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The law of the land:

Amnesty International Canada's position on the conflict over logging at Grassy Narrows

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The people of the Asubpeeshoseewagong Netum Anishinaabek (Grassy Narrows First Nation) in northwestern Ontario have said no to industrial development in their traditional territory. For more than a decade, the Band Council, individual trappers and others in the community have written to the federal and provincial governments and to the forestry companies operating in their territory to denounce clear-cut logging as incompatible with traditional ways of life.[1]

In December 2002, youth from Grassy Narrows, frustrated over government failure to address their concerns, initiated a blockade of the main logging road nearest the community. That blockade still stands today. On January 17, 2007, the Grassy Narrows Chief and Council, Clan Mothers, Elders Council, Trappers Council, Youth Council, and blockaders, declared a moratorium "on further industrial activity in our Traditional Territory until such time as the Governments of Canada and Ontario restore their honour and obtain the consent of our community in these decisions that will forever alter the future of our people."[2]

On September 8, 2007 the government of Ontario announced the appointment of former Supreme Court of Canada Justice Frank Iacobucci to lead discussions between the province and Grassy Narrows over management of the forest and other related issues.[3] These talks are scheduled to begin in November 2007. To date, no interim measures have been taken to protect the rights of the people of Grassy Narrows while these talks are proceeding. Logging and other industrial development has not been stopped.

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[1] Correspondence dating back to 1998 has been posted at: http://freegrassy.org/learn_more/resources/official_correspondence/. Amnesty International has reviewed similar correspondence from specific individuals in the community that spans a period of ten years or more.
[2] Open Letter from Grassy Narrows Chief and Council, Environmental Committee, Blockaders, Trappers, Clan Mothers, Elders, Youth Re: Moratorium on industry in our Traditional Territory, and opposition to MNR tender process. http://www.amnesty.ca/grassy_narrows/voice_of_the_people.php
[3] Ontario Ministry of Natural Resources. "Ontario Enters into Forestry Discussions with Grassy Narrows." Press Release, September 8, 2007. http://www.mnr.gov.on.ca/mnr/csb/news/2007/sep7nr_07.html

The recently concluded provincial inquiry into the September 6, 1996 police shooting of Indigenous protester Dudley George at Ipperwash Provincial Park in Ontario found that many of the province's laws, regulations, and policies must be be brought in line with its legal responsibilities toward Indigenous peoples.[4]

Canadian courts have affirmed that any decisions with the potential to impact on the rights and interests of Indigenous peoples require the involvement of the affected people. In every instance, there is a minimum legal duty to carry out prior consultation with the sincere intent of accommodating Indigenous concerns. In most instances, the legal obligation toward Indigenous peoples will require governments to take further steps to protect their rights from harm.[5]

While Canadian courts have tended to see these requirements as generally – but not always – falling short of a duty to obtain Indigenous peoples' consent, international human rights standards have increasingly recognized free, prior and informed consent as an important safeguard for Indigenous peoples' survival and well-being.[6]

In the case of Grassy Narrows, the Province of Ontario has long failed to uphold its responsibility to respect Indigenous rights. The province did not carry out meaningful consultation before licensing large scale logging activities. And it has ignored clear calls from the community to stop the logging and other industrial development until consent is given. This is despite the fact that past decisions by the federal and provincial governments, such as the relocation of the reserve community and the

[4] Report of the Ipperwash Inquiry, 2007, Volume 2. http://www.ipperwashinquiry.ca.
[5] See Delgamuukw *v*. British Columbia, [1997] 3 S.C.R. 1010. Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 3 S.C.R. 388.
[6] For example, Committee on the Elimination of Racial Discrimination, General Recommendation XXIII concerning Indigenous Peoples, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).

contamination of the river system in the 1960s, have had catastrophic social and economic impacts from which the people of Grassy Narrows are still struggling to recover.

The history of displacement, cultural upheaval and social strife at Grassy Narrows illustrates the tragic consequences of government failure to protect the human rights of Indigenous peoples. Given this history, it is urgent that governments in Canada take all reasonable precautions to ensure that their decisions do not contribute to any further erosion of Indigenous peoples' ability to enjoy their rights.

All governments must consistently meet the minimum legal duty of carrying out meaningful consultation before taking decisions with the potential to impact on the human rights of Indigenous peoples. And when dealing with issues such as land rights that are central to Indigenous identity and indispensable to their well-being and survival, Amnesty International believes it is vital that governments commit to proceeding only with the free, prior and informed consent of the affected people.

This briefing paper is informed by a research mission to Grassy Narrows in April 2007 that involved representatives of Amnesty International Canada and the global movement of Amnesty International, as well as independent experts on Indigenous rights issues. There were other visits to the area in 2006 and 2007 and ongoing exchanges and interviews with members of the community, as well as with representatives of business and the provincial government. In releasing these preliminary findings, Amnesty International Canada is renewing its call for the Government of Ontario to respect the moratorium declared by the people of Grassy Narrows and to halt all clear-cut logging and other industrial development in the traditional territory until free, prior and informed consent has been given.

The purpose of this report is not to assert that the human rights violations faced by the people of Grassy Narrows are unique or exceptional. In Treaty #3 territory, elsewhere across Ontario, and throughout the country, there are countless instances in which the land and resource rights of Indigenous peoples are not being upheld. Those violations in turn undermine the exercise of other fundamental rights including rights to culture, health, housing, and an adequate, minimum livelihood. By focusing on Grassy Narrows in this report, Amnesty International intends to draw attention both to the urgency of the situation faced by that particular community as well as the broader issues of Indigenous rights in Canada that the experience of Grassy Narrows so starkly illustrates.

