. These efforts are ongoing and, properly implemented, will bring to fruition the obligations and commitments contained in the 2013 Substantive Fishing Agreement. At the very time that SON secures an agreement that would properly protect our waters and the fishery, however, another arm of government seeks to undo it all by building, transporting and burying nuclear waste several hundred meters from the shores of Lake Huron though the construction of a project that

[35] See Minister Orazietti's comment that SON, who has "unfettered" rights, "voluntarily" negotiated with Ontario out of concern for the long-term sustainability of the fishing resource: Denis Langlois, "Minister Praises SON For Negotiating Fishing Agreement" Owen Sound Sun Times (April 18, 2013) [Exhibit "H" Tab 9].

is unprecedented in Canadian history. SON should not have to endure further encroachment or attacks on our rights and our territory. Those days have long since passed. The 2013 Agreement is an important milestone agreement whose very implementation is now threatened by the DGR.

III. SON'S OTHER EFFORTS TO PROTECT THE FISHERY

117. What I have described above is our decades' long fight to have our rights recognized and build a new foundation for our fishery through negotiated agreements.

118. However, SON has fought to protect our rights and fishery on other fronts. Over the last fifteen years, SON has made tremendous effort, spent millions of dollars and devoted countless hours to protect the waters, fish and fish habitat in Lake Huron and Georgian Bay, through legal action, participation in numerous regulatory proceedings and sponsorship of scientific research initiatives. I will briefly describe these efforts in the paragraphs that follow.

119. In January 2013, community members noticed a shore well being constructed that was harmful to fish habitat. SON obtained an injunction to prevent the harm that was occurring. We then entered into negotiations with the Conservation Authority to create a better relationship to ensure that the resource was protected. We have attempted, as part of this effort, to engage the Department of Fisheries and Oceans ("DFO") in order to better protect fish habitat in our traditional waters. Most recently, SON has sent a letter to DFO Minister Shea expressing concern about SON's relationship with DFO and our attempts to reach a relationship agreement with DFO. Our struggle and difficulties to engage with DFO are set out in a letter recently sent by our Chiefs. It is annexed as Exhibit "J". As of the date of the swearing of this affidavit, we have not received a response from the Minister.

120. SON has been consistently and actively involved in the regulatory review of many different industrial developments in our Traditional Territory that could threaten our fishery. We have pushed for scientific and environmental study of the resource, in order that good and precautionary decisions can be made to allow only responsible developments and to mitigate any dangers that those developments might pose.

1. The Bruce Nuclear Site and Bruce Power Inc.

121. Many of these efforts have focused on the operations of Bruce Power and developments at the Bruce Nuclear Site – the site on which OPG now proposes to build its DGR Project. This area is particularly important to the SON fishery because it is close to and influences critical fish spawning areas within Lake Huron.

122. Over the last many years, SON has had a central role in the review of proposed developments and initiatives relating to Bruce Power, including:

    a. In 1997, an environmental assessment was carried out for a used fuel dry storage facility at the Bruce Nuclear site. SON went to the hearings and challenged the science and conclusions of OPG and others respecting the interaction of the facility with Lake Huron and the aquatic environment. As a result of our voice, a new research program was initiated to look at the question of Whitefish interaction with Nuclear Generating

Stations. This study was called "WINGS". Its history is described in a Final Report by Holes & Noakes, in 2002:[36]

> During the Bruce Nuclear Used Fuel Dry Storage Environmental Assessment (BUFDS EA) revew process in 1997, representatives of the Chippewas of Nawash First Nation expressed concern about the monitoring of lake whitefish in Lake Huron as part of the overall Bruce Nuclear environmental monitoring program conducted by Ontario Power Generation (OPG 1990). These concerns predate the BUFDS EA process and derive partly from the fact that the single largest component of the Nawash commercial fishery to which they have an established Treaty right (Walters 1988), the harvest of lake whitefish, is from the eastern Main Basin of Lake Huron, where Bruce Nuclear Power Development (BNPD) is located (OPG 1990)....The health of the ecosystem and the whitefish population(s) it supports in the vicininty of the BNPD are of fundamental importance to the health and economic viability of the Nawash community (OPG 1990) and other users of fisheries resources in Lake Huron.
>
> In response to these long-standing concerns about the effects of the BNPD on the fishing industry and the Lake Huron ecosystem near the Bruce Peninsula, a 3-year collaborative effort to jointly review the available scientific information on the ecology and population dynamics of both lake whitefish and round whitefish in Lake Huron was initiated in 1999. The project was conducted by the University of Guelph with field support from the Chippewas of Nawash and is funded by OPG and since 2001 Bruce Power (BP), which leased the Bruce A and B generating facilities from OPG.

b. In 2002, Bruce Power initiated an environmental assessment respecting its intention to restart two of its reactors (Units 3 and 4) after their refurbishment. In reviewing the application and review documents by CNSC, SON was extremely concerned about the manner in which ecological effects on lake whitefish and the results of the WINGS Project were being ignored. SON filed detailed submissions critiquing the work of Bruce Power and CNSC, and attended the one-day hearing into the screening report in Ottawa

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on December 12, 2002. At those hearings, Nawash Chief, the late Ralph Akiwenzie, along with our biologist Dr Steve Crawford, made the case that the science behind the application was lacking and did not address SON concerns. Ultimately, the Commission made the decision that the application would not go to a fuller review and that the interests and concerns of SON could be addressed through a follow-up monitoring program as a condition of the approval. The Lake Huron Whitefish Follow-up Monitoring Program was initiated, and for a time, SON and its researchers were deeply involved in its work. However, as time went on, it became apparent that the direction research was going would not answer the key questions that SON had about the impact of the Bruce Nuclear facility on the total ecology of Lake Huron, and specifically, questions about populations of lake whitefish and the impacts on those various populations.

c. In 2006, Bruce Power began its application to build four new nuclear reactors at the Bruce Nuclear Complex. SON engaged in a lengthy consultation and accommodation process with the federal Crown, represented by the Canadian Nuclear Safety Commission (the "CNSC") to ensure that the project would be reviewed to the highest possible standards under Canadian law, and that the review would focus on the potential impacts of the project on SON Rights, interests, and way of life. The Joint Panel Review Agreement for that project identified SON specifically as having a unique interest in the territory and the project.[37] It went further to set out a new mandate for the panel to

[37] A copy of the JRP Agreement on the New Nuclear Power Plant Application is annexed hereto as Exhibit "K".

consider and take evidence on the potential impacts of the project on SON Rights and interests to support ongoing consultation efforts between SON and the Crown. The Agreement is attached here as "K". During the environmental assessment of the project, SON engaged experts both external and from within our community, as well as academic reviewers and legal support to review Bruce Power's application. SON representatives continued to meet with the CNSC to participate in a collaborative review of the application, all with the goal of identifying potential impacts on SON rights and the fishery. The project to build the four new reactors was subsequently abandoned by Bruce Power.

d. In 2008, Bruce Power was required to seek a licence for the refueling and restarting of two refurbished reactors. Again, SON made detailed submissions at the CNSC hearings emphasizing, in part, that the ongoing impacts of the facility on the fish and fish habitat of Lake Huron. In particular, SON pointed out its repeated complaint, first made in response to the inadequate follow up monitoring program described above, that the work that Bruce Power was doing in monitoring its entrainment and impingement effects were meaningless without an understanding of the nature of the whitefish populations in Lake Huron. As a result of our submissions, the CNSC imposed on Bruce Power a requirement that it undertake studies that would satisfactorily answer the questions and concerns of SON.

123. Following from the decision of the CNSC panel, SON engaged directly with Bruce Power to negotiate the terms of an agreement to carry out a collaborative study to answer five key

questions respecting the impacts of the facility on the Lake Huron Whitefish, and in particular set out a first of its kind course of study on understanding populations of the Lake Whitefish in Lake Huron so that impacts from contaminants, radiation, thermal changes, and entrainment and impingement could finally be understood. An agreement was concluded in May 2011. The study is referred to as the Collaborative Lake Whitefish Research Program and is being led by SON and Bruce Power with the University of Guelph and McMaster University.

2. The Integrated Power Supply Plan and the "MEI Agreement"

124. In 2007, the Ontario Power Authority proposed a new energy plan for Ontario referred to as the Integrated Power Supply Plan (the "IPSP"). Included in that plan were proposed developments that would have tremendous adverse impacts on SON's rights and interests, including direct impacts on our fishery. Most importantly, the IPSP called for the continued and potentially increased reliance on nuclear power at the Bruce Nuclear Site, as well as the development of offshore wind development in the waters off the coast of Lake Huron and within SON Traditional waters.

125. The IPSP had identified our Traditional waters, and the coast of our Traditional lands adjacent to those waters as the best possible sites for the development of onshore and offshore wind. These areas surrounded our historical fishing islands and were situated very close to important lake whitefish spawning grounds.

126. Because of potential for adverse impacts caused by such developments, SON became deeply involved in the Ontario Energy Board review of the IPSP. Again, SON was forced to devote

significant time and resources to understand and challenge government plans that threatened our fishery. Again, we were required to engage lawyers and external experts, as well as devote countless hours of the time of our Councilors and Chiefs to take up the reviewing and challenging the plan.

127. In late 2008, in an effort to negotiate an agreement on how the developments called for in the IPSP would be reviewed, approved and developed, SON engaged the government of Ontario, represented by the Ministry of Energy and Infrastructure, in negotiations to conclude an accommodation agreement. Negotiations were conducted over seven months in the summer and fall of 2009. An agreement was signed between SON and MEI in January, 2010 (the "MEI Agreement").

128. The MEI Agreement sets out many provisions for the protection of SON Territory and calls for engagement between SON and Ontario on energy related planning and development decisions.

129. The MEI Agreement specifically refers to the off-shore wind development and states that no decisions that would permit the development of off-shore wind until an extensive consultation process with SON was undertaken. It states that:

> Prior to any government decision which would permit renewable energy development in SON Traditional waters, the Parties agree to establish a consultation process to address the matter, including consideration of: the findings of the Natural and Cultural Values study as they might be relevant to a proposed Project in SON Traditional waters; a determination of adverse effects or impacts

on SON Rights; and Special measures to mitigate adverse effects or impacts on SON Rights.[38]

130. Shortly after the signing of the Agreement, the Government of Ontario announced a moratorium on the development of off-shore wind.

131. The MEI Agreement also specifically addresses decisions regarding nuclear developments within the Territory and recognizes that these must be addressed and that Ontario and others must come to the table with SON to resolve them. It states:

> 33. SON has expressed concern about the history, current operations and future of the Bruce Nuclear site. The Parties agree that the resolution of these issues is complex and will require the participation of multiple parties, including SON, Ontario, Canada, Bruce Power, Ontario Power Generation and the Nuclear Waste Management Organization based on their respective authorities and roles.
>
> 34. The Parties recognize that a consultation and accomodation process is the appropriate mechanism for addressing the future of nuclear projects and facilities in Anishnaabekiing and that the process may include consideration of concerns relating to existing projects.
>
> 35. The Minister agrees to be a party to a consultation and accommodation process established between SON, Canada and other federal agencies around the future of nuclear projects and facilities in Anishnaabekiing, focused on those matters for which Ontario has jurisdiction, responsibilities or a role in decision-making.[39]

132. From our perspective, the current decisions being made by the governments of Canada and Ontario, as well as OPG and NWMO, are all the kinds of decisions contemplated by the MEI Agreement. The actions now being considered with respect to the DGR Project fall squarely within our agreement, and must be dealt with as agreed and in an honourable manner. This is

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[38] MEI Agreement, section 31.
[39] MEI Agreement, supra.

especially so given the huge potential impacts of the DGR Project on our fishery and rights. This has not yet occurred, and all of these parties are proceeding to make decisions without our involvement and without any proper process or accommodation of our rights, interests and culture.

THE DGR AND THE THREAT TO THE SON FISHERY

133. All of the efforts I have described above were done to ensure that the waters, fish and fish habitat that we have relied on for our livelihood since time immemorial would continue to be able to sustain us. For our people, it has been one long fight against the constant encroachment and industrialization of our lands and waters, and the devastating effect this has had on the resource and our people's ability to exercise our rights to fish.

134. As I have explained, since time of contact and the beginning of the encroachment of settlers and industry on our lands and waters, our fishery has been under attack. We have had to make great efforts to protect it from being wiped-out entirely. Now we are facing the difficult task of rebuilding our fishery, but we are always on the back foot. We had hoped and put our efforts into our 2013 Substantive Fishing Agreement with Ontario so that it could be the foundation of our effort to finally rebuild our fishery and restore it to its central place in our economy and culture. We have invested in efforts to protect the resource through legal action, involvement in regulatory review and scientific research. And we have trusted in our MEI Agreement with Ontario to set out key protections against energy related industrial developments that could endanger the resource.

135. But now we have a new and potentially devastating project to contend with: OPG's DGR Project. We have heard that this project, if approved, poses many different kinds of threats to our fishery. The impacts of the DGR will be permanent, impacting our people and the fishery forever. And all of this is being done by a corporation of the Ontario Government—the same government that has entered into many agreements with us to help us protect our fishery.

136. Since we learned of OPG's plans to build the DGR at the Bruce Power site within our Territory, we have been trying to understand the project, and the threats it could pose to our rights, interests and way of life.

137. We have had many meetings of our leadership, communities and experts to try to understand what dangers it may pose. We have engaged world-class nuclear experts with deep experience in the development and regulation of nuclear projects, including nuclear waste repositories. These experts have reviewed all the information provided by OPG in their environmental impact statement and all of its support documents. Our experts and our team have visited the Bruce Nuclear Site to see the specific site proposed for the DGR. We have had many workshops with our experts, leadership, and community members to try to understand the Project.

138. We do not yet know all the dangers this project proposes, and we do not believe that OPG or NWMO or anybody else does either. But we do know that there are critical concerns that have not been fully addressed by OPG, and some that have not even been considered by OPG in any meaningful way.

139. Our experts have told us that the DGR Project is a "first of its kind" project, and because of this it is untested and many unknowns remain. Only a few underground repositories for nuclear waste have been built around the world. Even fewer have been used to store the "intermediate level" nuclear wastes that OPG has planned to place in the DGR Project. We are also told that no repository has been put into the kind of rock formation found under the Bruce Nuclear site. We have heard that of the few repositories that have been developed, some, like the ASSE II in Germany, are experiencing significant and dangerous problems. And all are so new that we do not know what kinds of problems might develop.

140. We also understand that OPG does not yet understand all the impacts that the construction and operation of the DGR Project could have on the fish and fish habitat. There are unanswered questions about run-off from the rock pile that will be created from the excavated rock and how this could affect the waters around the facility. There is poor understanding of the effect of the extensive blasting that will be required to build the facility and what impact this might have on fish. OPG has not considered at all the impacts on fish populations, nor do they have the ability to do so. As I explained above, SON is only now undertaking research that could lead to answers on these kinds of questions. Finally, OPG has not fully explained how it will gather information about the site to confirm its assumptions about the rock and its predictions on how the likely the risk of dangerous failures and leaks.

141. All of these shortcomings have caused our people significant stress, anxiety and fear – we simply do not know what the dangers of this project are. We are being asked to trust OPG and its science, and take on all the risk that they are right that the DGR Project will not cause significant impacts to our environment, fishery and, ultimately, our way of life.

142. An issue of great concern to us is that OPG has completely ignored a critical impact that the DGR **will** have on our Rights and our fishery. That is, that the DGR will cause a "stigma" that has the potential to devastate a local food economy, like our commercial fishery.

143. Stigma has been explained to us as a negative emotional judgment that forms about a place or thing and changes peoples' behaviour. Stigma is quite often developed around nuclear facilities and, in particular, around nuclear waste projects, partly because these projects are difficult to understand and partly because media like to exaggerate any nuclear incident, no matter how small. We understand that it is extremely difficult, often impossible, to eliminate a stigma once it's created.

144. As I understand this, even if there is no accident or malfunction at the DGR Project, the consequences of building a DGR at the Bruce Site could be devastating to our fishery. The mere existence of such a facility is enough. Even worse, any time a nuclear accident happens anywhere in the world, people will become more afraid of the DGR. The stigma will grow and our fishery will suffer even more, and there is nothing that OPG or Bruce Power could do about it. We are told that food economies are particularly sensitive to stigma and that there are examples from around the world where food economies have been seriously harmed, and even devastated, because of stigma.

145. We are told that two DGR projects planned for other places in the world (Yucca Mountain, Nevada, US and Cumbria County, UK) were ultimately rejected because of the potential for stigma to kill local economies. We are told that these other projects happened recently and that there is a very large amount of research available about these projects, but that OPG did not

consider any of this information in its submissions about the DGR. We do not understand how so much relevant information could be ignored by the very people who are asking for our trust and confidence.

146. We are also told that OPG did not even mention the protests and hearings that occurred when it tried to ship contaminated steam generators through the Great Lakes in 2010. I was at these hearings and remember how many people said they were afraid and that the risks were too great. We also understand that the amount of radioactive material in each generator was very small, especially compared to how much waste OPG wants to store in the DGR. We don't understand how OPG could say there is no risk of stigma from the DGR and nuclear waste after seeing the public reaction to the steam generators.

147. We are also troubled by what our experts tell us about OPG's analysis of stigma. Our experts tell us that OPG made many errors in its analysis and yet somehow still concluded the risk of stigma was minimal. We understand that OPG asked questions that were biased and surveyed very few people. We understand that OPG tried to measure potential stigma by surveying people who already live in the area, even though these people have an economic interest in the DGR Project and so are obviously biased.

148. We also understand that OPG made no effort to disclose or discuss any of the limitations of its analysis of stigma. Our experts tell us that OPG's conclusion of minimal stigma is different from what has happened at virtually all other nuclear waste projects, but that OPG does not even mention this fact. Instead, OPG did a very poor analysis of stigma and just concluded that the risk of stigma would be minimal.

149. These problems are compounded because of another nuclear waste management plan to build a DGR for all of Canada's spent nuclear fuel waste. This is a project being carried out by the NWMO. There is growing evidence that the spent nuclear fuel repository is likely to be developed at or near the Bruce Nuclear site.[40] Already all of the 5 local municipalities around the Bruce Nuclear Site, all within the SON Traditional territory, have engaged with NWMO to become the hosts for a new DGR for all of Canada's used nuclear fuel.

150. Our people do not believe that these two plans are unrelated. Rather, our people believe that OPG's DGR plan is only the beginning – a project to test the area for the used fuel DGR and to get local people comfortable with the idea.

151. We have sought assurances from government and NWMO and OPG that the spent fuel DGR would not be developed within SON Territory over our objections, but we have been rejected.

152. We have been told that this plan is not certain, and that nothing has yet been decided. But we have been given no assurances at all that we would have a say in this.

153. We also know that the possibility that another DGR for spent fuel will be built in our Territory, and the media attention and confusion surrounding the two projects together will only add to the potential stigma, as people will continue to be confused about what is going into the "nuclear waste dump" in our territory and likely assume the worst.

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[40] Much of this evidence is detailed in various SON correspondence and submissions annexed hereto as Exhibit "L".

IV. THE CONTINUING HISTORY OF BROKEN PROMISES

154. There are many ways in which the DGR Project threatens our commercial fishery, which, as I have explained, is the way our people have made a living since time immemorial. It has the potential to deal a fatal blow to our fishery and our aboriginal and Treaty rights. These questions have not yet been adequately understood or even studied by OPG.

155. From the perspective of our people, government and their corporations are once again taking unilateral action that will further damage or even kill our fishery. It is a continuation of the long and terrible history that we have been fighting against since the time of settlement. It could undermine all of the efforts that we have made in the last many decades to protect and reestablish our fishery and return it to a central place within our culture and economy.

156. These actions by the Ontario government's corporation could also undermine the agreements that SON and Ontario have made together. Ontario and SON have concluded four separate agreements that speak to and are designed to protect our rights, including those in the fishery, and to include us in decision making on projects that could negatively impact those rights. A

course of action that again allows OPG to make unilateral decisions about the future of our Territory and our rights is not only a broken promise but a broken legal commitment.

157. No decision should be made that would allow OPG to proceed with its DGR Project in a way that goes against our rights and agreements. This would not be fair, legal or honourable. The only proper way forward to protect SON Rights, interests and way of life is for Ontario and OPG to reconsider the plan for the DGR Project, understand all the dangers posed to SON rights and interests, and include SON in the ultimate decisions these critical decisions.

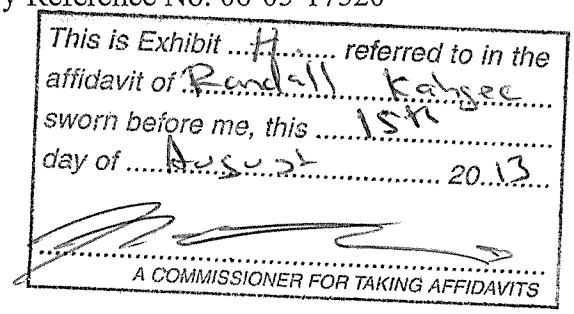
SWORN BEFORE ME at the)
City of Toronto, in the)
Province of Ontario)
this 15th day of August, 2013)
)

Commissioner for Taking Affidavits
LSUC # 60974J

PAUL JONES

EXHIBIT “H”

CEAA Registry Reference No. 06-05-17520



Saugeen Ojibway Nations' Application for a Determination on the Scope of Review of OPG's DGR Project and the Inclusion of a Project for the Long-Term Management of High Level Nuclear Wastes

August 9, 2012
Toronto, Ontario

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IV. RELIEF REQUESTED 35

I. OVERVIEW

1. The environmental impact statement ("EIS")[1] submitted by the Proponent Ontario Power Generation Inc. ("OPG") with respect to the proposed deep geologic repository ("DGR") for low and intermediate level radioactive waste (the "DGR Project") fails to consider a project for the disposal of used nuclear fuel within the Study Area as a cumulative effects project and is therefore fundamentally deficient.

2. The governing law,[2] the EIS Guidelines for the DGR Project[3] and this Joint Review Panel's own terms of reference[4] all require that a full "cumulative effects analysis" be undertaken as part of the environmental assessment of the DGR Project. It was incumbent on OPG to ensure that all projects—certain, reasonably foreseeable and, where appropriate, hypothetical—that could result in cumulative environmental impacts when combined with the DGR Project were included in the EIS and thus could be assessed by the Joint Review Panel ("JRP" or the "Panel).

3. In its analysis of potential cumulative effects in the EIS, OPG failed to include any discussion or analysis of a deep geological repository for used nuclear fuel (also referred to as high-level waste ("HLW")) or other project for the disposal of used nuclear fuel ("HLW DGR Project"). Yet an HLW DGR Project is a

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1 *OPG's Deep Geologic Repository Project for Low & Intermediate Level Waste: Environmental Impact Statement* (dated March 2011, filed April 2011) ("EIS").

2 The relevant statutory provision is Section 19(1)(a) of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (the "*Act*"). Under recent revisions to the *Act*, the section that addresses the need for an analysis of cumulative effects has been renumbered as Section 19(1)(a) from the previous Section 16(1)(a). The revised *Act* contains no substantive changes with respect to how a cumulative effects analysis is to be undertaken.

3 *Guidelines for the Preparation of the Environmental Impact Statement for the Deep Geologic Repository for Low- and Intermediate-Level Radioactive Wastes* (January 2009) ("EIS Guidelines").

4 Terms of Reference to the *Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. Within the Municipality of Kincardine, Ontario Between the Minister of the Environment and the Canadian Nuclear Safety Commission* (January 26, 2009, as amended August 3, 2012) ("JRP Terms of Reference").

"reasonably foreseeable" future project and as such its inclusion in the cumulative effects analysis is mandated by the *Act*, by relevant Canadian Environmental Assessment Agency ("CEAA") policy and practice directives, by the EIS Guidelines for this DGR Project and by the JRP's own terms of reference.

4. There is ample evidence to demonstrate that the construction and operation of an HLW DGR Project at the Bruce Nuclear site, or within the Study Area, is a reasonably foreseeable project. Accordingly, OPG's failure to include consideration of an HLW DGR Project in the cumulative effects analysis constitutes a fundamental deficiency in the EIS, materially comprises the review and precludes the Panel from fulfilling its mandate.

5. This is a preliminary matter that must be addressed prior to any further steps in this review being taken and prior to the close of the technical review period. OPG must be given specific direction to amend its EIS to include consideration of an HLW DGR Project and provide full consequential data and analysis.

6. The Panel may wish to order other procedural steps as may be required in order to permit OPG to amend its EIS and to allow the Panel, intervenors, government reviewers and agencies to consider the amended EIS and resume this review.

II. FACTS AND BACKGROUND

7. The Nuclear Waste Management Organization ("NWMO") is mandated under the *Nuclear Fuel Waste Act* ("*NFWA*") to develop, propose to government and implement a long-term project for the management of nuclear fuel wastes currently stored in interim storage facilities throughout Canada.[5]

8. The *NFWA* was a legislative initiative recommended as a result of the federal environmental assessment of a "Concept for Disposal of Canada's Nuclear Fuel

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5 *Nuclear Fuel Waste Act*, S.C. 2002, c.23, section 6.