This report is part of a larger, ongoing program of work in which Amnesty International is working alongside Indigenous peoples in Canada and around the world to promote greater understanding of, and respect for their rights. For more information, see www.amnesty.ca.

1. "Everything about being Anishinaabe is the land"

The Asubpeeshoseewagong or Grassy Narrows First Nation is an Anishinaabe community in northwestern Ontario. Grassy Narrows is within the territory covered by the 1873 peace and friendship treaty known as Treaty #3.[7] Under the treaty, a 36 square kilometre reserve was established for the exclusive use of the people of Grassy Narrows. The people of Grassy Narrows also continue to use – and assert rights over – an area of more than 6,000 square kilometres beyond the reserve boundaries.[8] This traditional territory corresponds almost exactly to the area covered by trap lines still maintained by the families of Grassy Narrows.

Under the terms of Treaty #3, the Anishinaabe have the right to:

> …pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes…

There are more than 1,200 registered members of the Grassy Narrows First Nation, of whom approximately 800 live in the community.[9] In addition to trapping, the people of Grassy Narrows continue to use their traditional territory for hunting, fishing, harvesting wild rice, gathering berries and plant medicines, carrying out ceremonies, and educating and counselling their

[7] The 28 First Nations in Treaty # 3 are together represented by the Grand Council of Treaty # 3 http://www.treaty3.ca

[8] "Traditional lands are the lands on which the Crown recognized Aboriginal title when it made a treaty with the First Nations owners of those lands." While traditional lands outside the reserves may have become known as Crown lands, "the control over them by the Crown is burdened by treaty obligations. Virtually all of the treaties were made with the assurance to the First Nation that its people could continue to sustain themselves on their off-reserve traditional lands." Report of the Ipperwash Inquiry. Op cit., p. 55.

[9] Department of Indian and Northern Affairs Canada. Registered Indian Population by Sex and Residence 2005. http://www.ainc-inac.gc.ca/pr/sts/rip/rip05_e.pdf

youth. Many points on the landscape are associated with traditional stories and teachings.

"Everything about being Anishinaabe is the land," says Roberta Keesick, a trapper and grandmother from Grassy Narrows. "Without the land that's pretty well cultural genocide."

Like other Indigenous peoples throughout Treaty #3 and across Canada, the people of Grassy Narrows have suffered from severe disruptions to their lives and culture as a result of historic government policies. These policies include the forced removal of children to residential schools, the persecution of Indigenous religious societies, and the exclusion from federal Indian status of women who married non-status men.

For the people of Grassy Narrows, the struggle to overcome the legacy of these assaults on their identity and culture has been greatly compounded by the impact of additional upheavals in their community in the 1960s and 1970s. These include the relocation of the community, the severe mercury poisoning of the river system and the subsequent collapse of the commercial fisheries (see section 4 below).

Despite these profound threats to their culture and way of life, the people of Grassy Narrows are clearly determined to maintain and, where necessary, rebuild their relationship to the land. Community members estimate that at least half the residents of Grassy Narrows continue to use the rivers and forests for part of their income and subsistence or for ceremonial purposes. Access to and control of the natural resources of the traditional territory are seen as a vital part of their cultural identity and a key to getting out of the current trap of poverty and dependency created by the erosion of traditional ways of living on the land.

"We want our people to have a place where we can regain who we are," says Roberta Keesick. "There are few of us that have jobs and a lot more that don't have jobs, that barely meet the basic needs each month. That's not a good way to live. My hope is not just something for us, but that something good will be set for our kids and for future generations so our people will no longer have to live in poverty like they live now."

During Amnesty International's research mission to Grassy Narrows, we spoke with many young people who clearly saw life on the land as an essential part of their own lives and who want to ensure that this way of life will not be denied to their children. We also witnessed innovative projects intended to pass on traditional ways of living. For example, trapper Andrew Keewatin Jr. runs a training program for unemployed youth that teaches traditional subsistence skills, such as ice fishing and log building. Where these skills have already been lost to the community, elders from other communities are brought in to help restore this knowledge.

The site of the anti-logging blockade, located outside the reserve on the traditional territory, has emerged as a unique space where youth and elders are able to spend time together on the land. "What was taken from us a long time ago, I feel we can bring back," says Chrissy Swain, one of the young leaders of the blockade. "Not to go back in time, but to use what we have left. A lot of young people come here to learn how to fish, to learn how to hunt, to learn how to trap, to go pick berries, wild rice. We have ceremonies out here. There are a lot of young people that have come down to get their names. I feel like we're already accomplishing that much."

2. Domestic law: "significantly deeper than mere consultation"

Canadian courts have recognized a clear obligation on the part of all governments to involve Indigenous peoples in decision-making whenever their rights are at stake. For example, in 1997, in the landmark Delgamuukw decision[10], the Supreme Court of Canada considered the implications of the Crown's duty to deal honourably with the Indigenous peoples over whose lands and lives it had assumed jurisdiction. The Court found that the "honour of the Crown" requires "the involvement of aboriginal peoples in decisions taken with respect to their lands." The Court concluded that

> …even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation.