Waste" proposed by Atomic Energy of Canada Limited ("AECL"). In February 1998, the Panel for that review issued its *Report of the Nuclear Fuel Waste Management And Disposal Concept Environmental Assessment*, commonly referred to as the Seaborn Panel Report.[6] The Report made a number of key findings and recommendations, including:

a. The concept proposed by AECL, deep geological disposal in the plutonic rock of the Canadian Shield, while technically feasible, had not been demonstrated to be safe from a social perspective, and had not been demonstrated to have public support.

b. A robust approach would need to be developed for building and demonstrating public support for the concept, and demonstrating safety from a social perspective.

9. Under the *NFWA,* NWMO was required to submit an approach, among others, based on the recommendations of the Seaborn Panel Report. Section 12(2)(a) of the *NFWA* requires the development of an approach based on:

> [D]eep geological disposal in the Canadian Shield, based on the concept described by Atomic Energy of Canada Limited in the Environmental Impact Statement on the Concept for Disposal of Canada's Nuclear Fuel Waste and taking into account the views of the environmental assessment panel set out in the Report for the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment Panel dated February 1998.[7]

10. In 2005, NWMO recommended an approach of Adaptive Phased Management leading to "centralized containment and isolation of the used fuel in a deep geological repository in a suitable rock formation, such as the crystalline rock of

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6 *Report of the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment Panel*, Nuclear Fuel Waste Disposal Concept Environmental Assessment Panel (February 1998) (the "Seaborn Panel Report).

7 *NFWA*, *supra* note 5 at s.12(2)(a).

the Canadian Shield or Ordovician sedimentary rock."[8] The Government of Canada accepted this recommendation on June 14, 2007.[9]

11. In May 2010, NWMO issued its process for the identification of a site for a deep geological repository for used nuclear fuel, entitled "Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel" (the "Site Selection process"). That document sets out the key aspects of NWMO's Site Selection process, including: (1) seeking an informed and willing host community; (2) focus on nuclear provinces; and (3) that the siting process must be led by interested communities. On this last criteria, the NWMO states specifically that "the steps in the siting process must be driven or triggered by communities expressing interest in exploring their potential suitability as host."[10] In May 2010, NWMO announced that it had begun implementation of its Site Selection process.

B. The Proposed DGR Project

12. OPG has submitted an EIS for the review of a proposal to prepare a site for, construct and operate a deep geological repository at the Bruce Nuclear site on the shore of Lake Huron, Ontario. The DGR Project is intended to be a repository for low and intermediate level radioactive wastes that are currently stored in an interim facility, the Western Waste Management Facility, at the Bruce Nuclear site. The DGR Project will also be the repository for similar wastes that will be produced from the continued operation of the OPG-owned nuclear generating stations at Bruce, Pickering and Darlington.

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8 *Choosing a Way Forward: The Future of Management of Canada's Used Nuclear Fuel, Final Study*, Nuclear Waste Management Organization (November 2005) at 44.

9 *Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel*, Nuclear Waste Management Organization (May 2010) ("Moving Forward Together") at 5 (attached as Exhibit A).

10 *Id.* at 18.

13. OPG's proposal, as described in the EIS, includes the site preparation, construction, operation, decommissioning and abandonment of above-ground and below-ground facilities. Planned operations include activities required to operate and maintain the DGR facility, including the transfer of waste from the existing interim storage facility and the receipt of waste at the DGR, the emplacement of wastes in rooms within the DGR and the closure of these rooms.

14. Although not included in OPG's EIS, the proposal requires the continued transportation of radioactive wastes from OPG-owned generating facilities at Pickering and Darlington to the interim Western Waste Management Facility at the Bruce Nuclear site, as well as the continued processing of these wastes at that facility prior to transfer to the DGR.[11]

15. The Bruce Nuclear site currently houses two operating nuclear stations, Bruce A and Bruce B, comprised of eight nuclear reactors and associated facilities. The site also houses the Western Waste Management Facility, the Western Used Fuel Dry Storage Facility, the Douglas Point nuclear reactor and related radioactive waste storage site, an on-site landfill, two Heavy Water Production plants (currently being decommissioned) and various water supply and processing facilities, as well as numerous administrative and support buildings.[12]

C. This Joint Panel Review and OPG's EIS

16. In December 2008, the Minister of the Environment and the Commissioner of the Canadian Nuclear Safety Commission entered into an Agreement to Establish a Joint Review Panel.[13] Joint Panel Agreement requires that a thorough analysis of

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11 EIS, *supra* note 1 at s. 1.2.3.

12 *Id.* at s. 10.4.1.

13 *Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. Within the Municipality of Kincardine, Ontario Between the Minister of the Environment and the Canadian Nuclear Safety Commission* (dated January 26, 2009, amended August 3, 2012).

cumulative environmental effects is completed as part of the environmental assessment of the DGR Project. The Terms of Reference appended to the Joint Review Panel Agreement, at Part IV(a), state that "[t]he Review will include a consideration of . . . any cumulative environmental effects that are likely to result from the Project in combination with other projects that have been or will be carried out."

17. In addition to providing the terms of reference for the Panel, the Joint Panel Agreement, at Section 4(1)(c) instructed that "[t]he JRP shall conduct the Review in accordance with the Terms of Reference . . . in a manner that permits it to obtain information and evidence about the adverse effects the project may have on potential or established Aboriginal rights, title or treaty rights as identified to the JRP by the [Saugeen Ojibway Nations ("SON")] and enables it to bring any such information and evidence to the attention of the Minister of the Environment and the Responsible Authorities for the Project in support of consultation between the Crown and the SON."[14]

18. In January 2009, CEAA and the Canadian Nuclear Safety Commission ("CNSC") issued EIS guidelines to OPG to guide the preparation of its EIS for the DGR Project. As discussed further in paragraphs 65-66, *infra*, Section 14 of the EIS Guidelines requires OPG to identify and assess the cumulative adverse and beneficial environmental effects of the DGR Project in combination with other past, present or reasonably foreseeable projects and/or activities within the study area, as required by the *Act*.[15]

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[14] *Id.* On August 3, 2012 a notification was posted on the CEAA Registry that the JRP Agreement had been amended to reflect recent legislative changes to the *Act*. Changes include (1) modification to the acceptance and approval structure of the Panel's final report, and (2) fixed time periods for the completion of the Panel's final report and Minister's approval. Changes to the Agreement included modifications to s. 4(1)(c) respecting the Panel's mandate in the current review were not required as a result of amendments to the *Act* and were made without any prior consultation with or communication to SON.

[15] EIS Guidelines, *supra* note 3 at s. 14.

19. In April 2011 (although dated March 2011), OPG submitted its EIS for the DGR Project for consideration by the Joint Review Panel. Section 10 of the EIS addresses cumulative effects and identifies those projects for which OPG has undertaken a cumulative effects analysis in relation to the DGR Project. OPG included in its cumulative effects analysis a number of projects that are either "certain/planned" or "reasonably foreseeable" (Table 10.4-1):[16]

    a. The decommissioning of Bruce A and Bruce B nuclear stations
    b. Refurbishment of the Bruce B nuclear station
    c. Transfer of radioactive wastes from the RWOS1 facility to the Western Waste Management Facility ("WWMF facility")
    d. Upgrades to the WWMF facility
    e. Expansion of the Western Used-Fuel Dry Storage Facility
    f. Transfer of fuel to a Long Term Repository
    g. Construction of a DGR for Decommissioning Waste
    h. Various smaller infrastructure projects on site

20. Regarding the DGR for Decommissioning Waste at the Bruce Nuclear Site, OPG states in the EIS that:

> The decommissioning waste from OPG-owned or operated reactors will, at some point in the future, be relocated to a suitable long-term management site. The long-term management of decommissioning waste is not expected to start before 2050. Although no site has been identified, the DGR Hosting Agreement includes provision for decommissioning waste to be placed in the DGR Project and the EIS guidelines stipulate that consideration of placing decommissioning wastes in the DGR be included in the cumulative effects assessments."[17] OPG confirms that the DGR project site could be extended to double its capacity with no further site clearing required.[18]

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16 EIS, *supra* note 1 at s. 10, table 10.4-1.

17 EIS, *supra* note 1 at 10-18, Table 10.4.3.

18 *Id.*

21. OPG has included in its EIS cumulative effects analysis, as a reasonably foreseeable project, the removal of used fuel currently stored at the Western Used-Fuel Dry Storage Facility and transfer to a suitable long-term storage site.[19] OPG notes that NWMO is mandated to seek an informed willing host community for the long-term management site, that no such location has been yet determined and that used fuel transfer is not expected until 2035 or later.[20] Despite this, OPG, for the purposes of its cumulative effects analysis, supposes that the used nuclear fuel will be removed from the Study Area and concludes that, as a result of this removal, there will be a resulting net reduction of radioactivity at the site:

> At some point in the future, used fuel and decommissioning wastes will be transferred to a long-term repository. The DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site. Any dose will be solely from the transport of used fuel, and as the used fuel is transferred off-site, will result in net reduction of dose.[21]

22. OPG has not included as part of its cumulative effects analysis a project for the long-term storage of used nuclear fuel at the Bruce Nuclear site or within the Study Area. OPG provides no explanation or justification for this omission except for its statement that "the DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site."

D. An HLW DGR Project at the Bruce Nuclear Site

23. As discussed in Part III, *infra*, it is a legal requirement under Canadian environmental assessment law and policy that the cumulative effects of any project that is "reasonably foreseeable" be considered during the review of a proposed project. The evidence demonstrates that a project for the long-term management of used fuel wastes at the Bruce Nuclear site or otherwise within the Study Area, *i.e.*, an HLW DGR Project, is a reasonably foreseeable project.

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19 *Id.*

20 *Id.*

21 *Id.* at 10-37, s.10.6.4.

24. The reasonable foreseeability of an HLW DGR Project is demonstrated by the following facts:

    a. The conditions at the Bruce Nuclear site that OPG and NWMO have argued make it suitable, and operationally ideal, for the development of the DGR Project are identical to those NWMO will consider for an HLW DGR Project, are fully consistent with NWMO's Adaptive Phased Management Approach. Further, Development of the DGR Project will significantly increase the likelihood of the Bruce Nuclear site being developed as a location for an HLW DGR Project.

    b. NWMO has already commenced its consideration and screening of locations within the Study Area as a site for an HLW DGR Project through its engagement with all five municipalities within the Study Area and CNSC's consultations with those same municipalities are already under way;

    c. NWMO and OPG have steadfastly refused to provide assurances that the Bruce Nuclear site, or another site within the Study Area, would not be considered for an HLW DGR Project;

i. Bruce Nuclear Site is a Suitable Location for an HLW Project and is Consistent with NWMO's Adaptive Phased Management Approach for an HLW DGR Project

25. As part of its project justification and needs analysis for the DGR Project, OPG has set out a number of criteria that it argues makes the Bruce Nuclear site a suitable, and operationally ideal, location for the DGR Project. Section 3 of the EIS lists various factors that led OPG to propose the Bruce Nuclear site for the DGR Project. OPG argues that:[22]

    a. The geology at the Bruce Nuclear site is highly suitable from a technical perspective, offering multiple natural barriers to safely isolate and contain the waste for tens of thousands of years;[23]

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22 *Id.* at s. 3.

23 *Id.* at 3-1.

b. The management facility could be safely constructed and operated at the site;[24]

c. The majority of the waste to be managed in the DGR Project is already stored on site at the WWMF;[25]

d. Reduced need for off-site transportation of nuclear waste;[26]

e. Location has already been a nuclear facility for 40 years;[27]

f. The land is owned and managed by OPG; [28] and

g. Local community support, as demonstrated by the Hosting Agreement with Kincardine.[29]

26. These same characteristics are equally applicable to the development of an HLW DGR Project and are consistent with, and virtually identical to, the screening criteria for an HLW DGR Project as set out in NWMO's Site Selection process and are fully consistent with NWMO's Adaptive Phased Management Approach.[30]

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24 *Id.*, at 3-1.

25 *Id.* at 3-21.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 3-7.

30 The screening criteria set out by NWMO in its Site Selection process document include acceptability criteria for an HLW DGR Project that are functionally identical to those currently being promoted by OPG to demonstrate the suitability of its DGR Project including *Moving Forward Together*, *supra* note 9 at 30-35: (a) availability of land to accommodate surface and underground facilities; (b) location outside of heritage sites and protected areas; (c) meets key safety related questions: (i) are characteristics of the rock at the site appropriate to ensuring the long-term containment and isolation of used nuclear fuel from humans, the environment and surface disturbances caused by human activities and natural events? (ii) is the rock formation at site geologically stable and likely to remain stable over the very long term in a manner that will ensure the repository will not be substantially affected by geological and climate change processes such as earthquakes and glacial cycles? (iii) are conditions at the site suitable for the safe construction, operation and closure of the repository? (iv) is human intrusion at the site unlikely, for instance through future exploration or mining? (iv) can the geological conditions at the site be practically studied and described on dimensions that are important for demonstrating long-term safety? (vi) can a transportation route be identified or developed by which used nuclear fuel can safely and securely be transported to the site from the locations at which it is stored?

27. OPG's assessment of the technical suitability of the Bruce Nuclear site geology is not specific to a repository for low and intermediate level nuclear wastes. Rather, OPG's analysis is generalized to its suitability for deep geological repository construction and radioactive containment. There is no indication in the EIS that there are unique characteristics of used nuclear fuel that would make the site unsuitable for an HLW DGR Project.[31] The Panel, in its Information Requests issued to OPG on July 23, 2012, identified this issue and asked OPG to clarify whether there are technical factors that would prevent the DGR Project from being transformed into a DGR for HLW.[32]

28. OPG has concluded, and seeks to demonstrate through its EIS, that the various facilities required to be constructed as part of the DGR Project could be safely constructed at the Bruce Nuclear site.[33] There is no indication that facilities for an HLW DGR Project would present unique challenges that would make the Bruce Nuclear site technically unsuitable from OPG and NWMO's perspective. As noted above, this is a key safety characteristic identified by the NWMO in its Site Selection process document.[34]

29. OPG has relied on the fact that the majority of nuclear waste intended for the DGR Project is already on site at the WWMF in support of its preferred location at the Bruce Nuclear site.[35] With respect to used nuclear fuel waste, NWMO states that as of June 30, 2011, nearly one million bundles of used nuclear fuel are housed at the Bruce Nuclear site, comprising approximately 42% of all used fuel in Canada.[36] NWMO states that as part of its assessment criteria, it will consider

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31 EIS, *supra* note 1 at s. 4.5.

32 Information Request Package #4 From the Deep Geologic Repository Joint Review Panel (July 23, 2012) IR# EIS 04-99.

33 EIS, *supra* note 1 at s. 3.3.5.2. More generally, see EIS s. 4.7.

34 *Moving Forward Together*, *supra* note 9 at 30-35.

35 EIS, *supra* note 1 at 3-21.

36 *Learning More Together: Annual Report 2011*, Nuclear Waste Management Organization (2012) at 11 (attached as Exhibit B).

factors that have the "potential to avoid or minimize effects of the transportation of used nuclear fuel from existing storage facilities to the repository site."[37] In public statements, the mayors of communities already engaged with NWMO under the Site Selection process have specifically noted as a key factor in their decision to get involved that 40% of all used fuel is already at the Bruce Nuclear site.[38]

30. OPG has not included as part of its EIS consideration of issues relating to the transportation of nuclear wastes from other OPG-owned nuclear facilities for eventual disposal in the DGR Project. OPG assumes and relies, however, upon the continued operation of the WWMF for the feasibility of its DGR Project,[39] including the existence of transportation routes and protocols that have been established for the delivery of nuclear wastes to the Bruce Nuclear site from other OPG-owned nuclear facilities in Ontario.

31. The OPG-owned nuclear facilities at Darlington and Pickering, together with the Bruce Nuclear facility, currently produce and store approximately 88% of all used nuclear fuel in Canada.[40] The WWMF is the only facility in Canada for the centralized storage of nuclear wastes. It is the only facility and location for which transportation routes have been developed and, from the perspective of a proponent, could be demonstrated to be "safe and secure"—a key requirement of

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37 *Moving Forward Together*, *supra* note 9 at 37.

38 Mayor Mike Smith of Saugeen Shores states: "We have the biggest nuclear power site here in Canada in Bruce County very close to our home and about 40% of the fuel is there", Owen Sound Sun Times, December 7, 2011 (attached as Exhibit C). Vice Deputy Mayor of Saugeen Shores, Doug Gowanlock is quoted as saying "40 per cent of Canada's high level waste is already stored here on the Bruce Power site", "Repository in Saugeen Shores?", Bayshore Broadcasting, December 6, 2011 (attached as Exhibit D). Arran-Elderslie Mayor Paul Eagleson is quoted as "fully supporting" Saugeen Shores involvement in the Site Selection process and noting "40% of the nuclear waste from Ontario nuclear plants is already being stored above ground at the Bruce County site", "More local communities to look at nuclear waste", The Sun Times, December 7, 2011 (attached as Exhibit E).

39 EIS, *supra* note 1 at s. 3.1.

40 *Learning More Together: Annual Report 2011*, *supra* note 36 at 11.

the HLW DGR Project site selection process under the Adaptive Phased Management approach.[41]

32. OPG has used the fact that it currently owns the site identified for the DGR Project as a factor that supports its application.[42] OPG has confirmed in its EIS that the current site could be expanded to double the capacity of the DGR to accommodate a DGR for other types of nuclear waste, using a DGR for decommissioning waste as an example.[43] While OPG has consistently stated that it will not accept used nuclear fuel waste in the DGR Project, it is clear from the EIS that the current project site could accommodate the development of a new repository project in the future.

33. A critical factor that OPG has used in support of its current application is the "community support" for the DGR Project as demonstrated by its Hosting Agreement with the municipality of Kincardine.[44] OPG has held out that such an agreement with a municipality is sufficient to demonstrate wide community support and "an informed and willing host community."[45] As discussed in paragraphs 40 to 49, *infra*, NWMO has now engaged with all five Municipalities whose borders comprise the Study Area as part of the process to identify "an informed and willing host community" for the HLW DGR Project, a core requirement of the Adaptive Phased Management approach.[46]

34. As discussed more fully below, if the DGR Project proceeds, another key criteria of the Adaptive Phased Management approach—the requirement for long-term

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41 *Moving Forward Together*, *supra* note 9 at 30-35.

42 EIS, *supra* note 1 at 3-21.

43 *Id.* at 10-18, Table 10.4-3.

44 *Id.* at s. 3.2.

45 *Id.* at 3-1. It must be noted that there was no legal or regulatory requirement on OPG to demonstrate, or even use the language of, a "willing host community" when developing the DGR Project—that requirement exists only for an HLW DGR Project.

46 *Moving Forward Together*, *supra* note 9 at 16-17.

study[47]—could best be demonstrated at the Bruce Nuclear site. The requirement for practical long-term study will best be satisfied at a site where there is extensive, site-specific and practical experience with nuclear waste storage and management and with the operation of a deep geologic repository. The development, construction and operation of the DGR Project at the Bruce Nuclear site will provide NWMO many years of research and data. NWMO will not gain a comparable level of study or site-specific knowledge for any other site in Canada demonstrating the suitability of the site for an HLW DGR Project.

35. In its 2005 report to government, the NWMO recommended as the preferred approach for the long-term management of used nuclear fuel the concept of Adaptive Phased Management leading to "centralized containment and isolation of the used fuel in a deep geological repository in a suitable rock formation, such as the crystalline rock of the Canadian Shield or Ordovician sedimentary rock" (emphasis added). This language was a deviation from the AECL concept considered by the Seaborn Panel, as well as a deviation from numerous historical reports which all concluded that the preferred location for a deep geological repository for used nuclear fuel would be the plutonic rock of the Canadian Shield.[48] These include: (1) a 1974 report of a committee formed by AECL, Ontario Hydro and Hydro-Quebec;[49] (2) the 1977 Hare Report;[50] and (3) the 1978 Ontario Royal Commission on Electrical Power Planning (the Porter Commission).[51]

36. The recommendation to include "Ordovician sedimentary rock" proposed by the NWMO also differs from the language of the *NFWA*, which in section 12(2)(a) specifically requires development of an approach based on: "deep geological

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47 *Id.*, at 31. *See also*, *Choosing a Way Forward, supra* note 8 at 44, s. 13.2, Chapter 15.

48 Seaborn Panel Report, *supra* note 6 at s.1.1.2.

49 *Id.*

50 *Id.*

51 *Id.*

disposal in the Canadian Shield, based on the concept described by Atomic Energy of Canada Limited in the Environmental Impact Statement on the Concept for Disposal of Canada's Nuclear Fuel Waste and taking into account the views of the environmental assessment panel set out in the Report for the Nuclear Fuel Waste Management and Disposal concept Environmental Assessment Panel dated February 1998."[52]

37. The Bruce Nuclear site is not situated within the Canadian Shield. Rather, the geological formation of the area includes the Ordovician rock formation. OPG proposes to construct its DGR Project within those Ordovician layers.[53] The NWMO, by recommending a modification of the historical approach adopted by Canada to specifically include consideration of these Ordovician layers, has opened the door for the consideration of the Bruce Nuclear site for a HLW DGR Project. This change removed the only significant obstacle that could foreclose the Bruce Nuclear site becoming the site for an HLW DGR Project.

38. Additionally, if the DGR Project is approved and constructed, it will greatly increase the likelihood that the HLW DGR Project will be constructed at the Bruce Nuclear site, or elsewhere within the Study Area:

    a. As indicated above in paragraph 34, a requirement of the Site Selection process, and the Adaptive Phased Management more generally, is the development of site specific data for a potential site. There is an additional requirement that the HLW DGR Project be built in a staged and incremental way, with continuous learning and site specific knowledge development. The development and operation of the DGR Project will act to satisfy these requirements for a potential HLW DGR Project site at or proximate to the Bruce Nuclear site, and within the Study Area.[54]

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52 *NFWA*, *supra* note 5 at s.12(2)(a) (emphasis added).

53 EIS, *supra* note 1 at Figure 6.2.6-3.

54 It should be noted that the NWMO has no mandate to participate in the development of the DGR Project, and does so only by contract for the management of the Project. Under the *NFWA*, the NWMO only has a mandate to develop and implement a strategy for the disposal of used nuclear fuel. According to

b. Successful development and operation of the DGR Project will allow the NWMO to argue that it has demonstrated, with a very high degree of certainty, the technical suitability of the site and the ability to build and construct DGR facilities on site.

c. Successful development and operation of the DGR Project will permit the development and demonstration of key operational processes and favourable conditions, including:

   i. Transportation of wastes from Ontario nuclear facilities to site;

   ii. Processing of accepted nuclear wastes at site and internment in repository facilities; and

   iii. Local community acceptance.

39. The approval, construction and operation of the DGR Project will provide a near perfect test case for the development of an HLW DGR Project at the Bruce Nuclear site or within the Study Area, making the construction of an HLW DGR Project here not merely reasonably foreseeable, but nearly certain.

ii. NWMO has Already Begun its Formal Consideration of Sites within the Study Area

40. A key feature of NWMO's Site Selection process, emanating from the recommendations of the Seaborn Report, is that the identification of a site for an HLW DGR Project would need to be "community driven" and could only be sited where there was an "informed and willing host community."[55] As stated above, NWMO commenced its Site Selection process in May 2010.

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its own documentation, the NWMO is managing the DGR Project to build experience in the development of a deep geological repository project.

55 *Moving Forward Together*, *supra* note 9 at 18.

41. Since at least November 2011, the NWMO has engaged with municipalities within the Bruce region for the purpose of considering that area for an HLW DGR Project. Saugeen Shores, Brockton, Huron-Kinloss, South Bruce and Arran-Elderslie have all engaged with the NWMO and all are within the Study Area as defined in the EIS. More precisely, and as is explained further below, the boundaries of these five municipalities define the boundary of the Study Area chosen by OPG for its DGR Project.[56]

42. These five municipalities have all authorized and requested a screening of the potential suitability of their communities for the HLW DGR Project. In addition, media reports indicate that NWMO is actively pursuing consultations and information campaigns with these communities and CNSC officials have now begun similar consultation relating to the siting of an HLW DGR Project.

43. In or about December 2011, various media outlets began reporting that a number of municipalities in the Bruce and Grey regions, those surrounding the Bruce Nuclear site, had passed resolutions to be considered as "host communities" for the HLW DGR Project, formally entering into NWMO's Site Selection process.[57] These municipalities were reported to include Brockton, Saugeen Shores and Huron-Kinloss.

44. On December 7, 2011, the Owen Sound Sun Times reported that other nearby municipalities were considering entering into the Site Selection process. That report included a quote from Dave Inglis, Warden of Bruce County and Mayor of Brockton, stating: "I expect a number of the municipalities in Bruce County will

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56 *See* EIS, *supra* note 1 at map included as Figure 2.2.1-1.