In 2004, in a case involving forestry operations on land claimed by the Haida Nation in British Columbia, the Supreme Court of Canada concluded that the government had an obligation to protect traditional land use even where Aboriginal title to the land has not been established or recognized.[11] In this decision, the Supreme Court found that the federal and provincial governments have a minimum duty, applicable in every instance where the rights of Indigenous peoples are at stake, to "act with good faith to provide meaningful consultation appropriate to the circumstances". This obligation arises as soon as the government considers taking action that could impact on Indigenous peoples' rights.

In 2005, in a case involving a dispute over road building on the traditional land of the Mikisew Cree in Alberta, the Supreme Court determined that

[10] Delgamuukw *v.* British Columbia, [1997] 3 S.C.R. 1010.
[11] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511.

there was a minimum duty to carry out meaningful consultation, even though the land had been formally surrendered to the Crown and traditional land use rights are restricted by the terms of the treaty.[12] The court found that the government was still "under an obligation to inform itself of the impact its project will have on the exercise of traditional land use rights, to communicate its findings, and attempt to deal with the community's concerns in good faith, and with the intention of substantially addressing [these] concerns."

Canadian courts have further defined this minimum duty of consultation and accommodation as requiring the government to:

- Inform itself in advance of any relevant Indigenous interests and how they might be affected.
- Openly share this information with the affected peoples.
- Demonstrate willingness to make changes to the planned actions based on the views expressed by Indigenous peoples.
- Undertake this process in a manner appropriate to the cultures and needs of Indigenous peoples.[13]

In the Haida decision, the Court also found that meaningful consultation requires "good faith on both sides".[14] The Court stated that Indigenous participants "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached…".

Indigenous peoples in Canada have also identified factors that they consider essential to meaningful consultation and accommodation, such as adequate funding to participate fully and equitably in the process and time to

[12] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 3 S.C.R. 388.
[13] See for example, Halfway River First Nation v. British Columbia (Minister of Forests), [1999] B.C.J. No. 1880.
[14] Haida. Op cit.

appropriately engage all the concerned sectors within their own communities. In their Great Earth Law, or Manito Aki Inakonigaawin, the Grand Council of Treaty #3 defines consultation as a process of engaging the Anishinaabe nation as a whole carried out "in light of Anishinaabe traditions".[15]

If meaningful consultation is the starting point in the reconciliation of Aboriginal and non-Aboriginal interests, Canadian courts have also said that in most circumstances, government obligations will actually go beyond this minimum duty. In 1997, the Delgamuukw decision stated that situations requiring only the minimum duty of meaningful consultation are "rare".[16] In some situations, the Delgamuukw decision found, the legal duty of the Crown "may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands".

In the Haida decision, the Court found that interim measures are often necessary to protect Indigenous interests during the typically long and arduous process of establishing their rights. The decision stated:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests…. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

In the Haida decision, the Court found that so long as there is a "a strong *prima facie* case" for Aboriginal or treaty rights, the potential impact on these

[15] Manito Aki Inakonigaawin, Unofficial consolidated copy. http://www.treaty3.ca/grandchief/laws-policies.php
[16] Delgamuukw. Op cit.

rights "is of high significance to the Aboriginal parties", and if "the risk of non-compensable damage is high", governments should take what the court termed "deep consultation, aimed at finding a satisfactory interim solution".[17] While noting that "precise requirements will vary with the circumstances", the Court said that appropriate measures may include disclosure of written documentation, demonstrating that Aboriginal concerns were in fact considered by the government, and explaining the impact these had on the final decision. Other measures cited in the Haida decision include the use of dispute resolution procedures such as mediation.

Despite acknowledging the difficulties faced by Indigenous peoples in establishing their rights, in the Haida decision the Court concluded that the requirement of consent recognized in the Delgamuukw decision "is appropriate only in cases of established rights, and then by no means in every case".[18] The Court said that the duty of meaningful consultation requires

> … a process of balancing interests, of give and take… Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

Indigenous peoples' organizations point out, however, that such a balance is far from being the reality in Canada. Indigenous peoples' organizations have emphasized the importance of consent as a critical principle of Indigenous sovereignty and a tool for ensuring their own rights do not continue to be ignored in favour of other sectors of society. The Grand Council of Treaty #3

[17] Haida. Op cit.
[18] Ibid.

has also argued that a clear, formal process for Indigenous peoples to give their consent can help to avoid future disputes and provide certainty to Indigenous and non-Indigenous interests alike. Treaty #3's Great Earth Law, for example, states that before decisions are made that impact on the land and rights of the Anishinaabe, the people must grant their consent "subject to conditions for conserving the environment within Treaty #3 territory and protecting the exercise of rights of the Anishinaabe".[19]

3. International law: free, prior and informed consent

International human rights law recognizes that states are obligated both to refrain from activities that directly violate human rights and to promote the full enjoyment of these rights. Over the last quarter century, there has been growing recognition within the United Nations system and regional human rights bodies that ownership, use and control of lands and natural resources are critical to a wide range of Indigenous peoples' human rights. Erica Daes, the former chair of the UN Working Group on Indigenous Populations, has written:

> Few if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food and shelter, the right to self-determination, and the right to exist as a people.[20]

Similarly, the UN Human Rights Committee has repeatedly found that the established right to maintain and practice one's culture – protected under the International Covenant on Civil and Political Rights – creates an obligation for

[19] Manito Aki Inakonigaawin. Op cit.
[20] UN, Commission on Human Rights, Special Rapporteur Erica-Irene A. Daes, *Final Report on Indigenous peoples' permanent sovereignty over natural resources*, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004

all states to take proactive measures to protect Indigenous peoples' unique relationship to land. The committee has observed that:

> ...culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Aboriginal peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[21]

Other UN human rights treaty bodies have come to parallel conclusions about the fundamental importance of secure land rights and a meaningful role for Indigenous peoples in decision-making. The expert committee responsible for the interpretation and oversight of the UN Convention on the Elimination of All Forms of Racial Discrimination has called on states to:

- Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

- Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs…

- Recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or

[21] Human Rights Committee (HRC), General Comment No. 23: The rights of minorities (Art. 27), 50 Session. 1994. UN Doc. CCPR/C/21/Rev.1/Add.5 at para. 7. See also, Communication No. 167/1984 (Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada), views adopted on 26 March 1990, and Communication No. 197/1985 (Kitok v. Sweden), views adopted on 27 July 1988.

> used without their free and informed consent, to take steps to return those lands and territories.[22]

These principles are reaffirmed in the UN Declaration on the Rights of Indigenous Peoples. The Declaration was adopted by the UN General Assembly on September 13, 2007 after more than two decades of deliberation. Its provisions include:

> Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, 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 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Although Canadian officials had played a critical role in the development of the Declaration, Canada voted against the Declaration at the UN General Assembly. Government representatives have described the Declaration as incompatible with the Canadian Constitution, national legislation and existing treaties with Indigenous peoples. Responding to these claims, the Chief Commissioner of the Ontario Human Rights Commission, Barbara Hall, has said "These concerns are not valid. The declaration is not a document that creates new rights but one that would actually help clarify Canada's existing obligations under domestic and international law."[23]

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[22] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII concerning Indigenous Peoples, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).
[23] Barbara Hall. "UN vote needs Canada's support." *The Toronto Star*, September 13, 2007.

While the UN Declaration and the recommendations of treaty bodies and special mechanisms are not in themselves binding on states, they provide authoritative guidance for the interpretation of state obligations, including those established in binding human rights conventions. National and provincial laws, including the the Constitution Act, 1982 and the Canadian Charter of Rights and Freedom, should also be interpreted in light of these recommendations. As former Chief Justice Dickson observed, international human rights instruments were part of the context in which the Charter was drafted and adopted, and should be viewed as "…a relevant and persuasive source…" for Charter interpretation. Moreover, the Court has emphasized that "…the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents".[24]

4. "Think of all the injustices that have been done to us"

The Anishinaabe in what is now northwestern Ontario and eastern Manitoba were among the first Indigenous peoples to enter into treaty negotiations with the newly created Canadian state after Confederation. Critical elements of Treaty #3, including an implicit tension over the control of lands and resources, would be repeated in the other post-Confederation treaties.

Governments in Canada have tended to view these treaties as "surrenders" that "extinguish" Aboriginal rights and transfer sovereignty over traditional lands to the Crown. However, the historical record shows that the Indigenous leaders who took part in the negotiations saw the treaties in quite a different light. As the Ipperwash Inquiry noted:

> First Nations people regarded and continue to regard the lands they agreed to share as their 'traditional lands' where the resources had for

[24] Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 348-350.

many years provided their sustenance. Although, in making treaties with the Crown they agreed to give up their exclusive Aboriginal titles to these lands, they never intended to abandon them. They continue to regard these lands as a major source of their sustenance, and as fundamental to their identity. The promise of continued access to these lands was a crucial condition of their consent to the treaties.

Every treaty in Ontario supported the expectation that treaty lands outside of reserves would be shared. Promises made by Crown representatives encouraged these expectations, but despite these promises, colonial and Canadian authorities referred to these lands as 'surrendered lands'. The term 'surrendered lands is inaccurate and misleading. It suggests that the treaties were made after the Indian nations somehow 'lost' these lands. Moreover, 'surrendered lands,' contrary to the terms of the treaties, suggests that the First Nations gave up their continuing rights or interests in their traditional lands. A new approach to Aboriginal relations in Ontario requires a shared understanding of the rights and interests of First Nations in these traditional lands. [25]

In a submission to Ipperwash Inquiry, the Grand Council of Treaty #3 stated:

When the document known as Treaty No. 3 was signed October 3, 1873, our ancestors signed an agreement with the Crown on behalf of the Queen to share our land and resources, and ensure peace with the new settlers coming into our territory. We, the people of Treaty #3 nation, maintain that that relationship with the Crown has not been changed with our consent. Meaning that we have yet to define how

[25] Report of the Ipperwash Inquiry, Op. cit. p. 107. In contemporary treaty making, the federal government continues to seek the "extinguishment" or "release" of Indigenous peoples' inherent rights, a practice condemned by the United Nations Human Rights Committee (Concluding observations of the Human Rights Committee: Canada. 07/04/99. CCPR/C/79/Add.105) and the UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples (Report of the Mission to Canada. 2 December 2004. E/CN.4/2005/88/Add.3.).

> the relationship with the federal government on behalf of the Crown, and the province and its own 'Crown', fits in. You will have to understand we are a sovereign nation, we have never given up our sovereignty and never will, and it is the federal and provincial government's responsibility to respect and learn how to deal with us as a nation.[26]

Certainly, the Indigenous signatories to these treaties could not have predicted that the federal government would soon exert control over all aspects of life on the allocated reserves or that provincial governments would assert exclusive power to make decisions about the use of their traditional lands.