57 *See*, "Saugeen Shores opens door to nuke waste", Owen Sound Sun Times, December 7, 2011, *supra* note 38. "Repository in Saugeen Shores?"; Bayshore Broadcasting, December 6, 2011, *supra* note 38; "More local communities to look at nuclear waste", The Sun Times, December 7, 2011, *supra* note 38; Toronto Star, "Nuclear waste storage depot attracts southern Ontario towns", February 20, 2012 (attached as Exhibit F); "Tourist town bids to host 48,000 tonnes of nuclear waste", the National Post, December 11, 2011 (attached as Exhibit G); "Nuclear waste dump idea sparks unease in Ontario", Canadian Press, December 11, 2011 (attached as Exhibit H).

be doing the same. It's just gathering information that they are going through to select a site. I think the county should be involved as we go along. If it's going to be in Bruce County we should all be involved."[58] Explaining his Town's decision to get involved, Mayor Inglis is also quoted as stating: "We thought: Other communities are doing it in our area, and if its going to be in our backyard, we want to know all we can about it. If it is in Bruce County, its going to affect the whole county for infrastructure and jobs".[59]

45. Included in these media reports was a suggestion that the engagement between NWMO and the municipalities had predated the decision by the respective councils to enter into the Site Selection process. On December 11, 2011, the Canadian Press reported that Councilor Thead Seaman of Saugeen Shores stated "it was the waste organization [NWMO] that approached Saugeen Shores . . . looking for an invitation into the community."[60]

46. A report in the Owen Sound Sun Times on December 7, 2011 stated that NWMO took Saugeen Shores officials on a tour of the WWMF site and provided "a fairly extensive briefing" on the project to Saugeen Shores politicians and staff, according to its Mayor Mike Smith.[61] Another article in the Owen Sound Sun Times, dated December 7, 2011, quotes Huron Kinloss Mayor Mitch Twolan as stating in relation to the nuclear fuel wastes: "It's here already. The safest place is to be buried underground. What I hear is the geology here in Bruce County is second to none."[62]

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58 "More local communities to look at nuclear waste", The Sun Times, December 7, 2011, *supra* note 38.

59 "Nuclear waste storage depot attracts southern Ontario towns", Toronto Star, February 20, 2012, *supra* note 57.

60 "Nuclear waste dump idea sparks unease in Ontario", Canadian Press, December 11, 2011, *supra* note 57.

61 "Council opens door to nuke waste", Owen Sound Sun Times, December 7, 2011, *supra* note 38.

62 "More local communities to look at nuclear waste", The Sun Times, December 7, 2011, *supra* note 38.

47. On May 14, 2012, the town of Saugeen Shores passed a resolution to move to the second phase of NWMO's site selection process, including a request for a preliminary screening for the suitability of the area for an HLW Project. This resolution was passed in the face of public protest from residents of Saugeen Shores, including written and oral submissions made by a grass-roots community group opposed to the possibility of an HLW Project in their community.[63]

48. On July 9, 2012, a staff report was prepared by Larry Allison, Chief Administrative Officer for Saugeen Shores, to the Saugeen Shores Council.[64] This report indicated that a meeting was being arranged for members of the Saugeen Shores Council to travel to Ottawa on August 23, 2012 to receive a briefing on the HLW DGR Project by CNSC staff. The report lists by name ten CNSC staff members who would be attending the meeting(s). The report also states that a number of Saugeen Shores councilors were interested in participating and that all expenses will be covered by NWMO. An agenda for the meeting was attached and it included regulatory background sessions as well as a as session on the "Technical Safety of Deep Geological Repositories – Safety Assessment/Safety Case."[65]

49. In a letter dated July 19, 2012 from NWMO to the Chiefs of SON, Chief Scott Lee of the Chippewas of Nawash Unceded First Nation and Chief Randall Kahgee of the Chippewas of Saugeen First Nation, NWMO confirmed that five communities in Bruce and Grey Counties had now passed resolutions to formally enter into the Site Selection process for the HLW DGR Project – Saugeen Shores, Brockton, Huron-Kinloss, Arran-Elderslie and South Bruce.[66] The letter indicates

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63 *See, e.g.*, the website of the community advocacy group Save our Saugeen Shores, http://www.saveoursaugeenshores.org.

64 Larry Allison, CAO, the Corporation of the Town of Saugeen Shores, Staff Report, July 9, 2012. (attached as Exhibit I).

65 *Id.*

66 In a NWMO Newsletter dated March 2012, the NWMO announced that it was suspending "expressions of interest for new communities wishing to engage in the site selection process for Canada's Used Nuclear Fuel Repository and Centre of Expertise" on September 30, 2012.

that these communities had also requested an initial screening of the potential suitability of their communities.[67]

iii. NWMO and OPG Have Repeatedly Refused to Exclude Sites within the Study Area from Consideration

50. SON has been engaged with OPG over the last several years with the aim of understanding the DGR Project and seeking resolution of its concerns respecting that Project. Throughout this time, and as recognized by OPG in its report on this engagement contained in the EIS,[68] SON has raised the issue of the connection between the DGR Project and a potential project for the disposal of used-fuel wastes. It has been SON's concern that the DGR Project would lead to the development of the HLW DGR Project within its Traditional Territory, which encompasses the Bruce Nuclear site and Study Area.[69]

51. In or around November 2011, SON representatives first became aware that NWMO and various municipalities in the Grey and Bruce regions were engaging in discussions regarding a HLW DGR Project in the area. On November 18, 2011, SON sent a letter to NWMO expressing concern about these developments, in light of the fact that SON had repeatedly and consistently been given assurances that the DGR Project would not "pave the way for a used fuel repository within [SON] territory."[70] SON's letter sought confirmation that NWMO would not proceed to develop an HLW Project at the Bruce Nuclear site, or otherwise within the SON Traditional Territory, over the objections of SON. The letter also raised concern that NWMO had begun to consider the area for a used fuel repository during, and concurrent with, the JRP process for the DGR

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67 Letter from Kathrine Shaver, APM Site Selection and Engagement, NMWO, dated July 19, 2012 (attached as Exhibit J).

68 EIS, *supra* note 1 at Table 2.3.4-1.

69 *See* attached map of SON Traditional Territory (attached as Exhibit K).

70 Letter from Chief Scott Lee and Chief Randall Kahgee to Ken Nash, dated November 18, 2011 (attached as Exhibit L).

Project. The letter asks specifically that NWMO provide clear assurances that NWMO is not willing to engage in any consideration of siting an HLW DGR Project in the area.

52. NWMO responded by letter dated November 25, 2011.[71] That letter confirms that NWMO and Saugeen Shores are engaged under the Site Selection process for an HLW DGR Project. The letter fails to provide the assurance sought by SON that NWMO would not consider the area for an HLW Project

53. On February 23, 2012, SON sent another letter to NWMO, reiterating its request for confirmation that NWMO would not move ahead with the development of an HLW DGR Project in SON Territory if SON were opposed to the plan.[72] That letter also corrected a mischaracterization of SON concerns that NWMO had made in its letter of November 25, 2011. SON wrote:

> [Y]ou stated that neither the NWMO nor OPG has ever stated that communities in Bruce County would be excluded from consideration for a used nuclear fuel repository. You continued to say that NWMO will not seek to put used nuclear fuel in the proposed DGR for low and intermediate level wastes, which you must know has never been our concern. With these words, we are left with the feeling that our engagement with OPG and NWMO over the past years has been based on only half the story, and that OPG and NWMO have always planned to keep options open to build repositories for all of Canada's nuclear wastes, including used fuel, in our Territory.[73]

54. On May 3, 2012, NWMO provided a response.[74] That letter again failed to provide the assurances sought by SON in its letters of November 18, 2011 and February 23, 2012.

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71 Letter from Ken Nash, President, NWMO to Chief R Kahgee and Chief S Lee, dated November 25, 2011 (attached as Exhibit M).

72 Letter from Chief Scott Lee and Chief Randall Kahgee to Ken Nash, dated February 23, 2012 (attached as Exhibit N).

73 *Id.*

74 Letter from Ken Nash, President, NWMO to Chief R Kahgee and Chief S Lee, dated May 3, 2012 (attached as Exhibit O).

55. In addition to letters sent by SON to NWMO seeking assurance respecting the siting of an HLW DGR Project within SON Territory, SON has sought similar assurances from OPG directly. Over the last several years, SON and OPG have been engaged in discussions in an attempt to address SON concerns respecting the development of the DGR Project. One of the key concerns raised by SON during this process has been the connection of the DGR Project to a possible future HLW DGR Project. By letters of November 1, 2011,[75] and March 10, 2012,[76] SON asked OPG to confirm that it will not support the development of an HLW Project within SON Traditional Territory if SON opposes such a development. To date, OPG has failed to respond substantively to the request and has not provided any commitments in this regard.

56. The NWMO, under its Site Selection process, has included consideration criteria that would permit it "screen out" potential sites within the Bruce area—for example, it has stated that Aboriginal Traditional Knowledge considerations would need to be respected.[77] It has also indicated that Aboriginal Traditional Knowledge would guide its evaluation of sites to ensure "potential to avoid ecologically sensitive areas and locally significant features".[78]

57. Most importantly, the cornerstone of Adaptive Phased Management approach is that NWMO will not develop an HLW DGR Project without the support of the local community.[79] The area in which NWMO has engaged the five municipalities, and whose borders comprise the Study Area for the DGR Project, is the heart of the SON Traditional Territory. They are the lands and waters

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75 Letter from Chief Scott Lee and Chief Randall Kahgee to Albert Sweetnam, Exec. VP, OPG, dated Novemer 1, 2011 (attached as Exhibit P).

76 Letter from Chief Scott Lee and Chief Randall Kahgee to Albert Sweetnam, Exec. VP, OPG, dated March 9, 2012 (attached as Exhibit Q).

77 *Moving Forward Together*, *supra* note 9 at 37-38.

78 *Id.* at 37.

79 *See, e.g.*; *Choosing a Way Forward*, *supra* note 8 at 40.

throughout which the SON and their ancestors have exercised their Aboriginal and treaty rights since time immemorial. NWMO has given no indication that it will respect the wishes of the SON that it does not want the HLW DGR Project within its territory.[80]

58. Given the NWMO's persistent refusal to give SON assurances that it will not consider Bruce area sites for a HLW DGR Project, and its refusal to give assurances that it would not develop an HLW DGR within SON Traditional Territory over SON's objections, it should be concluded that the NWMO will resolutely continue down its path of developing relationships with the Study Area municipalities for the purposes of considering the area for the siting of its HLW DGR Project.

III. PROPER REVIEW OF DGR PROJECT REQUIRES CONSIDERATION OF AN HLW DGR PROJECT

A. Governing Law and CEAA Policy Regarding Cumulative Effects Analysis

59. When undertaking the environmental assessment of a project, such as this Panel's review of the DGR Project, it is incumbent on the reviewing authority to assess not merely the environmental impacts of the proposed project itself, but also the cumulative environmental impacts that may or will result from the interactions among the proposed project and other existing, planned, reasonably foreseeable and, in some cases, hypothetical projects.[81] As demonstrated in Part II, *supra*, an

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[80] It is notable that, SON is in closer proximity to the Bruce Nuclear site than many of the communities within the Study Area (including communities within the municipalities that have expressed interest in "hosting" an HLW DGR Project. For example, while the Saugeen First Nation Communal Lands are approximately 30 KM from the Bruce Nuclear site but fall outside the boundaries of the study area, Mildmay (50 KM away), Teeswater (43 KM away), Hanover (49 KM away) and Tara Siding (40 KM away) are all deemed to be within the Study Area.

[81] *See, e.g., A Reference Guide for the Canadian Environmental Assessment Act: Addressing Cumulative Environmental Effects*, Prepared by the Federal Environmental Assessment Review Office (November 1994) at 135 (explaining that it is necessary that consideration be given not only to the effects of the project itself, but also to "cumulative environmental effects resulting from the interaction among the environmental effects of the proposed project with those of future projects and activities.").

HLW DGR Project being constructed at the Bruce Nuclear site or otherwise in the Study Area is reasonably foreseeable.

60. Undertaking a proper cumulative effects assessment is not merely sound practice, it is a legal obligation imposed by governing law. Sections 19(1)(a)-(b) of the *Act* instruct that "assessment by a review panel shall include a consideration of . . . the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out . . . [and] the significance of the effects referred to [above]."

61. The specifics of how a cumulative effects analysis should be undertaken have been further developed by policy statements and other materials issued by CEAA as guidance to proponents, practitioners and review panels. Among these materials is CEAA's Operational Policy Statement on cumulative effects analysis, the purpose of which is to provide "clarification to responsible authorities on how cumulative environmental effects should be considered in environmental assessments conducted under [the *Act*]."[82] The Operational Policy Statement makes clear the broad scope of the cumulative effects analysis required by the *Act*, explaining that an assessment of "cumulative environmental effects" is not limited to "biophysical effects . . . [but] can extend to the effects of changes on health and socio-economic conditions, physical and cultural heritage, and other matters."[83]

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82 *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* (dated 1999, updated November 2007) (the "Operational Policy Statement").

83 *Id.*

62. CEAA has explained that it is incorrect for a cumulative effects analysis to consider only "projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval."[84] Such a narrow approach to determining what projects are included in the cumulative effects analysis risks "limit[ing] the ability of cumulative environmental effects assessment to contribute to informed environmental planning and decision making in the future of the project area."[85] Instead, both best practices and CEAA guidance require that a cumulative effects analysis "include 'certain' and 'reasonably foreseeable' projects and, where appropriate those projects that are 'hypothetical.'"[86] The Operational Policy Statement explains that "reasonably foreseeable" means that "[t]he action may proceed, but there is some uncertainty about this conclusion."[87]

63. When a potential future project will have similar effects to the project under review, those similar effects militate strongly in favour of including that potential future project in the cumulative effects analysis. As the Cumulative Effects Practitioners Guide that was developed for CEAA explains "[a] major criterion for selecting other actions is whether the action causes similar effects on the same [valued environment components ("VECs")] as the action under assessment. Focusing on actions with similar effects is a good first step, and will ensure that the most appropriate actions are included in the assessment (*i.e.*, those with the greatest likelihood of causing effects that interact)."[88] The failure to include

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84 Operational Policy Statement, *supra* note 82. Despite this clear direction from CEAA, in the EIS, OPG states that the only "reasonably foreseeable projects and activities" that it has considered are those "projects that have started in the approval process and are on the path to obtaining approval." EIS Guidelines at 10.1. When considered in light of the Operational Policy Statement, it is clear that this approach is unduly narrow, inconsistent with statutory and regulatory guidance and, as discussed at length in this submission, serves to distort the cumulative effects analysis and exclude projects, such as the HLW DGR Project, that should properly be included.

85 *Id.*

86 *Id.*

87 *Id.*

88 Cumulative Effects Assessment Practitioners Guide, Prepared For: Canadian Environmental Assessment Agency; Prepared By: The Cumulative Effects Assessment Working Group (Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker) and AXYS Environmental Consulting Ltd., February 1999 ("Practitioners Guide") at 20.

reasonably foreseeable projects "is increasingly becoming unacceptable to many stakeholders if there is reason to believe that . . . [those] reasonably foreseeable projects could have a significant cumulative effect with the project under review."[89] An HLW DGR Project will have similar, and exponentially greater, effects on the same categories of VECs as a will the DGR Project currently being reviewed.

B. The Importance of Cumulative Effects Analysis in the EIS Guidelines and the Joint Review Panel Agreement for the DGR Project

64. The importance of undertaking a thorough cumulative effects analysis in the review of the DGR Project was recognized by CEAA in the EIS Guidelines for this project.[90] Section 4.2 of the EIS Guidelines instruct OPG that "in order to adequately understand and assess the potential adverse effects of the project . . . any cumulative effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out" must be considered and assessed.[91]

65. Section 14 of the EIS Guidelines discusses the issue of cumulative effects at some length. It requires that "[t]he proponent must identify and assess the cumulative adverse and beneficial environmental effects of the project in combination with other past, present or reasonably foreseeable projects and/or activities within the study area."[92] The "management of decommissioning waste" is included as an example of the type of project that should be included.[93] The EIS Guidelines elsewhere explain that "[i]n assessing cumulative environmental effects within the study area, the proponent must consider the effects of the project in combination

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89 *Id.* at 19.

90 *Guideline for the Preparation of the Environmental Impact Statement for the Deep Geologic Repository for Low- and Intermediate-Level Radioactive Wastes* (January 2009) (the "EIS Guidelines").

91 *Id.* at 14.

92 *Id.* at 48.

93 *Id.*

with other past, present and future projects that are either 'certain' or 'reasonably foreseeable' as defined in [the Operational Policy Statement]."[94] The EIS guidelines also require that the proponent "provide a rationale for inclusion or exclusion" of potential future projects in the cumulative effects analysis.[95]

66. OPG has failed to properly observe the direction in the EIS Guidelines with respect to the inclusion of future projects in the cumulative effects analysis. It has, instead, included a range of speculative or contingent future activities in its cumulative effects analysis, and omitted analysis of the HLW DGR Project – a reasonably foreseeable project that stands to have profound and complex cumulative effects in conjunction with the DGR Project. OPG has done this contrary to the direction of the EIS guidelines and without providing any rationale for its exclusion.

67. Similarly, the Joint Panel Agreement requires a full analysis of cumulative effects be undertaken as part of this Panel's review of the DGR Project. The Terms of Reference appended to the Joint Review Panel Agreement, at Part IV(a), instruct that "[t]he Review will include a consideration of . . . any cumulative environmental effects that are likely to result from the Project in combination with other projects that have been or will be carried out." This language, which tracks the language of Section 19(1)(a) of the *Act*, expressly incorporates into this Panel's mandate the cumulative effects analysis that is required by the governing law.

68. This Joint Panel Agreement, at Section 4.1(c), further makes clear that:

> The JRP shall conduct the review in accordance with the Terms of Reference . . . in a manner that . . . [p]ermits it to obtain information and evidence about the adverse effects the project may have on potential or established Aboriginal rights, title or treaty rights as identified to the JRP by the SON and other Aboriginal groups and

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94 *Id.* at 27.

95 *Id.* at 49.

> enables it to bring any such information and evidence to the attention of the Minister of the Environment and the Responsible Authorities Authority for the Project in support of consultation between the Crown and the SON and other Aboriginal groups.

69. As the excerpt from Joint Review Panel Agreement above recognizes, the DGR Project stands to have significant impact on SON Aboriginal and Treaty Rights and interests, as well as impacts on other legal rights and way of life. It is for this reason that SON engaged in consultations with the federal Crown as represented by CNSC and CEAA to ensure that the JRP Agreement and the Panel's terms of reference would result in a robust and credible review capable of identifying impacts on SON Rights and interests, including impacts arising from cumulative effects. The development of an HLW DGR Project within the SON traditional territory, in conjunction with the development of the DGR Project, will significantly magnify potential impact on SON rights, interests and way of life. It will not be possible to understand the potential impacts from the DGR Project on SON if this environmental assessment fails to include consideration of all reasonably foreseeable future projects, including the most significant of these, the HLW DGR Project. Failing to include the HLW DGR Project in the cumulative effects analysis prevents the Panel from undertaking a proper review of the project and prevents the Panel from assessing—as the Joint Review Panel Agreement requires—the potential adverse effects on SON's Aboriginal and treaty rights.

C. *Failure to Include an HLW DGR Project in the Cumulative Effects Analysis Renders OPG's Application Fundamentally Deficient*

70. The law, best practice and CEAA policy makes clear that when a future project is "an important future development" and "may cause significant cumulative effects with the action under assessment," it is important to include that project in the regulatory review of the cumulative effects analysis, even if questions about the

future activity's likelihood cause it to fall "beyond statutory requirement[s]."[96] CEAA guidance explains that "[a] major criterion for selecting other actions is whether the action causes similar effects on the same VECs as the action under assessment . . . [focusing on these future projects] will ensure the most appropriate actions are included in the assessment (*i.e.*, those with the greatest likelihood of causing effects that interact."[97] The HLW DGR Project implicates, and adversely affects, many—if not all—of the same VECs that are implicated by the DGR Project under review.

71. The DGR Project itself is a first-of-kind project that poses unique and untested challenges. These challenges are compounded, and significantly magnified, if the DGR Project is colocated with an HLW DGR Project. The inclusion of an HLW DGR Project as a cumulative effect project will have a material and pervasive effect on the current review of the DGR Project, and will require significant new data, study and analysis, including (i) assessment of radiation effects from normal operations, transportation and accidents and malfunctions, (ii) accidents and malfunctions probability scenarios, effects and response; (iii) operations aspects for the projects resulting from increased intensification and demand on resources; (iv) socio-economic effects, including public perception, stigma effects and social acceptance; (v) transportation issues relating to increased intensification and unique issues regarding transportation of fuel wastes; and (vi) technical feasibility considerations relating to co-location. The failure to include an HLW DGR Project undermines the core conclusions of OPG's EIS and can only be remedied through a fundamental reassessment of a wide range of potential environmental impacts flowing from the DGR Project.

72. The development of the DGR Project will significantly increase the intensification of the Bruce Nuclear site, creating the World's largest nuclear site. The prospect of colocating this Project with a HLW DGR Project, along with continued

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96 Practitioners Guide, *supra* note 88 at 19.

97 *Id.* at 20.

operation of the WWMF, raises issues of the most serious and complex kind. These issues must be addressed in a clear and thorough manner. The recent experience at the Fukushima Dai-ichi Nuclear Facility in Okuma, Japan stands as a stark example of the complexity of the colocation analysis for the purposes of determining impacts relating to accidents and malfunctions and emergency response.

73. The NWMO has consistently identified transportation issues as a critical consideration in the Adaptive Phased Management approach.[98] A proper cumulative effects analysis here must consider the combined environmental impact of the transportation of fuel wastes along routes that are already used for the transportation of non-fuel nuclear wastes. The necessity and significance of this analysis is heightened by OPG's omission from its EIS of any consideration of transportation issues and by the fact that used nuclear fuel is not currently transported in Canada and would again be a first-of-kind undertaking.

74. Social safety, public perception and confidence, and broad public support are foundational considerations for decisions respecting the long-term management of Canada's used nuclear fuel. It has been consistently affirmed by our governments, regulatory agencies, scientific and policy commentators as well as the Canadian public, that social safety and acceptance of an HLW DGR Project are as important as technical safety considerations.[99] The evidence here shows that there is a connection between OPG's DGR Project and an HLW DGR Project. In these circumstances, it is incumbent upon the proponent and a review panel to ensure a full and transparent review of the projects to facilitate public information, participation and confidence. A failure to do so risks eroding public confidence in the institutions responsible for implementing and regulating Canada's nuclear industry.

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98 *Moving Forward Together*, *supra* note 9 at 37.

99 *See* Seaborn Panel Report, *supra* note 6.

75. OPG has acknowledged in Section 10 of the EIS that a project for the disposal of used nuclear fuel waste is a reasonably foreseeable project that needs to be considered in the cumulative effects analysis. OPG confirms this by including in its cumulative effects analysis the removal of used nuclear fuel waste from the Bruce Nuclear site. OPG has failed to include the equally or more likely project of constructing and operating an HLW DGR Project at the Bruce Nuclear site, or otherwise within the Study Area. This inconsistency is unexplained and, in the opinion of SON, cannot be explained or justified.[100]

76. Instead of acknowledging the reasonable foreseeability of an HLW DGR Project, and including a discussion of that project in its cumulative effects analysis, OPG does just the opposite, reframing the issue in a way that serves only to distort the cumulative effects analysis that this Panel must undertake. In Section 10-37 of the EIS, OPG states that "[a]t some time in the future, used fuel and decommissioning wastes will be transferred to a long term repository. The DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site. Any dose will be solely from the transport of used fuel, and as the used fuel is transferred off-site, will result in a net reduction of dose." OPG offers no explanation for its assertion that "the repository will be located off-site," nor does it explain what "off-site" means in this context.

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[100] This Panel has recognized that the cumulative effects analysis undertaken by OPG, and OPG's failure to address a possible HLW DGR Project, is a cause for concern. The Panel, in information request number EIS 04-99, asked OPG to "[d]iscuss the technical and regulatory factors that would prevent the transformation and use of the DGR for high-level waste disposal." While the transformation of the proposed DGR into a facility for high-level waste disposal is not the only issue—the possibility of construction of a new, nearby facility for high-level waste disposal appears equally, if not more, foreseeable—the Panel's request makes clear that the issue of HLW disposal cannot simply be ignored or brushed aside in the context of this review. Further, the Panel, in information request number EIS 04-110, recognized the apparent inadequacies of OPG's cumulative effects analysis. The Panel requested that OPG "[c]larify why 'the DGR for decommission Bruce Power waste' is 'not a planned activity, but is included to meet guideline requirements" and further, requested why a series of "other operations and potential projects were not included in the cumulative effects assessment."