The province of Ontario began to license and regulate Indigenous hunters, trappers and fishers in 1947. Although treaties such as Treaty #3 had recognized a distinct right to maintain traditional ways of living on the land, the province issued licenses and set quotas for Indigenous hunters, trappers and fishers on essentially the same basis as non-Indigenous people, without respect for their distinct rights. By the 1950s, this approach was extended to the wild rice harvest.

While asserting jurisdiction to license and regulate these traditional land uses, the province took little responsibility to protect these practices from the industrial development it was also licensing and promoting. Furthermore, Indigenous peoples have shared in little of the wealth generated by mining,

[26] Submission to the Ipperwash Inquiry by Grand Council Treaty #3. http://ipperwashinquiry.ca/policy_part/projects/pdf/Chiefs_of_Ontario-Grand_Council_Treaty_3.pdf. See also the "Paypom Document", the notes made for Chief Powasson at the signing of the 1873 treaty. http://www.treaty3.ca/grandchief/gct3-paypom-treaty.php and Wayne E. Daugherty. *Treaty Three Research Report*. Treaties and Historical Research Centre, Indian and Northern Affairs Canada. 1986. http://www.ainc-inac.gc.ca/pr/trts/hti/t3/index_e.html.

logging or dam construction that has displaced their traditional uses of the land. [27]

The Report of the Ipperwash Inquiry states, "From an Aboriginal perspective, the history of the management of land and resources in Ontario is a history of exclusion and the denial of rights."[28] Although the Inquiry noted that in recent years some First Nations in Ontario have been able to reach agreements with the federal and provincial governments to assume joint control of resource management in their traditional territories, it also pointed out that such agreements have been reached "only after years of turmoil and conflict".[29]

In the 1950s, the provincial energy utility Ontario Hydro built two generating systems on the English River system without consultation with the Anishinaabe people. The dams at Ear Falls and Whitedog led to fluctuations in water levels and flows that dramatically reduced the important wild rice harvest in much of the Grassy Narrows territory. These fluctuations also affected habitat of some of the furbearing animals trapped by the people of Grassy Narrows. Four decades passed before Ontario Hydro settled with Grassy Narrows First Nation for the damage caused by construction, operation and repair of facilities on the English River system.

In 1961, the federal government began to relocate the people of Grassy Narrows within their reserve lands. At the beginning of the decade, most community members lived on family-based land holdings spread out over the islands and rivers that were central to their way of life. By 1970, most had been relocated to a densely packed village that had more limited access to the waterways and whose poor soil could not sustain their traditional gardens. The chief at the time, Robert Keesick, recalls that the move was

[27] Jean Teillet. "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario" Research paper prepared for the Ipperwash Inquiry, 2006. http://www.ipperwashinquiry.ca/policy_part/research/pdf/Teillet.pdf
[28] Report of the Ipperwash Inquiry. Op cit. p. 106.
[29] Ibid. p. 61.

made voluntarily so that the community would finally have access to long promised services, such as an elementary school. A number of researchers have noted the reluctance of many community members to make the move and their sense of being coerced by the federal government through its control of basic services on the reserve.[30]

Just as the people of Grassy Narrows were beginning to experience the impact of the relocation on their economy and society, they learned that the river system had been contaminated by a massive release of mercury from an upstream pulp mill. It is estimated that between 1962 and 1970, the Reed pulp and paper plant in Dryden released more than 9 metric tons of untreated inorganic mercury into the English and Wabigoon Rivers, which flow through both the Grassy Narrows and Wabaseemoong First Nations[31]. Interaction with the ecosystem had begun transforming the inorganic mercury into lethal methylmercury, which would work its way up the food chain, concentrating in greatest quantities in the fish that many in these communities ate daily. The process would continue for decades.

A number of Grassy Narrows residents who were tested by government agencies in the 1970s were found to have mercury levels in their blood and tissues many times higher than Canadian health officials consider safe. A disturbingly high incidence of symptoms consistent with mercury poisoning began to be reported at Grassy Narrows. These include deterioration of motor control, memory loss, speech impairment and diminishing eyesight, as well as miscarriages and children born with developmental disabilities.

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[30] Anastasia M. Shkilnyk. *A Poison Stronger Than Love: The Destruction of an Ojibwa Community*. New Haven: Yale University Press, 1985. Christopher Vecsey. "Grassy Narrows Reserve: Mercury, Pollution, Social Disruption, and Natural Resources: A Question of Autonomy." American Indian Quarterly, II:4 (Autumn 1987), pp. 287-314.