77. The exclusion of an HLW DGR Project from the cumulative effects assessment of the DGR Project materially skews the analysis and renders the cumulative effects analysis in OPG's EIS all fundamentally inadequate. OPG, by the inclusion in the EIS of less proximate projects such as the removal of used nuclear fuel, coupled with the exclusion from the EIS of an HLW DGR Project, has promoted a scenario whereby the DGR Project, when considered cumulatively with other "reasonably foreseeable" projects, will have the net effect of diminishing negative environmental effects.

78. OPG claims this specifically for its predicted effect of a long-term reduction in radioactive dose at site. More importantly, by suggesting the removal of used nuclear fuel from site as a likely future scenario, OPG implies a reduction in all other possible adverse cumulative effects that could result from colocation of a DGR Project with existing stored nuclear fuel waste on site. Further, OPG avoids consideration of the cumulative effects that would result from the colocation of the DGR Project and a HLW DGR Project at or near the site, resulting ultimately in the disposal of all of Canada's nuclear wastes within the Study Area.

79. An HLW DGR Project is a reasonably foreseeable project. OPG's current EIS fundamentally fails to characterize the adverse cumulative effects of the DGR Project, and in fact inverts those effects, finding a reduction in adverse environmental cumulative impacts. in radiation when the exact opposite could be presumed would occur. To continue the review of the DGR Project on this basis will undermine the integrity and credibility of the Panel's work.

D. Issues Respecting the Scope of the Cumulative Effects Analysis Are Reviewable

80. The Federal Court of Canada has previously held that the failure of a JRP to properly consider all reasonably foreseeable projects as part of a cumulative effects analysis is a reviewable—and reversible—error of law.[101] The factors "set

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101 *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.*, [1999] 3 F.C. 425.

out in subsection 16(1) . . . are mandatory. The use of the word 'shall' in paragraph 16(1)(a) indicates 'that some consideration must be given to each factor.'"[102]

81. The Court in *Alberta Wilderness* explained that failure to properly consider all projects that should have been included in a cumulative effects analysis under Section 16 of the *Act* is a breach of a panel's duty and constitutes a failure of the panel to satisfy it statutory obligations. An "environmental assessment carried out by the Joint Review Panel in accordance with [the *Act*] is a pre-condition to [authorization of the project] . . . the assessment must be conducted in accordance with [the *Act*], including the requirements of section 16; and a 'proper' assessment is one conducted in accordance with [the *Act*] . . . an assessment which is not conducted in accordance with [the *Act*] is one conducted in error of law."[103]

82. A panel may commit reversible error when, if after being put on notice of certain activities that should be included in a cumulative effects analysis, it fails to do so. The court *Alberta Wilderness* explained that "the Joint Review Panel breached its duty to obtain all available information about likely . . . activities in the vicinity of the project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel's report."[104]

83. In light of the significant deficiencies in the EIS submitted by OPG, any review of the DGR Project on the basis of that EIS would be fatally compromised. In order to ensure the Panel is able to effectively fulfill its duty to do a full cumulative

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102 *West Vancouver (District)* v. *British Columbia (Ministry of Transportation)*, [2005] F.C.J. No. 727 at para. 50 (quoting *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)*, [2000] 2 F.C. 461 (C.A.)) (emphasis in original).

103 *Alberta Wilderness Association, supra* note 101 at para. 22.

104 *Id.* para. 69, 76.

effects analysis, as demanded by the governing law and the Joint Panel Agreement, the review of the application must be halted until such time as the EIS is revised and Panel has a complete application before it.

IV. RELIEF REQUESTED

SON respectfully requests the following relief:

That the Panel direct OPG to revise and resubmit its EIS to include a proper cumulative effects analysis that includes an analysis of the cumulative effects arising from an HLW DGR Project within or proximate to the Study Area.

That the Panel take necessary steps to ensure that the Panel, government reviewers and agencies, and all interveners, have sufficient time to review the amended EIS.

Any other relief or procedural orders that the Panel deems appropriate.

Dated: August 9, 2012

THIS APPLICATION IS BY:

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ON NOTICE TO:

CANADIAN NUCLEAR SAFETY COMMISSION

CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY

ONTARIO POWER GENERATION

NUCLEAR WASTE MANAGEMENT ORGANIZATION

REGISTERED INTERVENORS IN CEAA REGISTRY 06-05-17520

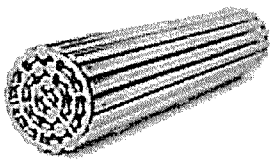
EXHIBIT A

nwmo

NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

MARCH 2012

Moving Forward Together:
Canada's Plan for the Long-Term Management of Used Nuclear Fuel



The NWMO announces date for suspension of expressions of interest for new communities wishing to engage in the site selection process for Canada's Used Nuclear Fuel Repository and Centre of Expertise

In May 2010, the NWMO initiated a site selection process for Canada's Used Nuclear Fuel Repository and Centre of Expertise for the long-term management of Canada's used nuclear fuel in an informed and willing host community. The nine-step process to select a site will take 10 years or more to complete, and begins with a community expressing interest in learning more about the project, the NWMO and the site selection process. Interested communities are the focus of a progressively more detailed set of scientific, technical and community well-being studies, and phases of learning to assess the suitability of the community for the project. Communities may leave the site selection process at any time up until the signing of a final agreement, which is still many years in the future. An expression of interest by a community triggers a process of broad outreach and discussion of the project with neighbouring communities and potentially affected Aboriginal peoples.

To date, a number of communities have expressed interest in learning more about the project, the NWMO and the site selection process. At this time, 15 communities are actively engaged in the site selection process, including several that have asked the NWMO to begin more detailed preliminary assessment studies (Step 3). As well, a number of other communities have requested information and briefings and are considering participating in the site selection process.

The NWMO is planning to suspend the expressions of interest phase of the site selection process on September 30, 2012. New expressions of interest will not be considered after this date. This will allow the NWMO to focus its efforts on conducting the detailed studies required in communities that have expressed an interest to date, or that express interest on or before the closing date. It will also help the NWMO plan for and fully support the engagement of surrounding communities and potentially affected Aboriginal peoples, which is initiated with the entrance of a new community to the siting process. Expressions of interest by new communities must be supported by a resolution of Council, or equivalent, and may take the following forms: request for an NWMO briefing to learn about the project and the site selection process; or request for an initial screening of the potential suitability of the community for the project.

The suspension of the expressions of interest phase of the site selection process is intended to help ensure that the best knowledge and expertise are brought to each of the studies that are conducted. It is also intended to ensure that the communities involved in the site selection process continue to be fully supported by the NWMO in their exploration of the project and are informed, as early as possible, whether they are among the short list of strong candidates for the project. The suspension of the expressions of interest phase will also help the NWMO plan for and fully support the involvement of surrounding communities. It will be important for the NWMO to engage potentially affected Aboriginal peoples to understand and fully respect their Aboriginal and Treaty rights and how Aboriginal Traditional Knowledge can be applied.

The NWMO is optimistic that the studies that have been initiated, or that will be initiated with communities that express interest on or before September 30, 2012, will identify viable options for implementing this project. However, until this work has been completed, the outcome of these studies is uncertain, and it may be necessary to study other communities and sites as potential hosts for this project in the future. The NWMO, therefore, reserves the option of reopening the process to expressions of interest by new communities in the future.

For more information, please contact:

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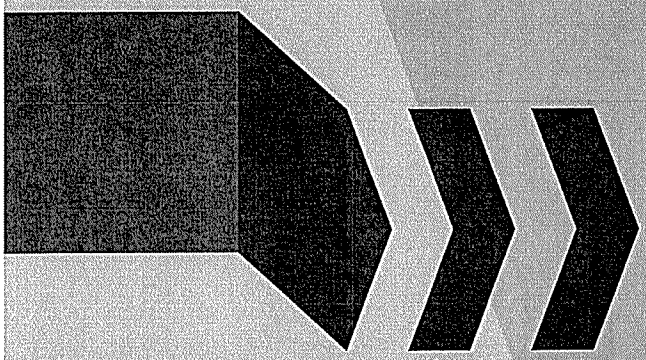
EXHIBIT B



Learning More Together

Annual Report 2011

nwmo

NUCLEAR WASTE MANAGEMENT ORGANIZATION

SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

Total Bundles			2,273,873
Owner	**Location**	**Number of Bundles**	**Current Status**
OPG	Bruce A[2]	421,494	2 units operational, 2 units under refurbishment (expected 2012 return to service)
	Bruce B[2]	544,251	4 units operational
	Darlington	399,723	4 units operational
	Pickering A & B	633,491	A – 2 units operational, 2 units permanently shut down B – 4 units operational
AECL	Douglas Point	22,256	Permanently shut down
	Gentilly-1	3,213	Permanently shut down
	AECL Whiteshell	2,268	Permanently shut down (see note 1)
	AECL Chalk River	4,886	Mostly fuel from NPD (permanently shut down) and with small amounts from other CANDU reactors (see note 3)
HQ	Gentilly-2	120,533	Operational (expected to be shut down for refurbishment in 2012)
NBPN	Point Lepreau	121,758	Currently undergoing refurbishment (expected 2012 return to service)

(1) 360 bundles of Whiteshell fuel are standard CANDU bundles. The remaining bundles are various research, prototype and test fuel bundles, similar in size and shape to standard CANDU bundles.
(2) Bruce reactors are leased to Bruce Power for operation.
(3) In addition to the totals shown in Table 1, AECL also has some 22,000 components of research and development fuels, such as fuel elements, fuel pellets and fuel debris, in storage at Chalk River. While the total mass of these components is small compared to the overall quantity of CANDU fuel, their varied storage form, dimensions, etc. require special consideration for future handling.

Total of:
- 17 units in operation
- 3 units under refurbishment
- 6 units permanently shut down

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NEWS LOCAL

Saugeen Shores opens door to nuke waste

By Scott Dunn, Sun Times, Owen Sound
Wednesday, December 7, 2011 7:38:10 EST AM

Saugeen Shores wants to explore the possibility of storing Canada's used nuclear fuel for centuries to come, 500 metres below ground.

Council passed a resolution Monday requesting "an initial screening be undertaken to determine whether the municipality is a candidate" for the site to store used nuclear fuel.

The project is separate from a similar plan to store low and intermediate level radioactive waste at a facility by nearby Kincardine at the Bruce nuclear site. That Ontario Power Generation deep repository proposal along the Lake Huron shoreline is undergoing a process of regulatory review. It is assisted by Nuclear Waste Management Organization, which is also responsible for leading the high-level nuclear waste project.

Asked why the municipality is pursuing the possibility of storing high-level nuclear waste, Saugeen Shores Mayor Mike Smith took a long view.

"We have the biggest nuclear power site here in Canada in Bruce County very close to our home and about 40% of the fuel is there," Smith said in an interview Tuesday. "So any long-term, where ever it goes, it's going to involve the county and our community.

"Why? I don't know. From my perspective I think we just need to learn more about it, about the final solution for it, or the ultimate solution for it."

Smith also said he wanted to "find out about it, because if you're going to truck it halfway across the country you're going to be going through a lot of communities."

The NWMO gave Saugeen Shores officials a tour of the existing Western Waste Management Facility on the Bruce Power site. Operated by Ontario Power Generation, it accepts low- and intermediate-level nuclear waste from OPG's 20 nuclear reactors, plus Bruce Power's reactors. Used fuel bundles from the Bruce site are stored there at the site now, although such storage has never been considered a long-term option.

Nuclear waste has been stored at the Bruce site, some 24 kilometres from Saugeen Shores, for years, Smith noted.

NWMO also provided "a fairly extensive briefing" on the project to Saugeen Shores politicians and staff.

Saugeen Shores is one of 10 communities to have indicated interest in the long-term storage project. Saugeen Shores' expression of interest is the only southern Ontario community on the list. Three are in Saskatchewan, six are in northern Ontario and a seventh in Northern Ontario didn't make it past initial screening.

But Smith stressed the municipality's interest is preliminary. "We haven't said we're interested in hosting it. We've simply said could we even be considered as a host," adding "I'm not sure where council would go."

Smith said that if after initial screening the municipality proves to be a potential site, it "would be up to council to decide do we engage the community and see if there's interest in the community to move this along to the next step?"

There would be economic benefits, Smith said. "Obviously that's one of the considerations, for sure. Not the only consideration."

The project would cost $16 billion to $20 billion, he said.

A big question which must first be answered is "can we do it safely?" he said.

Nuclear Waste Management Organization is responsible to find a willing community for this national project, spokesman Mike Krizanc said in an interview.

The NWMO estimates if everything runs smoothly, the earliest the deep geological repository could be open would be 2035.

The nine-step process to select a site would take seven to 10 years, he said.

It would take 10 years to construct, involving 500 to 600 direct construction jobs and 300 to 400 jobs to operate the facility. But more is proposed than a fortified vault for nuclear waste.

Krizanc said the project would be "transformative" for whichever community is selected.

The project would be a demonstration facility and there would be an "associated centre of expertise that will be a hub for national and international scientific collaboration."

"Without doubt, when we do site the project, it will attract scientists and people with expertise and interest in this kind of technology to the site," Krizanc said.

"The centre of expertise may be more of a scientific-based kind of thing, it may be partially a tourist-based kind of thing. It will depend on what the aspiration of the community are to a large extent. But there will be a lot of science conducted there."

First it needs an "informed, willing community" to host the facility.

"The important thing is this will not be imposed on any community. It will be a decision that they make with all of the information that they need so they will be fully informed," Krizanc.

The community would have to "demonstrate their willingness in a compelling way," chosen by the community, he said. A referendum or a series of public meetings would do, he said.

Step 1 in a nine-step process is an expression of interest in learning more. Step 2 takes two or three months and identifies "obvious reasons" why the community would not qualify.

Would the 250 surface acres needed impinge on parks, areas of natural resources, Native interests, or be hindered by groundwater issues? There are five high-level criteria in all, Krizanc.

If Saugeen Shores cleared that step, the community must decide whether to proceed to Step 3, to request a one- to two-year feasibility study. Step 4 takes four or five years of more intensive study of one or two community sites, costing more than $100 million.

During steps 3 and 4 economic and social factors are examined "in partnership with the community" to see how the project could "enhance the well being" of the host and surrounding communities.

It would take "another several years" to obtain a licence to construct the facility, Krizanc said.

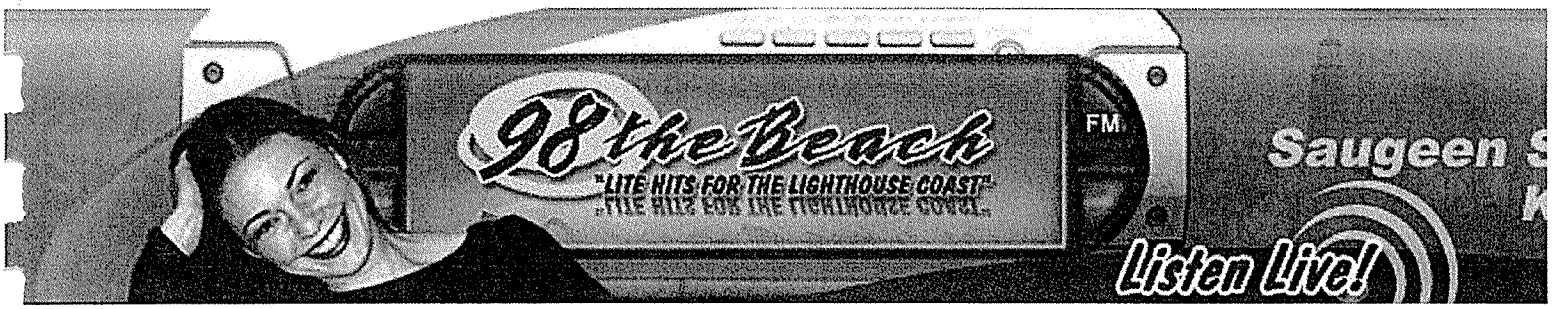
Smith said Bruce Power didn't make any request of Saugeen Shores to express interest in being a host for the used nuclear fuel storage facility. Neither did the NWMO, Krizanc said.

Prior to Monday's Saugeen Shores council resolution, council on Oct. 11 passed a resolution in open session "indicating a desire to further investigate the opportunity" to be host to a "deep geological repository for the long term management of Canada's used nuclear fuel."

A Sept. 28 letter tabled at that meeting from that organization thanked the mayor for stopping by at its exhibit at the Association of Municipalities of Ontario conference in London.

In the 40 years Canada has been generating nuclear energy, enough used fuel bundles have been created that if piled up would fill six hockey rinks to the top of the boards, NWMO says. About 85,000 fireplace log-sized used nuclear fuel bundles are created each year. More than two million of them are stored in licensed facilities now.

EXHIBIT D



Tuesday, December 6, 2011

Repository in Saugeen Shores?

Saugeen Shores
by John Divinski

Saugeen Shores Council has approved letting its name stand, at this point, as a possible site for storing used nuclear fuel.

The Nuclear Waste Management Organization will be advised that council is requesting an initial screening be undertaken to determine whether the municipality is a candidate for storing high level nuclear waste in a Deep Geological Repository.

Vice Deputy Mayor Doug Gowanlock says 40 per cent of Canada's high level waste is already stored here on the Bruce Power site.

Mayor Mike Smith wants it made clear that any future decision on this matter will be made by the citizens of Saugeen Shores, not the council.

Smith says there are some benefits to having a repository located here and there are some drawbacks and talks are just getting underway.

He says it's very preliminary and Saugeen Shores may not even be chosen.

Smith says eight or nine other communities have also expressed an interest.

The Mayor doesn't expect anything to come to fruition for another 15 years or so but now's the time to start the dialogue in the community.

The high-level waste project is distinct and completely separate from the ongoing work in Kincardine by Ontario Power Generation which wants to construct a facility for management of low and intermediate level nuclear waste at the Bruce Power site.

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EXHIBIT E

NEWS LOCAL

More local communities to look at nuclear waste

Don Crosby
Sunday, December 11, 2011 8:11:49 EST PM

Saugeen Shores isn't the only Bruce County municipality with an interest in hosting Canada's used high level nuclear waste, said Bruce County warden Dave Inglis.

"I expect a number of the municipalities in Bruce County will be doing the same. It's just gathering information that they are going through to select a site. I think the county should be involved as we go along. If it's going to be in Bruce County we should all be involved," Inglis said during an interview last week. The warden said this is the information gathering stage and at this point there's no commitment.

"Anyway you look at it Bruce County municipalities and probably Grey County as well will be impacted whether the facility stays here or if it's somewhere else there will be waste shipped out of Bruce County and Grey County," said Huron Kinloss Mayor Mitch Twolan. "So we might as well learn about the whole process. You're probably going to see other (Bruce County) municipalities come out.

He doesn't rule out the possibility of some community in neighbouring Grey County showing an interest.

Huron-Kinloss council has had a couple of brief discussions but has yet to make a decision on whether it will take the step toward seeking information about the process .

Twolan rationalizes that spent fuel from the nuclear industry has been stored in above ground facilities since Canada's nuclear generator at Douglas Point first came online in September 1968.

"It's here already. The safest place is to be buried underground. What I hear is this is the geology here in Bruce County is second to none, " said Twolan.

At one time Twolan worked at the Douglas Point plant when it was operated by Ontario Hydro and he remembers how he stood within a metre of the above ground heavy water storage facilities that hold the spent fuel bundles without protective clothing and without being affected by radiation.

Twolan is confident that new technology in future will make it possible for new uses to be found for the so-called spent fuel.

"Obviously I'm pro nuclear and everybody is entitled to their own opinion but at the end of the day how many people get treatment for cancer using nuclear medicine. I don't even like to call it nuclear waste. I think we have to let technology get there," he said.

Northern Bruce Peninsula Mayor Milt McIver supports Saugeen Shores decision to look into what is involved in hosting the waste from Canada's nuclear generators.

"It's to investigate further and that's entirely up to them. There's high level waste in our community already. If that's the direction that community wants to head I can support that," said McIver who is aware of the safety implications of hosting a longterm waste repository.

"I recognize the safety aspect now but there's nuclear waste in our community now . . . the fact that the high level waste is here already, finding a longterm solution is a good thing," he said.

On Dec. 5, Saugeen Shores council passed a motion requesting, "an initial screening be undertaken to determine whether the municipality is a candidate," for the site to store used nuclear fuel.

The project is separate from a similar plan to store low and intermediate level radioactive waste at a facility in nearby Kincardine at Douglas Point.

The Ontario Power Generation deep repository proposal along Lake Huron shoreline is undergoing a process of regulatory review. It is being assisted by Nuclear Waste Management Organization, which is also responsible for leading the search for a permanent high- level nuclear waste storage site.

Arran-Elderslie Mayor Paul Eagleson fully supports Saugeen Shores. He notes that 40% of the nuclear waste from Ontario nuclear plants is already being stored above ground at the Bruce County site.

"I was under the understanding that this was exploratory at this stage and to go to that stage is definitely good sense," he said.

All of the mayors interviewed said the topic of compensation is still a long way off but it could involve some formula that would benefit neighbouring communities as well as the host community.

"For a project like this the whole community and when I say community I mean Bruce County would have to be involved," said Inglis.

Saugeen Shores is one of 10 communities to have indicated an interest in the longterm storage project. There are three in Saskatchewan, six in northern Ontario and a seventh in northern Ontario that didn't make it past the initial screening.

The initial screening is the first in a nine-step process that would take seven to 10 years. The project requires 250 acres and would cost $16 billion to $20 billion. It would take 10 years to construct involving up to 600 construction jobs and 300-400 jobs to operate the facility.

In the 43 years that Canada has been generating nuclear energy enough used fuel bundles have been created to fill six hockey arenas up to the top of the boards. NWMO says about 85,000 fireplace log-sized nuclear bundles are created each year. More than two million of them are now stored in licensed temporary above ground facilities.

With files by Scott Dunn.

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Nuclear waste storage depot attracts southern Ontario towns

Article Comments (18)

Published On Mon Feb 20 2012 Email | Print | (18)

John Spears
Business Reporter

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You can call it a repository for used nuclear fuel in an adaptive phased management program.

You can call it a nuclear waste site.

Either way, a surprising cluster of municipalities in south-western Ontario's rural heartland are saying they might want to be the place where Canada's spent nuclear fuel is stored for thousands of years.

No final decisions on a waste site have been made – or will be for several years, under the multi-step process put in place by the Nuclear Waste Management Organization.

And the western Ontario municipalities who are showing interest will be judged against sites proposed by other communities scattered across Canada.

But it's a surprising show of interest for a region of the country best known for green fields, blue water and Alice Munro.

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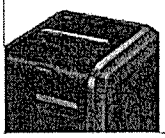

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Of course, it's also the home of the Bruce nuclear station, north of Kincardine on the shore of Lake Huron – and that's the touchstone for the interest in the waste site.

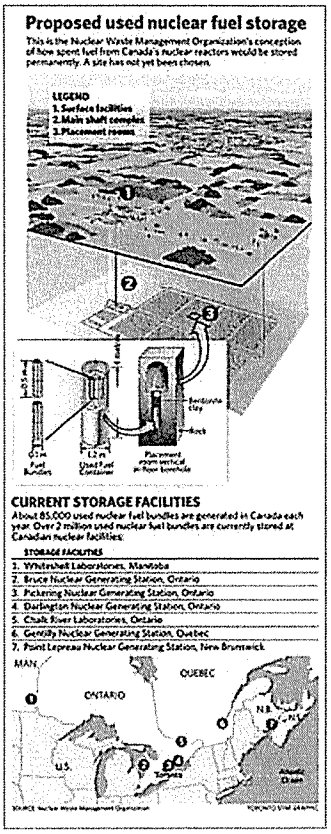
The Bruce nuclear operation already keeps its own waste in surface storage areas.

For some, it doesn't seem a big leap to take waste from nuclear power stations in Pickering, Darlington, Gentilly, Que. and Point Lepreau, N.B., and from research centres in Whiteshell, Man. and Chalk River.

Mayor Bill Goetz, mayor of South Bruce, puts it succinctly, as he notes that Highway 9 runs straight through his rural municipality on the way to the Bruce plant:

"It's going to come through here coming or going, so we thought we might as well be in the mix."

So far, South Bruce and its near neighbours Huron-Kinloss, Brockton and Saugeen Shores have done little more than ask for more information. They've taken a tour of the Bruce plant, or are scheduled to do so.



It's still a long way of making a commitment to host the site. The Nuclear Waste Management Organization, charged with the project, has designed a nine-step process for site selection

and all communities are still in the earliest stages. It's likely to take seven to 10 years to narrow the field down to one site.

The proposed site will then undergo a detailed environmental assessment before construction starts. The earliest date a storage facility could open, it figures, 2035.

And any or all may be ruled out by geology. The storage site will be buried at least 500 metres deep, and must be placed in stable, solid rock that doesn't permit water to flow through.

Still, interest is percolating, and in some ways feeds on itself.

David Inglis, mayor of Brockton and Warden of Bruce County, explains:

"We thought: Other communities are doing it in our area, and if it's going to be in our backyard, we want to know all we can about it. If it is in Bruce County, it's going to affect the whole county for infrastructure and jobs."