[31] Len Manko. "The Grassy Narrows & Islington Band Mercury Disability Board: A Historical Report 1986-2001, A Condensed Version." Prepared for The Grassy Narrows and Wabaseemoong Independent Nations Mercury Disability Board. September 2006. p. 8. http://www.mercurydisabilityboard.com/booklet.pdf

However, it has proven extremely difficult to convince the federal and provincial governments of the link between these symptoms and the known exposure to high levels of mercury. For example, Health Canada (the federal department of health) has argued that the symptoms could be linked instead to diabetes, multiple sclerosis or alcoholism.[32]

Nevertheless, concern over the health impacts of mercury contamination led the Province of Ontario to close the commercial fishery on English and Wabigoon Rivers in 1970 and to issue advisories discouraging eating fish from these waters. At the time, commercial fishing, guiding for sport fishers, and work in the fishing lodges were the main sources of income in the community. Unemployment rates soared.[33]

The collapse of the cash economy, combined with the impact of the relocation on traditional subsistence activities, led to an extreme social crisis at Grassy Narrows. Anthropologist Anastasia Shkilnyk, who carried out a detailed study on behalf of the community in the 1970s, wrote: "They say they live in crisis because they were uprooted. And before new roots could be established, they were faced with another blow: mercury poisoning of the English-Wabigoon river system."[34] Symptoms of this crisis documented by Shkilnyk – based on police and hospital records and her own observations – included widespread binge drinking, high rates of suicide especially among young girls, and drastically escalating violence including homicide, gang rape and other sexual assault and child abuse.[35] Such devastating social strife would inevitably impact on generations to come.

The federal government initially offered small compensation packages to a few Grassy Narrows fishers who were put out of work by the closing of the fishery. This compensation amounted to less than $6,000 in total. It took 14

[32] CBC News. "Reserves demand inquiry into mercury dumping." September 3, 2004. http://www.cbc.ca/canada/manitoba/story/2004/09/03/mb_mercury20040903.html.
[33] Anastasia M. Shkilnyk. Op cit. pp 199-202.
[34] Ibid. p. 53.
[35] Ibid. pp 11-49.

years from the closing of the commercial fishery before the federal government agreed to provide significant financial assistance to deal with the losses to the economy and traditional way of life.

In July 1984, the federal government provided an initial compensation package of $2.9 million for an economic development fund and $1.5 million for improved social services.[36] In a subsequent out of court agreement, which the Grassy Narrows and Wabaseemoong First Nations were required to accept as "settlement of all claims and causes of action, past, present and future,"[37] the federal government, the provincial government, and Great Lakes Forest Products (which had purchased the Dryden operation) agreed to contribute a further $16.67 million to fund programs for the two communities.

While continuing to dispute the link between mercury contamination and deteriorating health in the communities, the federal and provincial governments agreed that part of these funds would be used to establish a Mercury Disability Board (MDF).[38] Under this program, applicants are entitled to a maximum of $800 per month compensation, depending on the extent of mercury contamination in their bodies and the severity of their symptoms[39]. Most who are awarded compensation receive much less and at least as many are turned down entirely. As of April 30, 2007, 168 adults and 18 children at Grassy Narrows were receiving some level of MDF compensation.[40]

Ontario agreed in 1984 to resume negotiations with the Grassy Narrows First Nation to supplement and complement the agreement reached with Canada and Great Lakes Forest Products the previous year. Those negotiations have

[36] Indian and Northern Affairs Canada. "Fact Sheet: English-Wabigoon River Mercury Compensation." April 23, 2004. http://www.ainc-inac.gc.ca/pr/info/ewr_e.html
[37] *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*. June 17, 1986 (c. 23). Available at: http://laws.justice.gc.ca/en/ShowFullDoc/cs/G-11.4/en.
[38] Len Manko. Op. cit. p. 19.
[39] Ibid. p 21.
[40] These updated numbers were provided by the Mercury Disability Board.

proceeded in fits and starts over the years, but to date no agreement has been reached.

Apart from the individual decisions of the compensation board, the federal and provincial governments have done little to monitor the ongoing health impacts of the mercury contamination or the current levels of mercury in the fish and other wild animals being consumed in these communities. Amnesty International's research team observed considerable uncertainty and fear among the people at Grassy Narrows about whether or not a traditional diet high in fish is safe today.

An independent 2003 study of mercury levels in fish was the first such study published since the 1970s.[41] That study found that three commonly eaten fish – bass, northern pike and walleye – still had mercury levels exceeding government guidelines. Acknowledging the value of maintaining a traditional diet, the study recommended that residents of Grassy Narrows and Wabaseemoong should eat these species sparingly, rather than changing their traditional diet entirely.

The Grassy Narrows First Nation and the Grand Council of Treaty #3 have called for a through public inquiry to establish the current levels of mercury contamination and the extent to which affected communities are suffering health problems. They have said that such a study include a comparison with First Nations whose waters were not contaminated, to clarify whether or not mercury poisoning is the most probable cause for the severe health problems that have been observed in Grassy Narrows and Wabaseemoong.[42]

The ongoing concern over mercury contamination is just one example at Grassy Narrows that remedies offered to the community for the abuses of the past have not brought justice or provided the community with adequate

[41] Dr. Laurie Chan, et al. "'Our Waters, Our Fish, Our People': Mercury Contamination in Fish Resources of Two Treaty #3 Communities." Centre for Indigenous Peoples' Nutrition and Environment. 2004.
[42] CBC News. September 3, 2004. Op. cit.

opportunity to rebuild itself. "Think of all the injustices that have been done to us," says band manager Arnold Pelly. "The relocation of the community. The poisoning of the water. The kidnapping of our children who were forced to go to residential school. Every time one of our elders dies, that's another person who has died without knowing any justice in their lives."