The interest discourages some residents who are suspicious of the long term impact of storing tonnes of highly radioactive waste, for millennia to come.

"I think it's the money that's speaking to them," says Ruth MacLean, a minister who lives in Kincardine, and on Bruce Beach in Huron-Kinloss.

"I just think this is a company town – everybody knows what side their bread is buttered on."

A fuel storage site in the area is also likely to draw scrutiny in the U.S. A string of Detroit-

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area municipalities have already protested construction of a low and mid-level nuclear waste storage area now under way at the Bruce site.

It won't hold used fuel, but more mundane objects such as clothing and mops used in radioactive areas.

Local Ontario politicians don't deny the lure of the money.

"We're strictly a farming community and we haven't got much industry," says Goetz in South Bruce. "We're struggling to keep going."

Excavating and building the storage area will employ up to 2,000 workers at a time on a project costing billions.

"They estimated anywhere from $18 to $24 billion," says Goetz. "And in the end they figure there would be 200 permanent employees. That's the part that would really help us."

(In fact, the NWMO says the lifetime cost of the site will be $16 to $24 billion. That's equivalent to $6 to $8 billion cash in hand today.)

Even some who are apprehensive about bidding for the project want to get more information.

Ruth Dalton, who runs a pottery business in Ripley – part of Huron-Kinloss – is nervous but wants to get solid information.

"I definitely want to find out more about it, before everybody goes ahead with this crazy notion," says Dalton.

"Where the truth lies you don't know, and I'm not sure anybody does know."

Given that much waste already exists, she says, storing it "might be the lesser of many evils."

But Ruth MacLean says she's not sure how impartial the information will be. The nuclear industry will marshal its arguments, she knows.

The question is: Will there be qualified experts to challenge their point of view?

The mayors note that their people have lived near the Bruce nuclear facility since the first reactor was built there in the 1960s.

"Our residents are quite familiar, and I'd like to say comfortable with the nuclear industry as a whole," says Mitch Twolan of Huron-Kinloss.

Wind turbines are a much hotter issue in the community than nuclear waste, says Twolan.

"Something has to be done with this spent fuel. As a politician, the easiest thing to do is pass it on to the next generation. I think what you're hearing from councils around Bruce County is that because we are familiar and comfortable with it, let's do something now rather than later."

As for the argument that a waste storage site would damage the agriculture and tourist industries, Twolan – a real estate agent – sees no evidence that the nuclear industry can't co-exist peacefully with farmers and cottagers.

"The nuclear facility has been up there for years, and the prices at Bruce Beach are not going down," Twolan says.

But all the mayors agree that their communities need to be on board with whatever decision is taken.

Saugeen Shores – the former communities of Port Elgin and Southampton, north of the Bruce station – has delayed taking further steps toward seeking the waste site until May, to allow more time for its residents to get informed.

Mayor Mike Smith says he hopes the Nuclear Waste Management Organization will help send a mailing to every household in the community.

But there's residual sympathy for the nuclear industry, he says, since about one in three workers at the Bruce Station lives in Saugeen Shores.

Note: This article has been edited from a previous version that incorrectly said that Bill Goetz is the mayor of the Municipality of South Huron

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NEWS

ɪourist town bids to host 48,000 tonnes of nuclear waste

ɪistin Hopper Dec 11, 2011 – 10:01 PM ET

GETTY IMAGES/THINKSTOCK

The picturesque community of Saugeen Shores, Ont., has announced it is entering the running to become the permanent home for 3,000 tonnes of Canadian nuclear waste.

Last week, the Southern Ontario community's town council voted "to determine whether the municipality is a candidate" for an nbitious federal project to permanently store all of Canada's nuclear waste in a sprawling underground bunker.

We haven't said we're interested in hosting it. We've simply said could we even be considered as a host," Saugeen Shores Mayor Mike Smith told the Owen Sound Sun Times last week, adding that the council is particularly interested in finding out whether they ɔuld "do it safely."

The tourist-friendly Ontario community is the ninth Canadian municipality to express interest in becoming the home for depleted Canadian nuclear fuel, but it is the first in Southern Canada. All the other contenders are isolated northern communities such as inehouse, Sask., and Hornepayne, Ont.

Related

U.S. frustrated with Canada over nuclear watchdog funding, leaked cables show

ounting nine bed and breakfasts and at least 14 hotels and motels, Saugeen Shores (known for its "amazing sunsets") is easily among the most touristy of the contenders.

n comments last week, Mr. Smith argued that the nuclear facility was a natural fit for the 12,000-person community, which is only a 30-minute drive from the Bruce Nuclear Generating Station, North America's largest nuclear power plant — and the region's largest employer.

ince Canada's first nuclear power plant went online in 1962, reactors in Ontario, New Brunswick and Quebec have generated more than two million bundles of spent nuclear fuel. "If the entire current inventory could be stacked like cordwood, they could fit into a pace the size of six hockey rinks from the ice surface to the top of the boards," reads the website of the Nuclear Waste Management rganization (NWMO), an arm's length federal body set up in 2002 to manage Canada's used nuclear fuel.

Currently, all this waste is stored at Canadian reactor sites in temporary vaults and silos. A facility at Bruce Power, for instance, ready holds nearly 40% of the Canadian total.

The proposed repository would be a 375 hectare bunker located half-a-kilometre underground. With the facility's final price tag coming in as high as $24 billion, the project promises "thousands of jobs in the host region and potentially hundreds of jobs in a host ommunity for many decades," according to the NWMO.

Of course, from now until the NWMO picks a final spot, Saugeen Shores will have to prove its worth against the eight other candidate owns. "Ultimately, there will have to be a compelling demonstration of willingness expressed by the citizens of any interested ommunity," according to a mid-November press release by Saugeen Shores.

The community's flirtation with storing radioactive waste comes amid another a fierce dispute over a 76-meter-tall wind turbine oised to take shape at the Canadian Auto Workers Family Education Centre in the southwest corner of Saugeen Shores. "We're cared for our health and our property values," resident Paul Krane told Postmedia in November.

On Nov. 14, Saugeen Shores town council unanimously passed a resolution calling for the Ministry of Environment to "review, uspend or revoke" approval for the project. So far, their appeals have yielded nothing.

National Post

hopper@nationalpost.com

Posted in: Canada, News Tags: Nuclear Waste, Saugeen Shores

TRISTIN HOPPER
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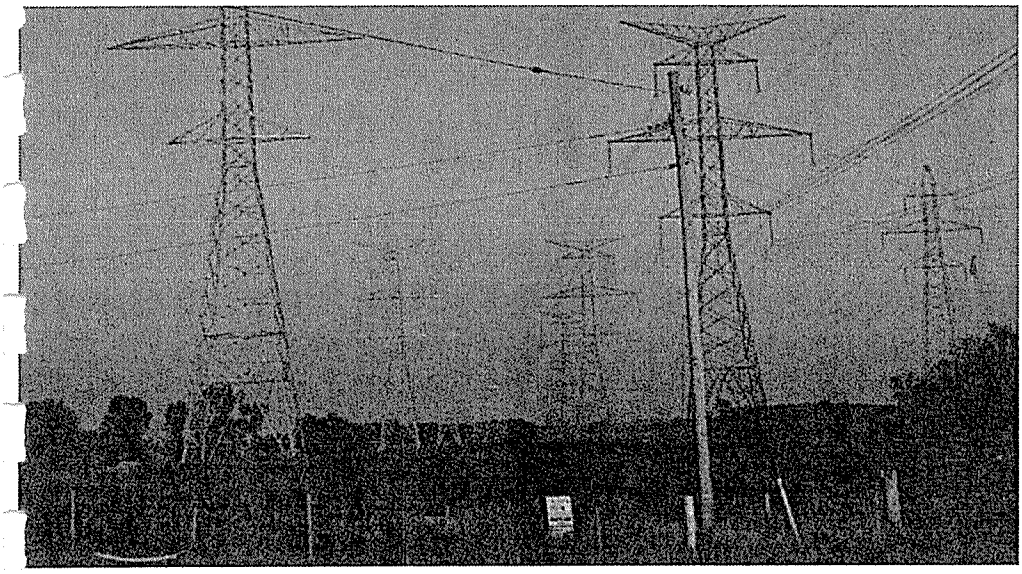
THE CONTRACTOR PLUS REWARDS PROGRAM

Nuclear waste dump idea sparks unease in Ontario



Transmission lines that run from the Bruce nuclear power plant on Lake Huron to Milton, Ont., are seen on Tuesday, Aug. 16, 2011 just orth of Hanover, Ont. The still-under construction third transmission corridor can be seen on the left.

Text:

he Canadian Press
ublished Sunday, Dec. 11, 2011 8:11AM EST

TORONTO - A community on the shores of Lake Huron has cracked pen the door to southern Ontario's becoming the permanent storage site or Canada's spent, but still dangerously radioactive, nuclear fuel.

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Until now, only nine communities in remote areas of northern askatchewan and northern Ontario were in the running to host the $24-billion project for a mammoth underground acility.

Now, to the consternation of some, one of southern Ontario's premier tourist destinations is on the radar, although ow it got there is already the subject of dispute.

he municipality of Saugeen Shores, which includes the picturesque lakeside towns of Port Elgin and Southampton about three hours west of Toronto, is showing interest in becoming home to the waste site.

leighbouring Brockton is also looking to get on board as part of an initiative to involve the entire county, which is already home to the Bruce nuclear power plant in nearby Kincardine.

t's a radical departure from what conventional wisdom has been for years: that (the waste) would go in the anadian Shield," said Chris Peabody, a Brockton councillor from Walkerton, Ont.

"Councils up here are freaking out about wind energy, but they're inviting a nuclear waste dump into their town."

he region is attractive as a waste site because 40 per cent of used nuclear fuel in Canada is already housed above ground at the Bruce generating plant.

he plant is a major employer in the region, has stored spent fuel for years, and community acceptance of a ermanent low-level waste facility was high.

Jamie Robinson, spokesman for the Nuclear Waste Management Organization, denied the federal agency has been ushing for expressions of interest from the county.

"We're not targeting any communities," Robinson said.

We're not targeting any communities," Robinson said.

"It's not us that's thinking about southern Ontario. Our process is open to any community in Canada. It's a community driven process."

The project involves finding a willing and suitable host for a six square kilometre bunker built half a kilometre below a square kilometre of field.

The facility would warehouse millions of high-level nuclear-fuel rods that remain dangerous indefinitely.

In return, the waste agency is dangling a huge economic-development carrot, promising the creation of hundreds of jobs for the community and thousands more for the region over many decades.

The downside, Robinson said, would be the huge stress such a project would have on existing infrastructure.

"There'll be significant positive benefits as well as potentially negative benefits," said Robinson.

"We encourage potential host communities to consider whether this project is consistent with the long-term vision that they've got for their community."

Coun. Thead Seaman said it was the waste organization that approached Saugeen Shores ("The Sun's Favourite Destination") looking for an invitation into the community.

The agency took councillors on a tour of the temporary storage at the Bruce plant last month.

With Mayor Mike Smith on board, a committee agreed to ask the agency for more information but Seaman said councillors will likely doom the idea soon.

"The public doesn't want us to even receive more information," Seaman said. "So, we'll just shoot it dead in the water and that will be the end of it."

Still, the idea continues to bubble that the entire county could act as host region with benefits shared across the area.

The suggestion gained little traction in the municipality of South Bruce earlier this year but nearby Brockton, which includes Walkerton, appears more enthusiastic.

Its councillors also toured the temporary storage site earlier this month.

Brockton Mayor Dave Inglis said the county has long-standing experience with nuclear power, and council would likely make a decision on the issue "shortly."

But Peabody said Walkerton's tainted water tragedy a decade ago should be reason enough to stay out of the radioactive-waste business.

"Taking a town like Walkerton, which has that legacy of E. coli, and inviting a nuclear waste dump in -- I have trouble with that," Peabody said.

"I would (also) question the wisdom of putting all of Canada's nuclear waste beside or close to Lake Huron under some of Canada's best farm land."

Either way, nailing down a site will likely take as long as another decade, and then at least that long to build the repository.

To date, three communities in Saskatchewan -- English River First Nation; Pine House and Creighton -- and six northern Ontario communities -- Ear Falls, Ignace, Nipigon, Schreiber, Hornepayne and Wawa -- have been through initial screening.

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Bell Media Television

EXHIBIT I

SaugeenShores

THE CORPORATION OF THE TOWN OF
SAUGEEN SHORES

STAFF REPORT

Prepared By: Larry Allison, CAO

Date: July 9th 2012

Subject: DGR Briefing Session with CNSC – August 23rd, 2012

RECOMMENDATION

That the briefing session with the Canadian Nuclear Safety Commission scheduled for August 23rd 2012 include _____from Council and _____from the Community.

BACKGROUND

As part of learning more about the national process to regulate approvals for a Deep Geological Repository for used nuclear fuel, the Canadian Nuclear Safety Commission will conduct a preliminary briefing session for interested communities. Such sessions are typically held at Stage 2 of the site selection process and are designed to provide further understanding about the role of the Agency in oversight.

Such a session has been tentatively arranged for Thursday August 23rd in Ottawa. The date proposed is the day following the conclusion of the AMO Conference which is also being held in Ottawa this year. As there are a few councilors expressing interest in attending AMO there would be some economies derived from making a single trip. The CNSC does not travel to interested communities, they are required to attend at their office.

A draft agenda for the session is attached. The CNSC can accommodate up to 10 participants and those attending are to be determined locally. The NWMO itself is not involved in the session what so ever. A cross-section of both elected representatives and community members with varying views on the DGR issue are encouraged to attend the briefing session. Staff understands that other communities who have participated in similar sessions recently have found them to be educational and worthwhile.

Depending on the level of interest from Council members themselves there may be opportunity to request a number of community groups or organizations nominate an individual to attend. Staff are seeking direction of Committee of the Whole as to participation in this regard in order to make final arrangements with the CNSC.

FINANCIAL IMPACT: Nil - The expenses incurred by Town and any community representatives attending the session are reimbursed by NWMO.

Government of Canada / Gouvernement du Canada

NOTICE OF MEETING -- *AVIS DE RÉUNION*

File / Dossier: 2.05.01
CNSC E-doc: 3958253

TO *À*	**Visitors:** Larry to fill in once known	**CNSC Members:** Mike Rinker — Don Howard Andrew Stewart — Andrée Mongeon Kim Mann — Trudy Chapman Raj Garg — Richard Tennant Andrew Elliot — Brian Torrie
SUBJECT *OBJET*	**CNSC's Early Role in the Adaptive Phased Management Project – Outreach meeting with Town of Saugeen Shores**	
AGENDA OR REMARKS *ORDRE DU JOUR OU REMARQUES*	10:00 –10:10 Introductions (all) 10:10 – 10:45 Overview of CNSC's Regulatory Framework and licensing process 10:45 – 11:00 Environmental Assessment 11:00 – 11:15 Public Hearing Process 11:15 – 11:30 Public Information Programs 11:30 – 11:45 Aboriginal Consultation 11:45 – 12:00 Participant Funding Program 12:15 – 12:45 **Working Lunch (to be provided by the CNSC)** Technical Safety of Deep Geological Repositories – Safety Assessment/ Safety Case (12:00 – 12:30) 12:45 – 13:00 Packaging and transportation of nuclear substances and emergency preparedness 13:15 – 13:30 Security 13:30 – 14:00 Closing remarks (additional time if needed)	
LOCATION OF MEETING *ENDROIT DE LA RÉUNION*	**Room 12-050, 280 Slater St, Ottawa, ON** Visitors please go to the CNSC reception desk, located on the ground floor of 280 Slater Street. CNSC staff contact Nicole Kearns (613-992-5544), if unavailable contact Valerie Leclerc-Vigeant (613-947-4346).	
	Date: **August 23, 2012**	
	Time / *Heure:* **010:00 – 14:00**	Duration / *Durée:* **4 hours**
ARRANGED BY *ORGANISÉ PAR*	Name / *Nom:* Julie Mecke	Tel / Tél: (613) 996-7314

EXHIBIT J

nwmo
NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

RECEIVED
JUL 30 2012
Chief, Council
SON-Ojke

July 19, 2012

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR #1
Southampton, ON N0H 2L0

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR #5
Wiarton, ON N0H 2T0

Dear Chief Kahgee and Chief Lee:

I am writing to you pursuant to our undertaking to ensure you are kept informed about our work in your area. As you may already know the communities of Saugeen Shores, Huron-Kinloss, Arran-Elderslie and South Bruce have each publicly acknowledged that they are interested in receiving information on our process to find a willing host community for a safe site for Canada's used nuclear fuel. Each community has recently passed a resolution requesting information about the NWMO, the project and the process to select a site. As part of this process of learning more about the project, they have also requested an initial screening of the potential suitability of their community.

As we have indicated to you before in our letters regarding Saugeen Shores and Brockton we remain committed to ensuring you have the most up to date information on this process and project. We are interested in meeting with you to discuss the project and begin to explore issues such as partnerships and decision making. As a company the NWMO acknowledges, respects and honours that Aboriginal peoples have unique status and rights as recognized and affirmed in s.35 of the Constitution Act (1982) and is committed to respecting the Aboriginal rights and treaties of Aboriginal peoples in Canada . The NWMO also recognizes and honours that First Nation people have a special relationship with Mother Earth and the associated unique stewardship responsibilities flowing from that relationship.

We mean no disrespect to your community by accepting the request of your neighbours to learn about our project and participate in our process. It is open to any community in Canada, including yours, to make a request to learn about our project. Such a request does not represent any commitment on the part of the requestor, nor does it represent any commitment by the NWMO as to where the project may end up. The focus of this very initial stage of the site selection process is to share information with all communities which express an interest in learning about Canada's plan and the project. Because we are only at the information sharing and gathering stage we are not screening out potential host communities unless we have determined that they are unlikely to have geologically suitable land available for a safe site based on our initial desktop studies.

Tel 416.934.9814
Fax 416.934.9526
Toll Free 1.866.249.6966
22 St.Clair Avenue East 6th Floor
Toronto Ontario Canada M4T 2S3
www.nwmo.ca

We are still several years from determining a suitable site for the safe storage of used nuclear fuel. We do not know which province we will be operating in, and as such we have not been delegated any aspects of the Crown's duty to consult. We do however believe in the importance of sharing information and attempting to address concerns as they become known to us.

As we work toward identifying a suitable site for our project, we will do so on a basis that respects Aboriginal rights and we will implement the project in a manner that benefits the communities in the vicinity of the project, wherever it ends up being located.

I am hopeful that we can find a suitable time to meet in the near future.

Yours Truly,

Kathryn Shaver
Vice President, APM Site Selection and Engagement

EXHIBIT K

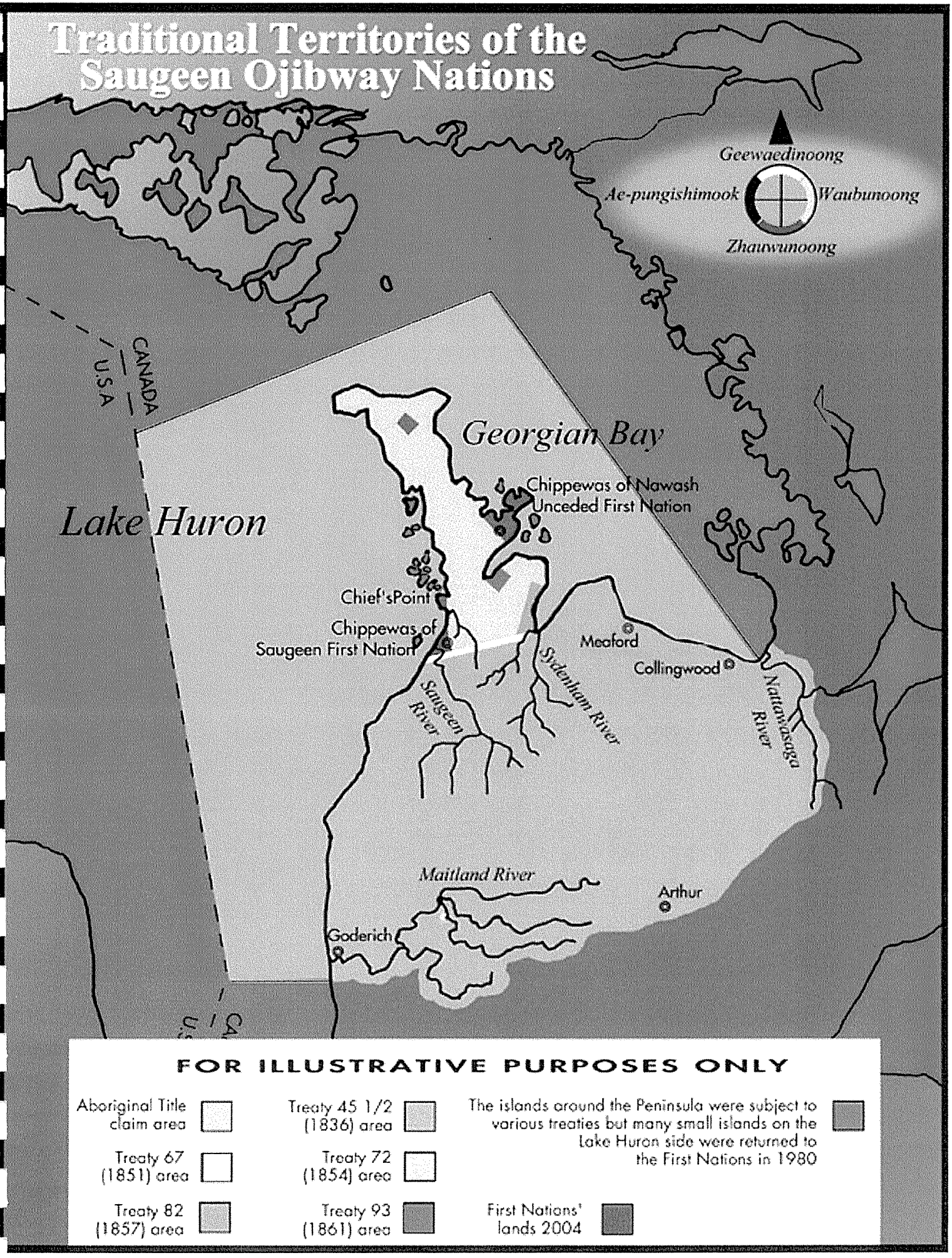
Traditional Territories of the Saugeen Ojibway Nations
Geewaedinoong
Ae-pungishimook
Waubunoong
Zhauwunoong
CANADA
U.S.A
Georgian Bay
Lake Huron
Chippewas of Nawash Unceded First Nation
Chief'sPoint
Chippewas of Saugeen First Nation
Meaford
Collingwood
Sydenham River
Saugeen River
Nottawasaga River
Maitland River
Arthur
Goderich
FOR ILLUSTRATIVE PURPOSES ONLY
Aboriginal Title claim area
Treaty 45 1/2 (1836) area
The islands around the Peninsula were subject to various treaties but many small islands on the Lake Huron side were returned to the First Nations in 1980
Treaty 67 (1851) area
Treaty 72 (1854) area
Treaty 82 (1857) area
Treaty 93 (1861) area
First Nations' lands 2004

EXHIBIT L

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

Chippewas of Saugeen, RR 1, Southampton ON N0H 2L0 519-797-2781
Chippewas of Nawash, RR 5, Wiarton ON N0H 2T0 519-534-1689

K. E. Nash
President
Nuclear Waste Management Organization
22 St. Clair Avenue East, 6th Floor
Toronto ON M4T 2S3

BY FAX: 416 934 9526

November 18, 2011

Dear Mr Nash,

RE: NWMO Consideration of Saugeen Ojibway Territory for a Used Nuclear Fuel Repository

It has recently come to our attention that the Council of Saugeen Shores intends to formally enter into the site selection process with NWMO to consider Saugeen Shores as a site for a used nuclear fuel repository. As you know, Saugeen Shores is within the Saugeen Ojibway Nation traditional territory and is directly adjacent to the Saugeen First Nation communal lands.

We are deeply troubled by this development. As you well know, SON has been engaged with Ontario Power Generation Inc. (OPG) and the NWMO for many years to consider OPG's plan for a Deep Geological Repository for Low and Intermediate Level Nuclear Wastes at the Bruce site. You have been personally involved in these meetings, initially as a representative of OPG, and later as head of the NWMO. From our very first meetings, SON has consistently expressed its concern that the DGR for low and intermediate level wastes would pave the way for a used fuel repository within our territory. We have been given constant assurance, by NWMO and OPG both, that there was no plan or intention to build a used nuclear fuel repository in SON territory and that the DGR project would not be the basis for developing a used fuel repository in SON territory.

It would be completely illegitimate for NWMO to now begin a process to consider Saugeen Shores, or any other location within the SON territory, for a used nuclear fuel repository. It is contrary to the assurances repeatedly given to SON.