While negotiating compensation for the economic impacts of mercury contamination, the Chief and Council of Grassy Narrows argued that the best way to rebuild the community was to

> …return to the people of Grassy Narrows the exclusive use of, or the control over access to, land and resources that have traditionally been relied on for food or barter, on which a substantial portion of the population still depends for a livelihood, and which are the key resources for the future economic and social development of the community.[43]

This vision was never accepted by the federal and provincial governments. Even while mercury compensation was being negotiated, the province of Ontario reached an agreement with Reed Ltd. to expand its operations in the area. In 1980, the federal and provincial governments reportedly gave Reed's successor, Great Lakes Forest Products, grants of $48 million to expand its operations in the region.[44] Over the next decade, large-scale logging would come to be seen by an increasing number of people at Grassy Narrows as a growing threat to their traditional way of life.

[43] Grassy Narrows Band, "Presentation of the Grassy Narrows Band to the Governments of Canada and Ontario at the Opening Session of the Mediation Process," 1979. Quoted in Christopher Vecsey. Op. cit.. p. 298.
[44] Christopher Vecsey. p. 300.

5. "If that's consulting, they have to do better than that."

There has been commercial logging in the Grassy Narrows traditional territory since 1926. And, of course, Indigenous peoples were felling trees in the territory long before the arrival of Europeans. Since the 1980s, however, there has been growing concern within the community about the large areas of forest being cut down each and cumulative effect it will have on the ecosystem and traditional uses of the land.

Individual trappers report that they have been able to harvest very few furs because 70 percent or more of their traplines have been cut. Community members also say that the large-scale, industrial methods of logging and replanting may mean that the forest will never recover the richness of plant and animal species necessary to the subsistence and cultural life. Trapper and former Grassy Narrows Chief Bill Fobister told Amnesty International that his family's trapline has been destroyed by clearcutting. "It's a drastic change," says Fobister. "It's devastating to see."

Since 1997, Abitibi Consolidated of Montreal has been responsible for almost all the logging carried out in the Grassy Narrows traditional territory. The wood is consumed primarily by Abitibi's pulp mills and by a building materials plant in Kenora run by the U.S.-based multinational forestry company, Weyerhaeuser. Wood also goes to a smaller company, Kenora Forest Products. Since the 2006 closure of a Kenora mill owned by Abitibi, the province has been considering reallocating this wood to another company.

The scale, pace and methods of logging in the region are outlined in a twenty-year land use management plan, and elaborated in a series of more localized five year plans. The process is overseen and approved by the Ontario Ministry of Natural Resources according to provincial legislation and guidelines but the forest industry plays a central role in the planning. In the development of the latest five year plan, to take affect in 2009, there are

Indigenous representatives in the planning group along with non-Indigenous interests such as recreational users and tourist operators.

Ministry officials told Amnesty International that the Band Councils of the affected First Nations were all invited to help design a distinct consultation process for the development of the 2009 plan, but none took up this invitation. There was no distinct consultation process for the any of the previous five year plans. Indigenous representatives who sit on the planning team or on advisory committees are not given any greater weight or consideration than the other participants, despite Indigenous peoples' distinct rights under Treaty #3 and other Canadian law.

Abitibi acknowledges that it is logging in the midst of a "rights and compensation dispute" between Grassy Narrows and the provincial government. However, the company describes its own practices as guided by respect for human rights and environmental sustainability.[45] Abitibi points out that there is an opportunity for Indigenous peoples to map significant areas to be excluded from cutting and that the Province provides funds to First Nations to assist in such mapping. Since 2003, Abitibi has maintained a 10 km buffer zone around the reserve where it does not log. In a meeting that year with Grassy Narrows First Nation Chief Simon Fobister, Abitibi made a proposal to work with the community and the province "to develop alternative harvesting patterns and practices".

The Grassy Narrows Band Council says it has chosen not to participate in the planning process run by the Ontario Ministry of Natural Resources or in talks with the forest companies because nation-to-nation negotiation over management of the traditional territory is the only way to ensure the community's rights are protected.

[45] Letter to Amnesty International, March 29, 2006.

Current and former members of the Band Council, as well as representatives of other sectors of the community, such as the Trappers' Council and the Youth Council, have expressed great scepticism and mistrust of provincial planning processes that they say have failed to protect their right to maintain their traditional way of life. "We want an area where we can practice our traditional lifestyle, a place to hunt, a place to just enjoy," says trapper Joe Fobister.

> "I think we've still got a long way to go. The replies we were getting [from the Ministry of Natural Resources] six years ago are still the replies we are getting today. If we have a concern they say bring it to the information centre [part of the standard consultation process]. But we haven't seen any results coming from these information centres or whatever they have set up. If that's consulting they have to do better than that."

These words have been echoed by the Grand Council of Treaty #3. In a submission to the Ipperwash Inquiry, the Grand Council expressed its support for the anti-logging blockade at Grassy Narrows as a necessary step to protect the rights of the community. The submission stated: "All the processes set up by the Ministry of Natural Resources and Abitibi are just that – processes. The processes did nothing to attain any changes to the clear-cutting."[46]

Abitibi says that it has been working with the Grand Council for more than two years to improve its own understanding of treaty rights and Indigenous perspectives, and to share that insight with their contractors. Representatives told Amnesty International that Abitibi is currently considering making a formal application to the Grand Council to obtain the nation's consent to the company's operations in the territory but has not done so yet.

[46] Grand Council Treaty #3 Submission to the Ipperwash Inquiry. Op. cit.

Both Abitibi and Weyerhaeuser point to the fact that their operations provide much needed jobs in the region. Weyerhaeuser, for example, says that its Kenora mill employs 163 people, approximately a quarter of whom are Indigenous.[47] It is not apparent, however, why these mills could not be supplied with wood from other territories where Indigenous communities do not object to large-scale logging.