Further, for NWMO to now begin consideration of the Bruce site, or another proximate area, for a used fuel repository, on the eve of the Joint Review Panel consideration of OPG's DGR project for low and intermediate level wastes, is an affront to the JRP process and will act to undermine the legitimacy of its review.

SON must now receive clear assurances from you on behalf of NWMO, and from the most senior levels at OPG and government, that in the present circumstances, NWMO and OPG are not willing to engage in any consideration of siting a used fuel repository in SON territory. We expect that this position will be made clear to Saugeen Shores and other communities in the area who may seek to enter into NWMO's site selection process.

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. The Honourable Chris Bentley, Minister of Energy
Mike Smith, Mayor of Saugeen Shores, Warden of Bruce County
Albert Sweetnam, Ontario Power Generation Inc.

EXHIBIT M

nwmo

NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIETE DE GESTION DES DECHETS NUCLEAIRES

Ken Nash
PRESIDENT

Tel 647.259.3010
Email knash@nwmo.ca

November 25, 2011

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR#5
Wiarton, ON N0H 2T0

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR#1
Southampton, ON N0H 2L0

Dear Chief Lee and Chief Kahgee:

Thank you for your letter of November 18 regarding the possibility of the Town of Saugeen Shores deciding to enter the learn more phase of Adaptive Phased Management (APM). I would like to arrange to discuss the matters you raised at your earliest convenience. Meanwhile, I would like to offer the following explanation of where NWMO is positioned in implementing our mandate under the Nuclear Fuel Waste Act.

APM was developed over a period of three years during which time, we engaged with more than 18,000 Canadians, including 2500 Aboriginal people, across Canada and received advice from 500 experts. NWMO was consistently advised by Canadians that safety and security is a top priority and this generation must take action on the long-term management of the wastes that we have created.

NWMO's mandate for APM was approved by the Government of Canada in 2007. We are now responsible for implementing a national infrastructure project to safely isolate Canada's used nuclear fuel in a suitable geological formation where it will be monitored and it can be retrieved if necessary. This mandate requires an open and transparent process to locate the facility in an informed and willing host community.

The site selection process developed by NWMO is a result of a continuing dialogue with Canadians over a period of three years and is fundamentally community driven. It was initiated in 2010 with NWMO creating awareness and is now in the initial stages of what will eventually be a nine-step process spanning many years. The multi-year process of site selection is designed to provide the time required to assess the primary objective of safety, and explore the potential for the project to enhance long-term well-being of the host community and surrounding areas.

So far ten communities in Ontario and Saskatchewan have stepped forward with an interest to learn more. One community has been screened out because of unfavourable geological conditions.

With reference to the interest of Saugeen Shores, it is important to note that the APM site selection process is open to all communities in Canada. I should also clarify that no one in NWMO or, to my knowledge, anyone in OPG, has stated that NWMO would exclude communities in Bruce County, or anywhere in Canada for that matter, in advance of the learn more stage that forms the first step in our process. That would be inconsistent with our agreement with Canadians that we would implement the process we designed in collaboration with Canadians and that the process would be followed faithfully to determine the ultimate site for the APM DGR.

We note that the Hosting Agreement between OPG and Kincardine for an OPG DGR on the Bruce Nuclear site is only for Low & Intermediate Level Waste and clearly excludes used nuclear fuel. NWMO has consistently said that we would not be looking at the OPG DGR for used fuel. That will not change. NWMO is mandated by the Nuclear Fuel Waste Act to develop an NWMO deep geologic repository for all of Canada's used nuclear fuel.

Once a community passes a resolution to enter the learn more phase, the process requires NWMO to involve local Aboriginal communities and other communities in the region. We are pleased that Saugeen Shores has chosen to contact SON prior to any decision by Council to enter the learn more part of the process. NWMO looks forward to building a strong, mutually respectful relationship with SON and would be pleased to meet with SON to describe APM and the site selection process and the matters raised in your letter.

Sincerely,

K.E. Nash

K.E. Nash
President

cc: The Honourable Chris Bentley, Minister of Energy
Mike Smith, Mayor of Saugeen Shores, Warden of Bruce County
Albert Sweetnam, Ontario Power Generation

EXHIBIT N

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

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K. E. Nash
President
Nuclear Waste Management Organization
22 St. Clair Avenue East, 6th Floor
Toronto ON M4T 2S3

BY FAX: 416 934 9526

February 23, 2012

Dear Mr Nash,

RE: NWMO Consideration of Saugeen Ojibway Territory for a Used Nuclear Fuel Repository

We write to further to our letter of November 18, 2012 and in response to an NWMO letter of January 25, 2012. The subject of both of those letters is NWMO's consideration of SON Territory as a site for a used nuclear fuel repository.

We must be perfectly clear – SON strongly opposes the consideration of our Territory as a site for a used fuel waste repository.

In our November 18 letter we explained that SON had learned of Saugeen Shores Council's decision to enter into NWMO's site selection process for the used nuclear fuel repository. As you know, Saugeen Shores is adjacent to our communal lands and in the heart of our Territory. We explained that SON has been given constant assurances that the OPG's DGR for low and intermediate level nuclear wastes would not pave the way for a used nuclear fuel repository. We asked for your assurance that our Territory would not be considered for a used fuel repository.

In your response letter of November 25, 2011, you gave no such assurance. In fact, you stated that neither NWMO nor OPG has ever stated that communities in Bruce County would be excluded from consideration for a used nuclear fuel repository. You continued to say that NWMO will not seek to put used nuclear fuel in the proposed DGR for low and intermediate level wastes, which you must know has never been our concern. With these words, we are left feeling that our engagement with OPG and NWMO over the past years has been based on only half the story, and that OPG and NWMO have always planned to keep options open to build repositories for all of Canada's nuclear wastes, including used fuel, in our Territory.

In NWMO's letter of January 25, you inform SON that the Municipality of Brockton, again in the heart of our Territory, has also entered into the site selection process with NWMO. It must be noted that this is a form letter - it makes no reference to our earlier correspondence, it does not address the specific issues raised by SON in our letter of November 18, and it completely ignores the long history between SON, OPG and NWMO in these matters. Instead, you indicate that there will be "broad engagement" with potential host communities, surrounding communities and "Aboriginal people potentially affected". To receive such a letter is deeply offensive.

SON is not an "Aboriginal people potentially affected". These are our Treaty lands and our Traditional Territory. Our communal lands are closer to the Bruce site than many of the municipalities you purport to engage as "hosts". This is where we live and exercise our Rights, and where we must continue to do so forever. Our ancestors are buried on the Bruce site. No decision could be made to site a used fuel repository in our Territory without acknowledging SON as a host community, and engaging SON on this basis. This means that no decision could be made to build a used nuclear fuel repository in our Territory unless SON was informed and willing.

SON is not a willing host for this project. At this time, and in light of the Environmental Assessment and planning of the OPG's DGR project, SON is not prepared to even have our Territory considered for the used nuclear fuel repository. For this reason, SON will oppose any continuing work by NWMO in this regard.

We ask that you now, on behalf of the NWMO, confirm that NWMO would not develop and build a used nuclear fuel repository in SON Territory if SON was opposed to the plan.

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. Shawn Atleo, National Chief, AFN
Ed John, North American Representative to UN Permanent Forum on Indigenous Issues
The Honourable Chris Bentley, Minister of Energy
Regional Chief Angus Toulouse, Chiefs of Ontario
Mike Smith, Mayor of Saugeen Shores, Warden of Bruce County
David Ingles, Mayor, Municipality of Brockton
Albert Sweetnam, Executive Vice President, Nuclear, Ontario Power Generation Inc.

EXHIBIT O

nwmo
NUCLEAR WASTE MANAGEMENT ORGANIZATION
SOCIÉTÉ DE GESTION DES DÉCHETS NUCLÉAIRES

Ken Nash
President

Tel 647.259.3010
Email knash@nwmo.ca

May 3, 2012

Chief Scott Lee
Chippewas of Nawash Unceded First Nation
RR#5
Wiarton, ON N0H 2T0

Chief Randall Kahgee
Chippewas of Saugeen First Nation
RR#1
Southampton, ON N0H 2L0

Dear Chief Lee and Chief Kahgee:

Thank you for your letter of February 23 further explaining SON's position with respect to a DGR for used nuclear fuel on SON Treaty Lands and Traditional Territory.

There are a couple matters I will address in this letter, however, because of the importance of these issues, I continue to believe that it is important that we meet face to face and, therefore, reiterate my request for a meeting.

To be clear, the OPG DGR has not paved the way for a used nuclear fuel repository. The DGR for a used nuclear fuel is guided by our federally approved Adaptive Phased Management process This process, as you point out, is based on a willing host community. Seventeen communities in Saskatchewan and Ontario have indicated their interest in Learning More about our project. The NWMO has not made any commitment to any community, region or First Nation that they will be the host for this project. In fact, that decision is still 7-10 years away.

In your letter you refer to the "Bruce Site" and I want to assure you that with respect to the NWMO DGR for used nuclear fuel, there is no proposed Bruce site. In fact, there is no specifically identified site anywhere. It is just too early in our process to do so.

Our process recognizes the importance of working with Aboriginal peoples in whose traditional territories we are proposing to work and the need to ensure there is on-going involvement and participation in decisions that affect them. I wish to assure you that the NWMO will work with Aboriginal communities in a shared decision-making process leading to strong and lasting partnerships. In all of our work the health and safety of the environment and of people is the first priority.

Elders whom we work with have advised us to explore the possibility of working together with Aboriginal communities to assess the possible environmental effects of the project on Mother Earth through the application of Traditional Knowledge. They have also advised us to work closely with potentially affected Aboriginal communities in order to ensure that these communities benefit from this project should it be built in their territory. This could include matters such as, assessing the suitability of a particular site for the project and identifying the terms and conditions on which the project might proceed. The process could also include agreements with Aboriginal communities to ensure that they benefit from the economic opportunities, employment, education and capacity building a project this size will bring. Building a project of this size will generate thousands of jobs in the host region and potentially hundreds of jobs in a host community for many decades

The NWMO's work with Aboriginal peoples is guided by a few key principles:

- We acknowledge, respect and honour that Aboriginal peoples have unique status and rights as recognized and affirmed in s. 35 of the Constitution Act (1982.)
- We respect Aboriginal and Treaty rights.
  We recognize the unique circumstances of the Aboriginal peoples we will be working with and therefore our need to have an open mind on process.
- We believe that collaboration is key to a project of this size and therefore seek to make strong and lasting partnerships and relationships
- We believe that Aboriginal Traditional Knowledge will make our processes and our project better and therefore will seek to engage Traditional Knowledge holders in all aspects of our work and to interweave this knowledge with our work as appropriate and as agreed with the owners of this Knowledge

I believe in the value of having a good working relationship with you. You pose several ideas regarding our process and project which in the spirit of being "adaptive" should be explored. I do hope we can set up a process to do so.

Yours Truly,

K E Nash

Ken Nash
President

EXHIBIT P

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

Chippewas of Saugeen, RR 1, Southampton ON N0H 2L0 519-797-2781
Chippewas of Nawash, RR 5, Wiarton ON N0H 2T0 519-534-1689

Albert Sweetnam
Executive Vice President
Ontario Power Generation
700 University Avenue
Toronto ON M5G 1X6
EMAIL: albert.sweetnam@opg.com

November 1, 2011

Dear Mr Sweetnam,

RE: Discussions between SON and OPG regarding foundational issues respecting OPG's Operations within the Territory

As you know, representatives of SON and OPG have been meeting over the last month in an attempt to resolve key issues SON has raised respecting OPG's operations within SON Territory, and specifically, concerns respecting OPG's proposed Deep Geological Repository project.

At these and earlier meetings, we have made clear that SON's fundamental goal is to protect the safety of its communities, the integrity of its Traditional territory, and its Rights and interests within that Territory. Our objective now is to resolve the very serious and growing nuclear waste problem in our Territory.

With respect to OPG's proposed DGR project, SON could not support any such project that was not part of a comprehensive strategy to address the nuclear waste issues in our Territory and give our communities comfort and certainty that our Territory, people, Rights and interests will be protected. As we have said, such a strategy must include commitments that:

- OPG will not support the development of a used-fuel repository within SON Traditional Territory if SON opposes such a development.

- OPG will reconsider the inclusion of long-lived intermediate level nuclear wastes as part of any project for the management of low and intermediate level nuclear wastes.

- OPG will not plan for or develop additional nuclear waste management projects within SON Territory without the support of SON.

- OPG, with SON, will identify legacy issues arising from its past and current operations within SON Territory and develop a plan to resolve those issues.

- OPG will not proceed to construct the DGR without the support of SON as evidenced by a ratification vote by its communities.

We have conveyed this position to OPG in our last number of meetings. Although we believe we have had good discussions, we do not feel that OPG has fully understood us or is prepared to adequately respond to our position. At our last meeting on October 14th, OPG shared its response to SON's positions and conveyed what OPG was willing to commit to in this regard. OPG's proposal fell far short of what SON requires at this time.

We remain hopeful that these issues can be resolved between SON and OPG through ongoing discussions. However, we believe that no progress will be made unless there is a meeting between the leaders of SON and OPG. For this reason, we ask that you be in attendance at our next meeting, and that you consider whether your President should also attend.

While we try and resolve these matters, it has become clear that SON must continue its review of the current DGR project to prepare for its participation in the upcoming federal review of the project. We will ask our Environmental Office to be in contact with Donna Pawlowski to address administrative and budgeting matters under our Protocol Agreement to allow this work to proceed.

Lastly, SON is of the view that given the seriousness of these matters and their significance for the relationship between SON and Ontario, it is appropriate that SON meet with our new Minister of Energy to brief him on SON's concerns and positions. Out of respect for our process, we want to ensure that we have had the opportunity to meet with you again on these issues prior to our meeting with the Minister.

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. Donna Pawlowski, OPG

EXHIBIT Q

CHIEFS AND COUNCILS
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Albert Sweetnam
Executive Vice President
Ontario Power Generation
700 University Avenue
Toronto ON M5G 1X6
EMAIL: albert.sweetnam@opg.com

March 9, 2012

Dear Mr Sweetnam,

RE: Discussions between SON and OPG regarding foundational issues respecting OPG's Operations within the Territory

We write to follow-up on both our letter to you of November 1, 2011 as well as our meeting of December 20, 2011. As you know, we raised and discussed many critical issues relating to the ongoing engagement between SON and OPG respecting OPG's operations within SON Territory, including your proposal for the DGR project.

It was our understanding coming out of our December meeting that OPG would provide us with response to the issues we have raised. Could you please confirm whether OPG intends to provide such response and when we might expect to receive it?

Miigwetch

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc. Donna Pawlowski, OPG

CEAA Registry Reference No. 06-05-17520

Saugeen Ojibway Nations' Application for a Determination on the Scope of Review of OPG's DGR Project and the Inclusion of a Project for the Long-Term Management of High Level Nuclear Wastes

SUPPLEMENTARY SUBMISSION

February 25, 2013
Toronto, Ontario

I. OVERVIEW

1. On August 9, 2012, the Saugeen Ojibway Nations ("SON") made a submission to this Panel (the "August 9 submission"). That submission argued that Ontario Power Generation Inc. ("OPG") must include a project for the disposal of used nuclear fuel (a "HLW Project") within the Study Area in its cumulative effects assessment for the DGR Project under review. The failure to do so renders the OPG's Environmental Impact Statement ("EIS")—and thus the assessment being undertaken by the Panel—fundamentally flawed.

2. The question of whether the HLW Project should be considered as part of the cumulative effects assessment of the DGR Project is not in dispute. OPG expressly acknowledges in the EIS that a HLW Project is a reasonably foreseeable project. OPG, in fact, includes such a project in its assessment of cumulative effects. OPG distorts the analysis, however, by considering only the possibility of a HLW Project located outside the Study Area, ignoring the more likely possibility that a HLW Project will be located inside the Study Area.

3. Further, by considering only that used nuclear fuel will be removed from the Study Area, OPG claims the benefit of an ameliorative cumulative effect in the Study Area—a net reduction in radiation and radioactivity—without ever addressing the numerous significant adverse environmental effects that would result from the co-location of the DGR Project and a HLW Project within the Study Area.

4. Having taken the position in its EIS that a project for the disposal of used nuclear fuel is a reasonably foreseeable project, OPG cannot now argue that the siting and construction of a such a project is too contingent or hypothetical to be consider as part of the cumulative effects assessment of the DGR Project. Thus, the only question facing the Panel is whether it is appropriate for this environmental assessment to consider only the possibility that the HLW Project will be developed outside the Study Area, as OPG contends (albeit without justification, rationale or

evidence), or whether it is necessary to also consider the possibility that a HLW Project will be developed within the Study Area.

5. In its August 9 submission, SON explained that the preponderance of available evidence demonstrates that is more likely that a HLW Project will be developed within the Study Area than outside it. Since SON made its submissions in August 2012, further evidence has come to light that makes it increasingly clear that a HLW Project is a reasonably foreseeable future project within the Study Area, as detailed in SON's submission of December 21, 2012.

6. It would critically undermine the legitimacy of this environmental assessment to consider only the possibility that a HLW Project will be developed outside the Study Area, as OPG urges in its EIS and in its responses to recent information requests. A review on this basis would be materially skewed and fundamentally flawed. OPG must be given specific direction to amend its EIS to include full consideration, data and analysis of the possibility that the HLW Project will be developed within the Study Area.

II. THE NEED TO CONSIDER THE POSSIBILITY OF THE HLW PROJECT WITHIN THE STUDY AREA

7. SON will make specific submissions on: (i) requirements of law and environmental assessment best practices for the inclusion of reasonably foreseeable projects such as a HLW Project in the Study Area in this review; (ii) OPG's recognition of the need to include the HLW Project in its cumulative effects assessment and its decision to include only the possibility that it will be developed outside the Study Area; (iii) available evidence that demonstrates it is as likely, or more likely, that a HLW Project will be developed inside, rather than outside, the Study Area; and (iv) how a cumulative effects assessment—and thus this environmental assessment—on this basis would be materially skewed and fundamentally flawed. SON will also make brief submissions on the Panel's concern that there remains confusion between the two DGR projects. SON will submit that there is no confusion, rather concern about

the connection between the two projects and that this must be addressed in a transparent way as part of this review, not managed by willfully excluding the HLW Project from consideration.

A. Law and Environmental Assessment Best Practices Require Inclusion of HLW Project in Cumulative Effects Assessment

8. A proper cumulative effects assessment is a condition precedent for any environmental assessment under the *Canadian Environmental Assessment Act*. As this Panel noted in its letter of February 1, 2013, "paragraph 19(a) of CEAA 2012 states 'that the environmental assessment of a designated project must take into account . . . any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out.'"

9. The Joint Panel Agreement that constituted the JRP for this review requires "a consideration of . . . [t]he environmental effects of the Project, including the environmental effects of . . . any cumulative effects that are likely to result from the Project in combination with other projects that have been or will be carried out."[1] Similarly, the EIS Guidelines require that OPG "must identify and assess the cumulative adverse and beneficial environmental effects of the project in combination with other past, present or reasonably foreseeable projects and/or activities within the study area."[2] The EIS Guidelines make clear that "it is the responsibility of the proponent to provide sufficient data and analysis on any potential environmental effects to permit proper evaluation by a joint review panel, the public, and technical and regulatory agencies."[3]

10. The direction to the proponent in the EIS Guidelines is consistent with best practices for undertaking cumulative effects assessment under Canadian environmental

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1 JRP Agreement Terms of Reference at Part IV, paragraph 1(a).

2 EIS Guidelines at section 14.

3 EIS Guidelines at section 1.1

assessment law and policy. The *Cumulative Effects Practitioner's Guide* is clear that a cumulative effects assessment should consider "[o]ther actions that have occurred, exist, or may yet occur which may also affect those same VECs are identified [in the EIS]. Future actions that are approved within the study area must be considered; officially announced and reasonably foreseeable actions should be considered if they may affect those VECs [identified in the EIS] and there is enough information about them to assess their effects. Some of these actions may be outside the study area if their influence extends for considerable distances and length of time".[4]

11. It is incorrect for a cumulative effects assessment to consider only "projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval."[5] Such a narrow approach to determining what projects are included in the cumulative effects assessment risks "limit[ing] the ability of cumulative environmental effects assessment to contribute to informed environmental planning and decision making in the future of the project area."[6] Cumulative effects assessment must "include 'certain' and 'reasonably foreseeable' projects and, where appropriate those projects that are 'hypothetical.'"[7] In this context, "reasonably foreseeable" means that "[t]he action may proceed, but there is some uncertainty about this conclusion."[8]

12. The governing case law is clear that it is incumbent on this Panel to ensure to a proper cumulative effects assessment is conducted. "Pursuant to paragraph 16(1)(a) of the Act, every screening or comprehensive study must consider any cumulative

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4 *Cumulative Effects Assessment Practitioners Guide*, Prepared For: Canadian Environmental Assessment Agency; Prepared By: The Cumulative Effects Assessment Working Group (Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker) and AXYS Environmental Consulting Ltd., February 1999 ("Practitioners Guide") at section 1.1.

5 *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* (dated 1999, updated November 2007) (the "Operational Policy Statement").

6 *Id.*

7 *Id.*

8 *Id.*

environmental effects which are likely to result from the proposed development in combination with other projects or activities which have been or will be carried out.[9] The court in *Bow Valley* explained the need for a broad and thorough cumulative effects assessment, noting "[u]pon a review of the jurisprudence in this area, it becomes clear that, although courts have narrowly interpreted the meaning of the 'scope of the project', they have gone further in their interpretation of the cumulative effects provisions under the *Act*."[10]

13. Similarly, the court in *Friends of the West Country* confirmed that a cumulative effects assessment "is indeed mandatory" and further "that the environmental assessment shall consider the environmental effects of the project as scoped and 'any cumulative effects that are likely to result from the [scoped] project in combination with other projects or activities that have been or will be carried out."[11] The court explained "the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered."[12]

14. In undertaking a cumulative effects assessment, a panel will "breach[] its duty" if it fails "to obtain all available information about likely [related projects] in the vicinity of the project" and will further "breach[] its duty" if it fails "to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel's report."[13]

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9 *Bow Valley Naturalists Society* v. *Canada (Minister of Canadian Heritage)* (C.A), [2001] 2 F.C. 461 at paragraph 38.

10 *Bow Valley* at paragraph 47.

11 *Friends of the West Country Assn.* v. *Canada (Minister of Fisheries and Oceans)* (C.A.), [2000] 2 F.C. 263 at paragraph 25.

12 *Friends of the West Country* at paragraph 34.

13 *Alberta Wilderness Assn.* v. *Cardinal River Coals Ltd.* (T.D.), [1999] 3 F.C. 425 at paragraph 76.

B. OPG Acknowledges the HLW Project as Reasonably Foreseeable and the Need to Include it in the Cumulative Effects Assessment of the DGR Project

15. OPG has acknowledged that a HLW Project is reasonably foreseeable and has included such a project as part of the cumulative effects assessment in the EIS. OPG, however, has only considered the possibility that a HLW Project will be developed outside the Study Area and has developed its EIS on this basis. This position is wholly unsupported by evidence. OPG's failure to consider the possibility of a HLW Project within the Study Area is a critical omission in the cumulative effects assessment and materially skews the environmental assessment of the DGR Project.

16. A HLW Project is not a speculative, contingent or imaginary project nor is it even a hypothetical project. It is a certain and planned project. The NWMO is mandated under the *Nuclear Fuel Waste Act* to develop, propose to government and implement a long-term project for the management of all nuclear fuel wastes in Canada.[14] In 2005, NWMO recommended its adaptive phased management ("APM") process that would lead to "centralized containment and isolation of the used fuel in a deep geological repository in a suitable rock formation, such as the crystalline rock of the Canadian Shield or Ordovician sedimentary rock."[15] APM was accepted by the Government of Canada on June 14, 2007.[16]

17. In May 2010, NWMO commenced its process for the identification of a site for a deep geological repository for used nuclear fuel (the "Site Selection process"). On September 30, 2012, NWMO suspended expressions of interest for communities wishing to enter into the process.

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[14] *Nuclear Fuel Waste Act*, S.C. 2002, c.23, section 6.

[15] *Choosing a Way Forward: The Future of Management of Canada's Used Nuclear Fuel, Final Study*, Nuclear Waste Management Organization (November 2005) at 44 ("Choosing a Way Forward").

[16] *Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel*, Nuclear Waste Management Organization (May 2010) ("Moving Forward Together") at page 5.