In 2006, the Province of Ontario began circulating draft guidelines designed to assist government ministries in understanding and meeting their obligation to carry out meaningful consultation with Indigenous peoples.[48] The guidelines are concerned almost exclusively with what the Supreme Court of Canada found in Delgamuukw to be the "rare instance", where the province is required only to meet the minimum duty of meaningful consultation and accommodation. The draft guidelines note only that "*in some limited circumstances* — for example, involving serious infringements of Aboriginal title — an Aboriginal community's consent may be required" [emphasis added].

The Ipperwash Inquiry concluded that the province needs more than guidelines to ensure that the rights of Indigenous peoples are respected in the decision-making process. The Inquiry called for provincial laws, policies and regulations to be rewritten in collaboration with Indigenous peoples, to ensure that government obligations toward Indigenous peoples are fully respected and upheld. The report of the Inquiry also expressed concern that the guidelines should not encourage government employees to make arbitrary and unilateral decisions about when consultation is required and the level of accommodation or consent that will be undertaken. The Inquiry's recommendations emphasized the need both for greater collaboration

[47] Letter to Amnesty International September 13, 2007.
[48] Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights. Ontario Secretariat for Aboriginal Affairs, June 2006. http://www.aboriginalaffairs.osaa.gov.on.ca/english/news/draftconsultjune2006.pdf

between government and Indigenous peoples and for the creation of independent and impartial mechanisms to resolve disputes.

On September 8, 2007 the provincial government announced the appointment of former Supreme Court Justice Frank Iacobucci "to begin discussions with Grassy Narrows First Nation focusing on sustainable forest management partnership models and other forestry-related matters, including harvesting methods, interim protection for traditional activities and economic development".[49]

The announcement was welcomed by Chief Simon Fobister of Grassy Narrows as "an important first step towards ending longstanding encroachments on our Traditional Territory without the consent of the people of Grassy Narrows".[50] In his statement, Chief Fobister went on to re-emphasize the community's call for a "moratorium on all on-the-ground activities such as forestry harvesting and mining explorations while discussions with Justice Iacobucci proceed".

[49] Ontario Ministry of Natural Resources. Op cit.
[50] Grassy Narrows First Nation. "Grassy Narrows Chief Applauds the Appointment of Justice Iacobucci by Ontario." Press release. September 11, 2007. http://freegrassy.org/media_center/news_article/?uid=2393

6. Recommendations

Ontario has the largest Indigenous population of any province or territory in Canada. Just and fair resolution of the numerous outstanding land disputes is an urgent necessity to improve the lives of Indigenous women, men and children in Ontario, and to ensure the survival and well-being of their societies and cultures into future generations.

The Ipperwash Inquiry heard extensive testimony and expert opinion over a period of more than two years. The report of the Inquiry includes a significant body of recommendations on critical aspects of land and resource disputes that, if implemented, would set positive examples for the rest of the country and, indeed, the world.

Moving ahead with these recommendations, however, requires a genuine partnership with Indigenous peoples and their representative organizations. The participation of the federal government will also be essential. This will take time. For communities like Grassy Narrows, where the situation can be accurately described as a crisis, immediate and decisive action is also required to demonstrate the province's good faith and to prevent further erosion of human rights.

Amnesty calls on the Province of Ontario to:

1. Respect the wishes of the people of Grassy Narrows and implement an immediate moratorium on logging and other industrial development in the traditional territory unless and until, free, prior and informed consent has been given.
2. Collaborate with Indigenous peoples in Ontario to bring all provincial laws, regulations and policies into line with the duty of consultation and accommodation, as recommended by the Ipperwash Inquiry, and to make it clear that there are instances where accommodation must

lead to the free, prior and informed consent of the Indigenous people whose rights are at stake. In doing so, the Province should consider its responsibilities under both national and international laws and standards.

3. Establish a permanent, independent and impartial agency to oversee and facilitate the fair and timely resolution of land and treaty disputes in Ontario, as recommended by the Ipperwash Inquiry.
4. As recommended by the Ipperwash Inquiry, engage constructively with Indigenous peoples and their representative bodies to develop resource management and revenue sharing arrangements consistent with inherent and treaty rights, so that Indigenous peoples can benefit from, and enjoy meaningful control over, the lands and territories vital to their survival and well-being.

Amnesty International calls on the Government of Canada to:

1. Work collaboratively with Indigenous peoples and their representatives in Treaty #3 to ensure ongoing monitoring of mercury contamination in the English and Wabigoon Rivers and the health impacts at the Grassy Narrows and Wabaseemoong First Nations. As called for by the Grassy Narrows First Nation and the Grand Council of Treaty #3, this should include a comparative study of health problems in these and other communities to objectively determine the likelihood that mercury poisoning is the source of the severe health problems experienced at the Grassy Narrows and Wabaseemoong First Nations. The findings should be made accessible to the affected communities.

Amnesty International calls on Abitibi Consolidated and Weyerhaeuser to:

1. Work toward a voluntary suspension of logging in the Grassy Narrows traditional territories and/or establish alternative sources for wood fibre, taking into consideration the fact that the people of Grassy

Narrows have not given their consent to large-scale logging in their traditional territory and have asked both companies to support a moratorium on logging.

2. Adopt and abide by codes of conduct consistent with the requirement of consultation and consent in national and international law.