18. OPG has recognized the need to include the HLW Project in its cumulative effects assessment for the DGR Project as a "reasonably foreseeable" project. In Section 10 of the EIS, Table 10.4-1 identifies a number of projects for which OPG has undertaken a cumulative effects assessment in relation to the DGR Project, including "Transfer of fuel to a Long Term Repository."[17] The description of the project states that the used fuel currently stored at the Western Used-Fuel Dry Storage Facility will, at some point in the future, be relocated to a suitable long-term storage site.[18]

19. OPG, however, only includes the possibility that a HLW Project will be developed outside the Study Area, and consequently, concludes that used fuel will be removed from the Study Area. OPG states:

> At some point in the future, used fuel and decommissioning wastes will be transferred to a long-term repository. The DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site. Any dose will be solely from the transport of used fuel, and as the used fuel is transferred off-site, will result in net reduction of dose.[19]

20. OPG has very recently confirmed both its acceptance of the need to include the HLW Project as a reasonably foreseeable project in the cumulative effects assessment and its position that only the removal of nuclear fuel wastes from the Study Area are reasonably foreseeable. On December 12, 2012, in response to EIS-06-233, OPG states: "[I]t is reasonably foreseeable that used fuel will be transported to a deep geological repository outside of the Bruce nuclear site."

21. OPG has provided no substantive explanation or justification for its decision to consider only the possibility of a HLW Project outside the Study Area. OPG offers

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17 EIS, *supra* note 1 at s. 10, table 10.4-1.

18 OPG notes that NWMO is mandated to seek an informed willing host community for the long-term management site and that used fuel transfer is not expected until 2035 or later. Despite this, OPG recognizes the project as reasonably foreseeable and includes it in the cumulative effects assessment. EIS, *supra* note 1 at s. 10, table 10.4-1.

19 *Id.* at 10-37, s.10.6.4.

only the nonsensical statement "the DGR is not for the long-term management of used fuel; therefore, the repository will be located off-site."[20]

C. *Evidence Demonstrates that it is as Likely or More Likely that the HLW Project Will be Developed Within the Study Area*

22. NWMO has now closed the period for expressions of interest from communities wishing to enter into the Site Selection Process. Some 21 communities located primarily in Ontario are engaged in the process. All five of the municipalities within the Study Area (the "Study Area Communities")—nearly a quarter of all communities engaged in the site selection process—have entered into the process. All five have passed initial screening and have issued council resolutions to move on to more advanced stages of the Site Selection process.

23. In the August 9 Submission SON explained that all available evidence demonstrates that the development of the HLW Project at the Bruce Nuclear site, or within one of the Study Area Communities, is reasonably foreseeable and that this outcome is as likely or more likely than the development of a HLW Project at any location outside the Study Area. At paragraphs 23 to 58 of the August 9 Submission, SON set out in detail the many factors which make it reasonably foreseeable that the HLW Project will be developed within the Study Area.

24. OPG has sought to demonstrate that the Bruce Nuclear Site, and the Study Area more generally, has characteristics that make it technically and operationally superior to any other potential candidate site for a deep geological repository for nuclear wastes. These characteristics, which accord with the very criteria that NWMO will consider as part of APM and Site Selection, include:

    a. Ideal geological conditions demonstrated through in-depth study for over a decade.[21]

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20 *Id.*

21 See August 9 Submission, at paragraphs 25 to 28.

b. OPG owned land, with sufficient available space for the construction of another deep geological repository, or expansion of the DGR Project.[22]

c. An existing secure and controlled nuclear site.[23]

d. Canada's only site with demonstrated and proven secure routes and protocols for transportation of nuclear wastes.[24]

e. Significant percentage of waste already on site (over 40% of Canada's used fuel waste).[25]

f. Existing "nuclear community" with all local municipalities expressing interest for a HLW Project.[26]

g. No identified policy constraints.[27]

25. The evidence makes clear that the Study Area Communities must be considered the "front runners" in the Site Selection process, based on OPG's and NWMO's own analysis. No other community—let alone a contiguous group of communities—currently in the Site Selection process, or elsewhere in Canada, has this collection of characteristics and circumstances marking its suitability for a HLW Project. No other site currently in the Site Selection process has had more than preliminary and cursory assessments of site suitability or technical feasibility. None are existing nuclear communities, none have undergone any assessment of the potential for safe and secure transportation of nuclear wastes, and of course, no other candidate site is currently owned and operated by OPG or currently holds a majority of spent nuclear fuel.

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22 *Id.* at paragraph 32.

23 *Id.* at paragraph 25.

24 *Id.* at paragraph 31.

25 *Id* at paragraph 29.

26 *Id.* at paragraph 33.

27 *Id.* at paragraphs 35 to 37. In addition, all communities have passed the initial site screening process, and more importantly, OPG and NWMO argue in their EIS that there are no policy constraints relating to the DGR Project, or any residual adverse impacts on VECs that cannot be mitigated. NWMO will certainly argue that this is *prima facie* evidence that the same analysis will apply to the HLW Project.

26. As explained at paragraphs 38 and 39 of the August 9 Submission, the DGR Project will become a "pilot project" for the HLW Project, allowing the NWMO to meet the requirements of its Adaptive Phased Management, generate extensive site specific data, develop and demonstrate operational processes, including transportation of nuclear wastes, processing and internment of wastes in the repository, and continue the building—or manufacturing— of "local community acceptance." If the DGR Project is approved and constructed, it will greatly *increase* the likelihood that the HLW Project will be constructed at the Bruce Nuclear site, or elsewhere within the Study Area.

27. Lastly, the Study Area Communities are a five-member cluster of communities within the Study Area. While it is exceedingly unlikely that any of the communities will be screened out for technical reasons at any stage of the Site Selection Process, even if one or more of the communities withdraws from the process, there is still a significant chance that some will remain, ensuring that a technically viable host community within the Study Area will remain through to the end of the process.

D. To Allow OPG to Ignore the Possibility of HLW Project within the Study Area will Materially Skew the Cumulative Effects Assessment and Undermine the EA

28. OPG has acknowledged that a HLW Project is a reasonably foreseeable project that must be addressed in the review of its DGR Project as part of the cumulative effects analysis. OPG baldly asserts, however, that the only possibility that must be considered is that the HLW Project will be developed outside the Study Area. This is simply wrong.

29. OPG implicitly takes the position that it is more likely that a HLW Project will be developed in one of the communities outside the Study Area currently in the Site Selection Process. By making this assumption, OPG's analysis has omitted critical cumulative effects considerations and seeks to demonstrate a net cumulative effect *benefit* to the Study Area through a reduction in radioactivity. OPG offers no

explanation for how it could have come to such a conclusion and OPG's position in this regard is flatly contradicted by all available evidence.

30. OPG has failed to consider, and has deprived the Panel and public the opportunity to consider, the many critical adverse environmental effects arising from the co-location of the DGR Project and a HLW Project within the Study Area. As explained at paragraphs 70 to 74 of the August 9 Submission, the DGR Project itself is a first-of-kind project that poses unique and untested challenges. These challenges are compounded, and significantly magnified, if the DGR Project is co-located with a HLW Project. The inclusion of a HLW Project as a cumulative effect project will require significant new data, study and analysis, including (i) assessment of radiation effects from normal operations, transportation and accidents and malfunctions, (ii) accidents and malfunctions probability scenarios, effects and response; (iii) operational considerations resulting from increased intensification and demand on resources; (iv) socio-economic effects, including public perception, stigma effects and social acceptance; (v) transportation issues relating to increased intensification and unique issues regarding transportation of fuel wastes; and (vi) technical feasibility considerations relating to co-location.

31. A HLW Project would cause impacts identical in kind, and to the same VECs, as the DGR Project, but with a greater magnitude given the nature of the nuclear wastes and the cumulative effect of the two projects. When a potential future project will have similar effects to the project under review, it militates strongly in favour of including that potential future project in the cumulative effects assessment.[28]

32. For example, as explained at paragraph 73 of SON's Application, transportation is a complex and critical issue for the long-term management of used nuclear fuel. However, transportation of nuclear wastes is completely omitted from the EIS. OPG has failed to address any stand-alone effects on the DGR Project resulting from the transportation of used nuclear full wastes or any cumulative effects resulting from

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28 August 9 Submission at paragraph 63.

the transportation of used nuclear fuel wastes in addition to the ongoing transportation of other nuclear wastes to the Study Area. Yet, OPG has failed to consider these matters despite including the removal of nuclear fuel wastes from the Study Area as an identified cumulative effects project.[29]

33. OPG recognizes that a stigma effect may result from the development of the DGR Project, which it defines as "negative images attached to a neighbourhood, community, other geographic area and its residents or to local products and services."[30] OPG, however, has included no analysis at all regarding the potential stigma effect from the DGR Project and the HLW Project in combination, or from the already extant confounding of the two projects in the media and among the public. This omission ignores, and patently biases, a critical consideration relating to the development of deep geological repositories. International experience demonstrates that stigma effects are definitive issues relating to the viability of nuclear waste repository developments.[31]

34. The need for social acceptance and public support for nuclear waste disposal programs has been a hallmark of Canadian law and public policy.[32] OPG appears to have recognized this to a degree, and describes its public engagement program it states is intended to fulfill the requirements under the *CEAA* and the *NSCA*.[33] OPG,

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29 Questions respecting transportation of nuclear wastes appear to have been a common concern expressed during OPG's public engagement. OPG states that one of the "Frequently Asked Questions" during open house meetings concerned transportation of nuclear wastes to the site. OPG stated response was "...The DGR Project will result in no changes to the volumes, means, or routes for transport." EIS at page 6-269. Again, this response reflects OPG's skewing of the cumulative effects analysis and of public understanding and perception. OPG fails to consider changes in volume, means, routes or types of nuclear waste transportation resulting from an HLW Project within, or outside of, the Study Area and in so doing *reverses* the potential adverse effects resulting from the two projects in this regard.

30 EIS at page 7-180

31 A recent example is the abandonment of the nuclear waste repository project in west Cumbria, England, which was reportedly based on the local communities concerns regarding the negative impacts on the local tourism economies. This was same issue has been cited as the reason for the abandonment of the proposed Yucca Mountain waste repository in Nevada, USA. "Nuclear Waste: Too Hot to Handle", New Scientist, February 18, 2013, available at http://www.newscientist.com/article/mg21729040.100-nuclear-waste-too-hot-to-handle.html.

32 August 9 Submission at paragraph 74.

33 EIS at page 2-1

however, has based its entire public consultation and engagement process on the basis that there is no connection between the DGR Project and the HLW Project, and further, on the basis that an HLW Project within the Study Area is not reasonably foreseeable.[34]

35. OPG has held out that there is evidence of strong overall support for the DGR Project from the community.[35] It is impossible to understand from the record what level of public support for the DGR Project would have existed, or exists today, if the connection between the DGR Project and the possibility of a HLW Project being developed within the Study Area was understood by or explained to the public. We must ask: "if people living in the area understood that the DGR Project might lead to the permanent disposal of all of Canada's used nuclear fuel waste within the same area, would they care?" This is a matter that must be addressed as part of a proper cumulative effects analysis.

36. The DGR Project and the HLW Project are the most significant nuclear projects in Canada's history. A failure to consider the possibility of a HLW Project inside the Study Area is no minor omission, it is a fundamental deficiency. The possibility of these two projects being developed within the same geographical region fundamentally changes the complexion and impacts of the DGR Project. Without consideration of the HLW Project within the Study Area, the environmental assessment of the DGR Project is rendered all but meaningless.

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[34] OPG makes this clear as part of its identified seven "key messages" for public consultation: "The DGR will not contain used nuclear fuel. It is for the long-term management of L&ILW. The long-term management project for Canada's used fuel is NWMO's Adaptive Phased Management (APM) Project. DGR and APM are separate, distinct projects." EIS at page 2-3.

[35] EIS Exec Summary at vii. OPG bases this on the results of a telephone survey, which OPG states indicated that 60% voted in favour of the DGR. EIS, Executive Summary at vi. This is profoundly misleading as there was no vote, and the telephone poll did not ask this question. In fact, the poll question made no reference at all to "the DGR", nor to "nuclear waste", "permanent disposal", or "underground disposal". The poll question did not even make clear reference to the location of the planned project. The question asked was: *"Do you support the establishment of a facility for the long-term management of low and intermediate level waste at the Western Waste Management Facility?"* EIS at page 2-10.

E. No Confusion Between the Projects, Rather Concern over the Connection Between the Two Projects

37. In its letter of February 1, 2013, the Panel identifies the possibility that some confusion may exist with regard to the information or lack of information provided to the SON by Ontario Power Generation or the NWMO regarding APM. To be clear, there is no confusion on behalf of SON regarding APM or the DGR Project. Rather, there is deep concern about a connection between the two projects that continues to be ignored and omitted from consideration in this environmental assessment.

38. As outlined in the August 9 Submission, SON has continuously raised concerns with OPG and NWMO regarding the connection between the DGR Project and a HLW Project. SON's concern has always been that the DGR Project would lead to the development of, or "pave the way" for, a HLW Project in the Study Area, and within SON Traditional Territory. OPG and NWMO have consistently failed to respond directly to this concern and have repeatedly and deliberately obfuscated the matter by stating that no used fuel would be placed in the DGR Project.[36]

39. OPG's public consultation and engagement activities reveal how common a concern this has been—the connection between the DGR Project and the future of used fuel disposal.[37] OPG has consistently responded that no used fuel would be placed in the DGR Project, or that the DGR Project and the HLW Project are separate and distinct projects. Both of these answers actively avoid the issue. There is no record in the EIS at all of OPG or NWMO acknowledging the possibility of a HLW Project being developed within the Study Area or any connection between the projects.[38] Rather, the record suggests that OPG and NWMO have relied on a formalistic distinction

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[36] For examples of this, refer to letters attached to SON's August 9 Submissions, at paragraphs 51 to 54, and EIS at page 2-17.

[37] For examples, see pages 2-17, 2-18, Table 2.3.4-1, Table 2.4.2-1, Table 2.5.1-1, page 2-75, Table 2.6.1-1 "Frequently Asked Question", Table 2.6.2-1.

[38] It is unclear from the record whether NWMO or OPG expressly held out, or relied on, the position that fuel would be removed from the Study Area. SON has submitted information requests seeking details of these many meetings, as well as the messages delivered by OPG and NWMO representatives, but these requests appear not yet to have been forwarded. SON IRs 1.19 and 1.20, submitted to Panel June 15, 2012.

between the two projects to assuage public concern about the connection between the two projects and the possibility of a HLW Project being developed within the Study Area.

40. In very recent submissions, OPG acknowledges the emergence of an increased number of NGO's and citizen's groups expressing concerns about the DGR Project and its connection to a HLW Project. OPG states in its report that "[m]any stakeholder opponents have expressed concerns that if OPG's DGR for low and intermediate level waste is successful, it will pave the way in Bruce County for NWMO's Adaptive Phased Management approach for used nuclear fuel."[39] It is clear from this statement that many stakeholders, in addition to SON, continue to express concern about the connection between the two projects, not confusion about which project is which. The report also demonstrates that OPG continues to obfuscate by asserting that no used nuclear fuel will be placed in the DGR Project or that the DGR Project and APM are separate and distinct projects, notwithstanding the clear concession in the EIS that a HLW Project is a reasonably foreseeable project, and the clear evidence set out herein and in the August 9 Submission that a community in the Study Area is a likely candidate for the ultimate siting of a HLW Project.

41. It would be highly improper for this review to aid in managing public concerns regarding the connection between the DGR Project and the HLW Project by allowing the deliberate exclusion from consideration of a HLW Project within the Study Area. Such a result would fly in the face of all available evidence and evident public concern and would fundamentally undermine the legitimacy of the review.

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[39] Ontario Power Generation's Written Submission for the Joint Review Panel's Socio-Economic Technical Information Session March 20, 2013, under cover letter dated February 21, 2013, page 18.

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Subject: Deep Geologic Repository Joint Review Panel – decision on request to include the Adaptive Phase Management (APM) siting process in the cumulative effects analysis for the Deep Geologic Repository for Low and Intermediate Level Radioactive Waste project review

Dear Chief Lee, Chief Kahgee and Mr. Robbins:

The Joint Review Panel (Panel) for the Deep Geologic Repository for Low and Intermediate Level Radioactive Waste project (DGR) received a request from the Saugeen Ojibway Nations (SON) that the Panel should direct Ontario Power Generation (OPG) to revise and resubmit its Environmental Impact Statement (EIS) to include "a project for the disposal of used nuclear fuel" in the cumulative effects assessment for the DGR review.

On February 1, 2013, the Panel issued a letter[1] to the SON and to OPG directing them to file their submissions as to whether or not the cumulative effects analysis of the DGR should include the consideration of the cumulative effects of the DGR in combination with the APM siting process. The submissions received by the Panel have been posted on the registry CEARIS # 898 (SON's submission) and CEARIS # 899 (OPG's submission). The SON's previous submissions and request on this issue are also posted on the registry CEARIS # 687 and CEARIS # 845.

The Panel has reviewed and carefully considered all submissions.

[1] CEARIS# 877

Mandate of the Panel-

The Panel is an administrative tribunal and as such, whatever powers or authority the Panel might want to exercise must be expressly conferred or expressly implicit in the governing authority. The Panel cannot on its own volition or without amendments to its mandate expand its powers to areas or considerations for which the authority has not been assigned or cannot be derived.

The Panel was established to conduct the review of the DGR Project in accordance with the *Terms of Reference for the Review* (ToR). The Minister of the Environment and the President of the Canadian Nuclear Safety Commission entered into an agreement[2] defining the Panel's mandate and authority, the scope of the project and the factors to be considered, the applicable regulatory framework together with the details as to how the review shall be conducted. Of particular importance with regard to the specific issue being considered by the Panel is the specific mention in the agreement that the Panel shall conduct the review in a manner that "discharges the requirements set out in the CEAA." [now CEAA 2012]

With regard to the consideration of the cumulative effects, Part IV, *Scope of the Environmental Assessment and Factors to be Considered in the Review*, of the ToR, provides that the review will include the consideration of the "environmental effects of the Project, including the environmental effects of malfunctions, accidents or malevolent acts that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project **in combination with other projects that have been or will be carried out:"**[3] (emphasis added)

Further, the *Guidelines for the Preparation of the Environmental Impact Statement for the Deep Geologic Repository for Low and Intermediate-Level Radioactive Wastes* (Guidelines), which were approved by the Minister of the Environment as required by the CEAA 2012, following a public consultation process provide further direction as to the information that OPG must submit for the review. More particularly, as stated in section 1.1 of the Guidelines, the purpose of the document is to identify to OPG the nature, scope and extent of the information that must be addressed in the EIS. Section 14 specifically directs the proponent to identify the "cumulative adverse and beneficial environmental effects of the project in combination with other past, present or **reasonably foreseeable** projects and/or activities within the study area." With regard to the cumulative effects assessment, the Guidelines further stipulate that a "reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included.

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[2] *Agreement to Establish a Joint Review Panel for the Deep Geologic Repository Project by Ontario Power Generation Inc. within the Municipality of Kincardine, Ontario,* Final Agreement signed December 2008

[3] The wording in the ToR reflects what the requirement was under 16(1)(a) of CEAA (now repealed) which requirement is materially the same in the new paragraph 19(1)(a) of the *Canadian environmental Assessment Act, 2012.*[3] (CEAA 2012)

Projects that are conceptual in nature or limited as to available information may be insufficiently developed to contribute to this assessment in a meaningful manner."

Decision-

The Panel has concluded that APM siting process does not meet the definition of project or physical activities to be included in the cumulative effects assessment under its ToR for the DGR Panel Agreement. The Panel has also concluded that the APM process is not a "reasonably foreseeable" project as set out in the Guidelines for the preparation of the Environmental Impact Statement for the DGR Project.

The reasons for this decision are presented below.

(1) Terms of Reference of the DGR Joint Review Panel Agreement.

The ToR stipulates that the Panel review will consider "....any cumulative environmental effects that are likely to result from the Project in combination with other projects that **have been or will be carried out**"

The Panel has concluded that the APM siting process does not meet the definition of a project that "will be carried out" for the following reasons:

- The APM siting process is a process which may ultimately result in a project for a used fuel repository but it is not yet a project under the ToR or under the CEAA 2012;
- The 21 communities that have expressed interest to enter the siting process have made no commitments to the NWMO and can exit the process at any time;
- Community acceptance is a prerequisite before a community can be selected and the APM process can move to the project phase. In the absence of community engagement or acceptance, there is no project to "be carried out";
    - The APM process is only in Step 2 (where communities learn more and an initial screening is conducted) and is far from Step 5 where communities identified as having technically suitable sites determine whether they are willing to accept the project and propose the terms and conditions on which they would have the project proceed[4]; and
- The technical and scientific screening evaluations of the suitability of one or more potential sites have not been completed, let alone any feasibility studies (Steps 3 to 6) required in support of a project being proposed to "be carried out." The

[4] Nuclear Waste Management Organization 2010. Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel.

> Nuclear Waste Management Organization estimates site evaluation to take 10 years or more[5];

The mandate for the DGR review as expressed in the ToR speaks of "cumulative effects" in terms of projects "**that have been or will be carried out.**" The term or expression "will be carried out" is not defined in the CEAA 2012 nor in the ToR. In previous instances where Courts were asked to interpret the exact same wording, Courts have determined that, despite the fact that the Canadian Environmental Assessment Agency's guide suggested that "it would be prudent to consider projects or activities that are in a government approval process as well", the Courts have concluded that uncertain projects need not be considered:

> Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered.[6]

Where the Courts have expanded the duty to include cumulative effects consideration beyond the legislative requirements of "have been or will be carried out" to include likely activities or other projects in the vicinity of a project, is where the terms of reference for that particular project had been modified and amplified to include cumulative effects. For example, in that particular instance, the mandate for that project with regard to the consideration of cumulative effects stated "in combination with other projects or activities that have been or **are likely to be carried out.**"[7] (emphasis added)

The requirements regarding cumulative assessment were not amplified in the Agreement that established the mandate of the Panel for the DGR review. The DGR Panel's ToR speaks in terms of projects "that have been or will be carried out." This language is consistent with what was in the CEAA and what is now in the CEAA 2012 and the DGR review requirements.

Recently, Parliament adopted the CEAA 2012. In the new Act, the legislator made many changes to the environmental assessment regime and had the opportunity to consider expanding or modifying the cumulative effects analysis requirements, but the requirements for the activities to be considered as part of the cumulative effects assessment remained unchanged: "other projects **that have been or will be carried out**."

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[5] Nuclear Waste Management Organization 2010. Moving Forward Together: Process for Selecting a Site for Canada's Deep Geological Repository for Used Nuclear Fuel.

[6] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage),*[2001] 2 FC 461, par. 41

[7] *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.,* [1999] 3 FC 425, where the Court, considering the "amplified" language of the Terms of Reference concluded that the panel had breached its duty to obtain all available information with respect to cumulative environmental effects.

The Panel is of the opinion that it is not within its mandate, nor within the Panel's authority, to amplify its mandate to consider projects or activities that are "likely" to be carried out.

For the above reasons, the Panel reiterates its conclusion that the APM siting process is not a project or activity, nor is it a project or activity that "will be carried out" under its ToR or under the CEAA 2012.

(2) Guidelines for Preparation of the EIS

The Guidelines direct the proponent to identify and assess the cumulative effects of the project in combination with "reasonably foreseeable projects." However, a "reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included."

The Panel has concluded that the APM is not a "reasonably foreseeable" project as determined under the EIS Guidelines and, therefore, the APM process does not have to be considered as part of the cumulative environmental effects assessment of the DGR for the following reasons:

- The APM siting process is a process, not a project;
- Any of the 21 communities now in the siting process can withdraw from the process at any time;
- Technical and scientific evaluations of the suitability of potential sites have not been done;;
- A credible cumulative effects assessment of any of the five communities now in Step 2 of the APM process and which are located in the Regional Study Area for the DGR Project is not possible because the technical and scientific evaluations that will be required, if and when the APM process moves from the siting process phase to a project phase have not been done;
- The Panel disagrees that Step 2 of the APM process translates into a "reasonably foreseeable" APM project within the Regional Study Area of the DGR Project; and,
- Kincardine is not one of the 21 communities that have expressed interest and the deadline for communities to register their expression of interest closed September 30, 2012
    - Therefore the, Municipality of Kincardine, the Bruce Nuclear Site and the Local Study Area of the DGR Project cannot be considered as a potential location of an APM project.

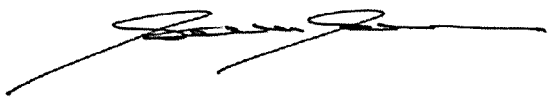
As mentioned above, the Municipality of Kincardine has not entered the siting process. As such, an APM project cannot be considered within the Municipality of Kincardine, nor can it be considered at the Bruce Nuclear Site. For that specific reason, the Panel is of the opinion that OPG, as part of the DGR environmental assessment, must consider the effects of the removal of the nuclear fuel wastes outside of the Bruce Nuclear Site and outside of the Study Area. The Panel disagrees that the inclusion of that consideration in the DGR review translates into the approval of the construction of an APM project.

Final Disposition-

For all the above-noted reasons, the Panel has determined that it does not need to consider the APM process in the cumulative effects assessment of the DGR and, as such, rejects the SON's request to direct OPG to amend the EIS.

In addition, if and when an application for an APM project is submitted, at that time the project will undergo a full environmental assessment that will incorporate the consideration of any cumulative effects associated with that project in combination with other activities, such as the effects associated with a DGR.

Sincerely,



Stella Swanson
Chair, Deep Geologic Repository Joint Review Panel

c.c.: James F. Archibald, Joint Review Panel Member
Gunter Muecke, Joint Review Panel Member

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BY EMAIL: DGR.Review@ceaa-acee.gc.ca

December 21, 2012

Dear Ms. Myles:

Re: Follow-up on SON Submission on Cumulative Effects

I write to follow-up on Saugeen Ojibway Nations' ("SON") August 9, 2012 submission to the Joint Review Panel (the "Panel"). SON's submission, entitled "Application for a Determination on the Scope of Review of OPG's DGR Project and the Inclusion of a Project for the Long-Term Management of High Level Nuclear Wastes," raised concerns with the failure of the proponent to include consideration of cumulative effects that would follow from the co-location of a deep geological repository for high-level nuclear wastes (a "HLW Project") within the study area for the planned deep geological repository for low and intermediate-level nuclear wastes. As SON explained in its submission, the failure of the proponent to include a HLW Project in its cumulative effects analysis distorts that analysis and renders the environmental impact statement—and thus the assessment being undertaken by the Panel—fundamentally flawed.

As SON explained in its submission, there is ample evidence demonstrating that Ontario Power Generation Inc. ("OPG"), the Nuclear Waste Management Organization ("NWMO") and the Canadian Nuclear Safety Commission ("CNSC") have taken and are continuing to take actions that significantly increase the likelihood that a HLW Project will be constructed in the study area and within SON Territory. As SON explained, the DGR Project currently being reviewed and the HLW Project are inextricably intertwined and a HLW Project is unquestionably a "reasonably foreseeable" project that must be included in the proponent's analysis of cumulative effects.

In the time since SON made its submission, additional information has come to light that further supports SON's position and reinforces the need for the proponent to revise its EIS to take account of the future construction of a HLW Project within the study area.

Arthur Pape* ON, EC, NWT, Yukon & Ont Bar
Richard B. Salter* Ont, EC, NWT & Yukon Bar
Jean Teillet* Ont, EC, NWT & Manitoba Bar
Alex Monem* Ont Bar
Colin Jesse Salter* Ont & NWT Bar

*Indicates Personal Law Corporation

As indicated in SON's August 9 submission, all five municipalities in the study area have formally entered NWMO's siting process to be considered host communities for the HLW Project. As of September 30, 2012, NWMO has suspended expressions of interest for communities that might be willing to host a HLW Project. Each of the municipalities in the study area has now passed the initial screening process to assess site suitability. On October 25, 2012, the municipality of Brockton issued a council resolution to advance to stage 3 of the site selection process. On November 19, 2012, the municipality of Huron-Kinross also passed a resolution advancing it to stage 3 of the process. On November 26, 2012, the municipality of Saugeen Shores passed a similar resolution. In addition to these activities, NWMO, as well as CNSC, continue to hold meetings and information sessions in the region on issues relating to the development of a HLW Project. Collectively, these developments demonstrate with certainty that the study area is being strongly considered as the site for the HLW Project, and consequently, that such a development is reasonably foreseeable.

As explained in SON's submission, on November 1, 2011, SON sent a letter to Albert Sweetnam, OPG Executive Vice President for Nuclear Projects. In that letter, SON asked, *inter alia*, that OPG commit that it "will not support the development of a used-fuel repository within SON Traditional Territory if SON opposes such a development" and that "OPG will not plan or develop additional nuclear waste management projects within SON Territory without the support of SON." At the time SON made its submission to the Panel, no response to that letter had been received. On October 24, 2012, SON received a response letter, attached here. OPG has refused to commit to SON that it will not support the development of a HLW Project within SON Territory if SON opposed the project. Rather, OPG states only that "OPG has heard your position regarding the siting of a [HLW] facility within SON territory and has and will continue to communicate your position to the NWMO Board of Directors."

With this response, OPG persists in its refusal to provide any assurances to SON that a HLW Project will not be sited within SON Territory. Further, OPG refuses to support SON in its position that no such project should be developed over SON objections, and refuses to state a position about OPG's preference or expectations regarding the siting of a HLW Project. Yet OPG continues to take the position in its EIS, and in response to Information Requests, that it is reasonably foreseeable that used fuel will be removed from the study area.

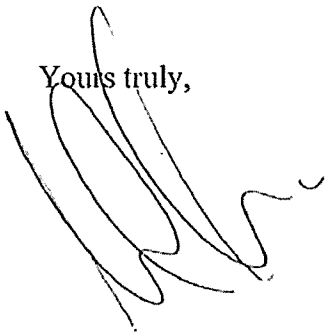
On December 12, 2012, OPG provided responses to information requests served by the Panel as IR Package #6. In its response to IR # EIS-06-233 OPG reiterated its position that a "reasonably foreseeable project" is "Transfer of Used Nuclear Fuel to a Long-Term Repository." OPG explained that "[I]t is reasonably foreseeable that used fuel will transported to a deep geologic repository outside of the Bruce nuclear site. Again, OPG

provides no justification for this statement and fails to address—or even mention—facts that suggest the greater likelihood of used fuel be transported into the study area. For example, OPG makes no mention of facts set out above that all of the municipalities within the study area have formally entered NWMO's siting process, have now passed the initial site screening stage and at least three have progressed to more advanced stages of the process.

OPG's continued insistence that used-fuel will be transported out of SON Territory for the purpose of this EA process, while refusing to provide assurances to SON in this regard, is self-serving, misleading and has the effect of perverting a fair and credible environmental assessment of its project.

SON feels it is necessary to ensure the Panel is aware of the continuing developments respecting the siting of a HLW Project within the study area of the DGR Project, and to ensure that the Panel has all necessary information available to it as it makes its determination on SON's submission and assesses the adequacy of the proponent's EIS. SON is ready to provide additional information or otherwise assist the Panel in any way that it can.

Yours truly,



Alex Monem

Encl.

EXHIBIT “I”

This is Exhibit ... I ... referred to in the affidavit of Randall Kahgee sworn before me, this 15th day of August 2013
A COMMISSIONER FOR TAKING AFFIDAVITS

Saugeen Ojibway Nations

Written Submissions to the Joint Review Panel respecting OPG's Darlington New Nuclear Power Plant Project (DNNP)

February 21, 2011

SON submissions will be limited to the following matters:

- SON's special interest in these proceedings
- The connection between this Project and OPG's proposed Deep Geological Repository for Low and Intermediate Nuclear Wastes
- The requirement that this Project not be approved on the basis of assumptions about the outcome of the EA review of the DGR Project and related consultation activities, and therefore:
    - OPG must show that it can safely and adequately carry out the project on the basis of on-site nuclear waste management alone.
    - OPG must show that it can manage nuclear wastes on-site for a sufficient period of time until long-term management facilities are developed in the event that OPG's DGR Project is not approved.
    - Approval of this EA, if granted, should promote the development of the Project in ways that are respectful and accommodating of future decisions on the use of SON traditional territory for nuclear waste management.

A. SON's Special Interest in these Proceedings

The Saugeen Ojibway Nations and its Territory

The Saugeen Ojibway Nations consist of the Chippewas of Saugeen First Nation and the Chippewas of Nawash Unceded First Nation. SON traditional territory extends east from Lake Huron to the Nottawasaga River and south from the tip of the Bruce Peninsula to the Maitland River system, 11 miles south of Goderich. SON traditional waters include the lakebed of Lake Huron from the shore to the international boundary with the United States and the lakebed of Georgian Bay to the halfway point. SON assert

Aboriginal and Treaty rights throughout its traditional territory, including an established commercial fishing right in the waters of Lake Huron and Georgian Bay.

The Bruce Nuclear Complex, including the OPG owned Western Waste Management Facility, is within SON traditional territory and interacts with significantly with SON traditional waters within Lake Huron. OPG has recently proposed the construction and operation of a Deep Geological Repository for Low and Intermediate Level radioactive wastes (LILW) within the Bruce Nuclear Complex. The Western Waste Management Facility currently accepts and stores LILW from all nuclear reactor facilities in Ontario. The proposed DGR for LILW would also act as a long-term disposal site for all LILW in Ontario.

OPG as part of its EIS for the Darlington NNPP Project has included nuclear waste management strategies that contemplate sending nuclear wastes off-site to management facilities for storage, and has indicated its preference to send nuclear wastes to the Western Waste Management Facility. Further, the Darlington NNPP Project contemplates the potential for OPG's proposed DGR project to act as a permanent disposal facility for LILW generated at that facility.

SON's commitment to ensuring the safety and security of the Territory

SON are the Aboriginal People who have lived in, cared for and relied on this territory since time immemorial, and who have had a treaty relationship with the Crown for countless generations. Under the Treaty of Niagara, SON and the Crown have agreed to jointly inhabit and govern this territory for the mutual protection and benefit of the aboriginal and non-aboriginal people who live here.

The Bruce Nuclear Complex is situated in the centre of SON traditional territory. SON residential communities lie within 20 kilometers of the site. SON ancestors are buried within the boundaries of the facility. And the facility is directly on and substantially interacts with Lake Huron, the traditional waters of SON - where they continue to exercise and rely on subsistence and commercial Treaty fishing rights.

It is for these reasons that SON has particularly deep and substantial interests in the safety of the Bruce Nuclear facility, including the Western Waste Management Facility. SON also has a substantial interest in all decisions relating to the management of nuclear wastes in Ontario. The Western Waste Management Facility, and now the proposed DGR, are central repositories for nuclear wastes within SON Territory. The decision to house these facilities within our Territory were all made with our involvement and without consultation.

SON's history of engagement

SON has a long history of engaging in positive way with nuclear proponents, the federal and provincial governments, and other parties, in efforts to ensure that its Aboriginal and Treaty rights, and way of life are not put at risk by planning and regulatory decisions respecting facilities at the Bruce Nuclear Complex.

SON and CNSC have worked together within a consultation framework that reflects a recognition of SON rights and interests within the territory. The early consultations led by CNSC for the Government of Canada resulted in the development of a unique Joint Review Panel Agreement, that recognizes the special role of SON within the territory, contemplates an active and central role for SON in the review of OPG's DGR Project, and develops a special role for the Joint Panel Review process in supporting the consultations with SON that are constitutionally mandated.

B. Relationship Between this Project and the Review of the OPG's Proposed Deep Geological Repository for Low and Intermediate Level Nuclear Wastes

1. OPG's Proposed Deep Geological Repository for Low and Intermediate Level Nuclear Wastes

OPG has commenced an application to the CNSC to prepare a site, construct and operate a Deep Geological Repository (DGR) on the existing Bruce Nuclear Site within SON traditional territory. The proposed DGR would receive low and intermediate level radioactive waste currently stored on the Bruce Site at the Western Waste Management Facility, as well as waste produced from the continued operation of OPG owned generating stations at Bruce, Pickering and Darlington.

OPG initiated a comprehensive study for this proposed project in January 30, 2006. The CNSC held a public hearing in Kincardine on the scope of the environmental assessment. As a result of that hearing the CNSC reported to the federal Minister of the Environment on the scope of the environmental assessment, public concerns, the possibility of adverse environmental effects and concerns regarding the comprehensive study's ability to address all of the questions raised by the project. The CNSC provided a recommendation to the Minister of Environment to refer the environmental assessment to a review panel. On June 29, 2007, the Minister of the Environment announced that the DGR project would be referred to a joint review panel.

A joint review panel under the *Canadian Environmental Assessment Act* and the *Nuclear Safety and Control Act* is being established to undertake an environmental assessment and regulatory review of this project. The review will examine environmental assessment issues that relate to the full life cycle of the project, from site preparation through to operations, as well as a preliminary examination of decommissioning and post-decommissioning activities.

The joint review panel process will also consider OPG's application for a site preparation and construction licence. Separate licence applications and regulatory reviews would be required for OPG to operate the DGR and decommissioning the facility. As a result of the unique Joint Review Panel Agreement, the process will also accept evidence that will support constitutionally mandated consultations between SON and Canada on issues relating to the Project.

It is expected that OPG will submit its final EIS to the Joint Review Panel in the spring of 2011, and the technical review period will commence.

2. Management of Low and Intermediate level nuclear wastes in OPG's Darlington NNPP Project

The proposed Darlington NNPP Project will generate significant quantities of Low and Intermediate Level radioactive wastes (LILW) as part of the routine and ongoing operation of the reactors and ancillary features during the approximately 60 year function period. (EIS 2.4) OPG expects that the type and activity levels of LILW will be similar to that currently being produced at the Darlington NGS and other OPG reactors.

Two Alternatives Considered

OPG has proposed two alternative means for managing low and intermediate-level waste as part of the Project description for EA purposes: (EIS 2.6.10)

1. On-site management with appropriate packaging and interim storage in modular storage buildings, including compaction of a portion of low level radioactive wastes. Eventually, the waste would be transported to an appropriate facility for long-term management.

2. Transport off-site of the un-processed waste to an appropriately licensed off-site facility, (e.g. the Western Waste Management Facility – WWMF) for processing, packaging and storage. Eventually, the waste would be transferred to an appropriate facility for long-term management.

OPG states that both options were assessed individually including aspects associated with transportation to an off-site facility. It states further that this approach ensured appropriate consideration of the likelihood that even if it was elected to ship LILW to an off-site facility, it is likely that some quantity of waste would continue to be managed on-site because of the impracticality of shipping (an example is given of over-sized components such as steam generators).

OPG concludes both alternatives are feasible

OPG has concluded that both alternative means for the management of LILW are feasible from an environmental assessment perspective, as neither form of management will result in significant residual effects (EIS 13.2.3).

Further, OPG states that it will make its own decision respecting which alternative it will implement based on a variety of practical considerations, such as cost, proven performance and availability. It states:

> "the EIS has shown that the Project, when evaluated in the context of its bounding envelope, and considering the identified mitigation measures, will not result in any significant adverse effects on the environment. Therefore, any and all of the alternative means included in the bounding envelope will be acceptable elements of the Project from an environmental perspective. (As an example; the bounding envelope included the range of reasonable alternatives for managing Project-related LILW. Because the bounding envelope assessed was determined to not result in residual adverse environmental effects of significance, all considered alternatives for management of LILW are deemed acceptable for the NND Project. (EIS 13.2)
>
> Because all alternative means have been proven to be acceptable from an EA perspective, as Project planning continues, OPG will make decisions concerning aspects of its implementation including the alternative means addressed in this EIS that are within its control. In addition to environmental considerations, those decisions will ultimately include factors such as cost, proven performance, availability and constructability".

OPG preference for off-site management

OPG, however, expresses a preference between the two alternatives – to transport LILW off-site to OPG's operating Western Waste Management Facility. It states that this preference is based on the fact that OPG has a well-established program, including physical plant and other related infrastructure at the WWMF for the management of these materials and the use of that facility will eliminate the need to replicate the program elsewhere. (EIS 13.2.3)

Long-Term Waste Management

OPG's EIS does not specify how long-term management of LILW will be accomplished, only that LILW will eventually be transferred to an appropriate licensed facility. (EIS 2.6.10)

In its Nuclear Waste Management TSD, August 2009, OPG identifies "potential options" for long-term management. Section 4.3.1 states:

> For the purposes of the NND EA, the long-term management facility is not specifically defined, other than it must be a suitably licensed facility. The potential options would include:
>
> a) Revising the Hosting Agreement and allowing the proposed LILW DGR to fill up to its current design capacity, then conducting a further EA in the future for an expansion, if required. For example, if not all of the existing reactors are refurbished and life-extended, then the wastes from the existing fleet will be

less than the design capacity of the DGR allowing room for some additional wastes from new-build.

b) Maintaining the wastes in interim storage (either at the DMWF or the WWMF) until such time as a decommissioning waste repository or other facility is available. The decommissioning waste repository has not yet been designed, so its size can easily be adjusted to accommodate extra wastes from NND.

It should be noted that OPG has stated in most recent FAQ, published April 2009, that it is currently conducting a separate EA on the potential construction of a DGR for low and intermediate level radioactive wastes at Kincardine, and that while the EA does not specifically address wastes from new reactors, the hosting agreement with the Municipality of Kincardine does not exclude these wastes from the Deep Geological Repository Project (FAQ p.26).

C. The Darlington NNPP Must Not be Approved based on Assumptions about the Outcomes of the Deep Geological Repository Review or Related Consultation Processes

SON is concerned that decisions made in these proceedings be made on the appropriate basis as they relate to OPG's plans for nuclear waste management at the Darlington NNPP Project. And, that no decisions are based on assumed outcomes of the Panel review of OPG's proposed Deep Geological Repository, or consultations between SON and Canada on related matters, including the future of nuclear waste management in SON traditional territory.

1. The Panel must be satisfied that the Project can be carried out on the basis of on-site nuclear waste management

OPG has concluded that both proposed alternatives for the management of LILW are feasible for the purposes of the current EA, as neither alternative will result in significant residual environmental effects. However, it has expressed a preference to manage LILW wastes by shipping them off-site to the Western Waste Management Facility. OPG states that it will ultimately make these decisions based on the considerations such as cost, proven performance and availability.

SON submits that the current EA should not be approved on the basis of assumptions about the future of the Western Waste Management Facility or any other proposed management alternatives that require the shipment of nuclear wastes to the Bruce Nuclear Complex.

OPG has commenced a EA on its proposed DGR for LILW. SON expects that the JRP process for that Project will be an extensive and fundamental review of the management

of LILW in Ontario, its history and future. It will also deal specifically with the Project scope of the proposed DGR, including its capacity, permissible waste inventory and cumulative effects associated with, among other things, future expansion of such a facility.

Under the terms of the JRP Agreement, that EA review will also accept evidence that will be the basis for consultations between SON and Canada relating to the matters assessed in the review. Accordingly, issues relating to the past and ongoing operations of the Western Waste Management Facility, as well as the continued shipping, storage and possible disposal of LILW in SON territory will all be the subject of extensive consultations.

SON submits that any decision respecting the EA for the Darlington NNPP should anticipate and accommodate all possible outcomes relating to the continued use of SON Territory for the storage and disposal of nuclear wastes, including the possibility that these options will no longer be available in the future.

It is for this reason that the Panel must be convinced that OPG has shown that it can safely and adequately manage the storage of LILW from the Darlington NNPP through on-site management alone. If the Panel is not satisfied that OPG has established that its on-site management alternative poses no significant residual environmental effects, the EA should not be approved.

Further, SON submits that the Panel should require OPG as part of the conditions of its EA approval, if granted, to continue to develop its Project on the basis of on-site storage of LILW until such time as certain critical decisions respecting the future of the WWMF and OPG's proposed DGR have been made.

2. <u>The Panel must be satisfied that the Project can be adequately manage nuclear wastes on-site until long-term management solution is developed and accepted</u>

OPG has not specified any plan for the long-term management of LILW. Instead, its EIS states only that there will be an eventual need to ship wastes to a licensed facility for long-term management.

However, in its Nuclear Waste Management TSD, OPG considers as an option for long-term storage its proposed DGR at the Bruce Nuclear Complex. That document contemplates the possibility of a "revisiting the Hosting Agreement" to allow the DGR to fill up, and to commence a new EA to expand the facility as necessary to accommodate Darlington wastes.

CNSC Staff appear to accept OPG's planning based on the eventual approval and construction of the proposed DGR facility. CNSC Panel Member Document, January 31, 2011 states: "if the LILW is transferred to the Western Waste Management Facility, it is likely that no additional storage buildings will need to be constructed as the Western Waste Management Facility, since the bulk of the wastes will be generated after 2018 <u>when the LILW Deep Geological Repository is assumed to be in operation</u>." (page 34)

OPG has planned its continued expansion of nuclear facilities on the basis of the existence of its proposed DGR at the Bruce Nuclear Complex. It has articulated no plan for the eventuality that the DGR Project is not approved, or that it is approved on the basis of a substantial different capacity or permitted inventory. On the contrary, OPG has clearly contemplated the eventual expansion of the DGR facility, including the renegotiation of a hosting agreement with the Municipality of Kincardine, to accommodate new wastes generated from the proposed Darlington NNPP Project.

SON is very concerned that these planning decisions by OPG prejudge the outcome of the Panel review process for the DGR Project, as well as any related consultations processes with SON.

SON is also concerned that a decision made in this EA Review to approve the Darlington NNPP Project could put additional pressure on the need to approve and construct a long-term nuclear waste disposal facility on an expedited basis.

SON submits that the Panel should only approve the EA for the Darlington NNPP Project if it is satisfied that OPG can adequately manage the LILW on-site and for sufficient periods of time to allow the development of a long-term management option that may take many many years to develop. Specifically, OPG must demonstrate that it can manage LILW adequately and safely even if its proposed DGR at the Bruce Nuclear Complex is not approved.

SON further submits that as a condition of an approval, if granted, OPG should be required to articulate its plan for the longer term storage and management of LILW to accommodate various scenarios in the development of long-term management options for LILW.

3. SON was never consulted on decisions to permit centralized storage of nuclear wastes in its Traditional Territory

As stated above, the Bruce Nuclear Complex lies in the heart of SON traditional territory, the area it occupies also contains the gravesites of our ancestors and our spiritual places. The complex as a whole interacts in significant ways with the surrounding environment, both land and water.

The Bruce Nuclear Complex has been the site of centralized storage of low and intermediate level radioactive wastes for many decades - initially at the Radioactive Waste Operations Site 1, and Radioactive Waste Operations Site 2 facilities, and currently at the renamed Western Waste Management Facility. It appears that nuclear wastes have been transported here from reactors throughout Ontario since the early 1970's, and the practice continues today. Even now, OPG expresses its preference to continue to follow this pattern of waste disposal in its current plans for expansion at the Darlington site.

SON has never been consulted on these early and profound decisions to store nuclear wastes from all reactors in Ontario within its traditional territory. SON was not consulted on the siting decisions for OPG's proposed DGR Project for the long-term, centralized disposal of all LILW in Ontario within our traditional territory.

Currently, there are no alternative plans for centralized storage and final disposal of low and intermediate level nuclear wastes in Ontario. We fear that continued planning decisions and regulatory approvals that permit the maintenance and expansion of nuclear power generation in Ontario will put ever greater pressure on our territory to be the repository of all nuclear wastes for the Province.

Such an outcome, in the absence of a deep and robust consultations with SON, is unacceptable. Consultations must be aimed at identifying SON interests in the future use of its territory as it relates to nuclear waste management, and accommodating those interest where necessary. SON must have a central and meaningful role in decisions about the ongoing and future use of its territory for nuclear waste management.

We ask the Panel to ensure, through its review and decisions, that OPG's current Project does not compound the problems facing SON and its territory. We ask that any approval made respecting the Project act to promote the development of the Project in ways that are respectful and accommodating of future decisions on the use of SON territory for the management of nuclear wastes.

EXHIBIT "J"

ONTARIO POWER GENERATION

Tom Mitchell
President & Chief Executive Officer

700 University Avenue, H19 A24 Toronto, ON M5G 1X6

Tel: 416-592-2121 Fax: 416-971-3691
tom.mitchell@opg.com

This is Exhibit J referred to in the affidavit of Randall Kahgee sworn before me, this 15th day of August 20 13

A COMMISSIONER FOR TAKING AFFIDAVITS

August 7, 2013

Chief Arlene Chegahno
Chippewas of Nawash Unceded First Nation
RR #5,
Wiarton, ON N0H 2T0

File: 08410.1-0016.07.1P

Chief Randall Kahgee
Saugeen First Nation
RR #1
Southampton, ON N0H 2L0

Dear Chief Kahgee and Chief Chegahno:

Ontario Power Generation (OPG) is committed to building long-term, mutually-beneficial working relationships with First Nations and Métis communities proximate to its present and future operations.

OPG is committed to developing these relationships on a foundation of respect for the languages, customs, and political, social and cultural institutions of First Nations and Métis communities.

OPG values its relationship with the Saugeen Ojibway Nations (SON) and respects the desire of the SON people to have accountability for how nuclear waste is managed in their territory today and in future generations.

OPG will not move forward with the construction of a deep geologic repository for low and intermediate level nuclear waste until the SON community is supportive of the project.

The determination of the SON's support shall include diligent efforts by OPG and the SON for the good faith, informed resolution of any impacts on the SON's aboriginal and treaty rights identified in the environmental assessment of this project or project impacts otherwise agreed to through the ongoing engagement between SON and OPG.

Where the SON community has other interests related to OPG's activities beyond the impacts of this project, OPG will work with the SON leadership to create frameworks that allow for meaningful and on-going consultation to occur. This includes specifically a commitment to identify and resolve legacy issues and to develop a framework to create a long-term relationship.

OPG's commitments herein are made on its own behalf, and not on behalf of the Crown in Right of Ontario or any other government agency. OPG's commitments are in keeping with its First Nations and Métis Relations corporate policy, which includes building long term, mutually- beneficial working relationships on a foundation of respect. These commitments are not intended to add or detract from OPG's and the SON's legal rights.

Sincerely,

Tom Mitchell
President
Ontario Power Generation