



## 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

## Table of Contents

<b>Letter of conveyance from Chief Paul Nadjiwan</b> .....	1
Abstract.....	1
<b>A. A SHORT HISTORY OF THE CLAIMS, RIGHTS AND RESPONSIBILITIES ASSERTED BY THE SAUGEEN OJIBWAY NATIONS (AND THE DISCOMFORT THEY CAUSE)</b> .....	3
1. Pre Contact.....	3
2. Contact and Treaties .....	5
3. Our Land Claims.....	8
4. Our Fishing Rights.....	11
5. Communications .....	13
6. Our Rights and Responsibilities Are Our Work .....	13
<b>B. THE SIEGE (1990-2005)</b> .....	18
1. Oka (September 1990) .....	18
2. Burial Ground Vigil, Owen Sound, December 1992.....	21
a) Chronology .....	21
b) The vigil by media release.....	24
c) Why the Burial Ground Vigil was Successful .....	30
d) Dealing with the Backlash.....	31
3. Fishing Rights, 1990-1995.....	34
a) Background.....	34
b) Chronology .....	38
c) Ross Forgrave (1991).....	46
d) Fish Buy Protest (1992).....	48
e) Jones-Nadjiwon (1993).....	48
f) Presentations to RCAP (1993) .....	51
g) Ontario Federation of Anglers and Hunters—Creating a dangerous atmosphere (1991-1995).....	52
h) Sportsmen’s clubs (1992-1997).....	58
i) Political Opposition (1991-1995) .....	61
j) Hate in the Schools (1992-1995).....	64
k) Hate in the Press (1992-1995) .....	66
l) Summer of Hate (1995).....	69
m) MNR Intransigence (1995-present).....	74
4. Potential for Future Confrontation.....	78
a) Around Resources.....	78
b) Around Burial Grounds .....	84
c) Around a Failure to Consult.....	89
d) Early Warning Signs of Confrontation.....	91

C. CONNECTING THE DOTS: LESSONS LEARNED.....	93
1. The Importance of Community.....	95
2. The Importance of Legal Strategy and Historical Research.....	95
3. The Importance of Responsibility.....	97
4. The Importance of Communications.....	99
5. The Importance of the Honour of the Crown.....	102
6. The Importance of Law and Order.....	110
a) Law.....	110
b) Order.....	111
c) The Need for Legislative Reform.....	113
7. The Importance of Allies.....	120
8. The <i>Impotence</i> of Official Institutions for Redress.....	124
D. RECOMMENDATIONS.....	126
1. From other Inquiries.....	126
a) The Manitoba Aboriginal Justice Inquiry.....	126
b) The Report of the Task Force on Multiculturalism in Saskatchewan, 1989 ..	127
c) Saskatchewan Commission on First Nations and Métis peoples and Justice Reform 2004.....	127
d) Royal Commission on Aboriginal Peoples.....	130
e) From the Royal Commission on the Donald Marshall Jr. Prosecution.....	139
2. From United Nations’ Human Rights Documents.....	140
a) International Covenant on Civil and Political Rights.....	141
b) Draft Declaration on the Rights of Indigenous Peoples.....	141
4. From the Saugeen Ojibway Nations’ “Issues of Jurisdiction”.....	144
5. From the Chippewas of Nawash Unceded First Nation.....	147
a) Improving the Relationship Between the Crown and First Nations.....	148
b) Legislative Reform.....	156
c) Access to Natural Resources.....	160
d) Management of Resources.....	163
e) Heritage and Environmental Assessments.....	166
f) Education.....	168
g) Redress.....	171
h) Implementation of the Recommendations of the Ipperwash Inquiry.....	175
<b>Bibliography.....</b>	<b>176</b>
<b>List of Appendices.....</b>	<b>180</b>
<b>Appendix A.....</b>	<b>1</b>
<b>Agenda for Community Forum at Chippewas of Nawash Unceded First Nation, September 8 &amp; 9, 2005.....</b>	<b>1</b>
<b>Appendix B.....</b>	<b>1</b>
<b>Bibliography of Reports and Research by the Saugeen Ojibway Nations.....</b>	<b>1</b>
<b>Appendix C.....</b>	<b>1</b>
<b>Three Public Education Materials.....</b>	<b>1</b>

<b>Appendix D</b> .....	1
<b>Map of the Saugeen Ojibway Nations Traditional Territories</b> .....	1
<b>Appendix E</b> .....	1
<b>Definition and Checklist for Racism</b> .....	1
<b>Appendix F</b> .....	1
<b>Background into Call for an Inquiry into the Events of the Summer of 1995</b> .....	1
<b>Appendix G</b> .....	1
<b>MNR Conservation Officer Joel Tost Retires</b> .....	1
<b>Appendix H</b> .....	1
<b>Best Practices ... What Works</b> .....	1
The Four Deadly Sins that Doom Relationships.....	1
Early Warning Signs .....	2
For First Nations Asserting Rights and Claims .....	3
For First Nations acting “outside the box” .....	5
For the Honour of the Crown—to Improve Relations .....	6
For the Honour of the Crown—What Consultation Looks Like .....	7
For the Honour of the Crown—to Succeed in Negotiations.....	9
For the Police—Dealing with Confrontations .....	11
For both First Nations and the Crown.....	11



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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

letter ... PAGE 2.

R Paul Nadjiwan, Chief, Chippewas of Nawash

## 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.<sup>1</sup> In fact, this was indeed the case some 7,200 (BP) years ago.<sup>2</sup>

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.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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<sup>6</sup> 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”.<sup>7</sup> 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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<sup>4</sup> 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.

<sup>5</sup> “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.”

<sup>6</sup> 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 30,000+ years old. Mainstream archaeology (which could not let go of the Bering Strait idea) re-evaluated the age to roughly 9,500 BP.

<sup>7</sup> *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<sup>8</sup>

**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.<sup>9</sup> 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 forbade the issue of survey warrants or land patents there; it forbade 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.<sup>10</sup>

**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. 45<sup>1/2</sup>:** 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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<sup>8</sup> <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.

<sup>9</sup> *Histoires Naturelles des Indes Occidentales*, par MLNP, found in Paris in Bibliotheque Nationale, Fr 24225, Ancien Oratoire 162, 196pp ca 1661, unpub.

<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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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<sup>11</sup> See Appendix D for a map of the traditional territories and the claims of the Saugeen Ojibway Nations.

<sup>12</sup> 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.<sup>13</sup>

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 no 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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<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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 200<sup>th</sup> 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.<sup>16</sup>

From the mid 1800s through to the late 20<sup>th</sup> 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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<sup>14</sup> Personal correspondence with elder Fred Jones who served in WW2. His son, Paul, served with Canada's UN Peacekeepers in Cyprus.

<sup>15</sup> Nawash elder Donald Keeshig to Ipperwash Inquiry Commissioner Sidney Linden at Nawash Community Forum, Sept. 8, 2005.

<sup>16</sup> <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.<sup>17</sup> 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.<sup>18</sup> 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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<sup>17</sup> 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.

<sup>18</sup> <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.<sup>19</sup> 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 6<sup>th</sup> 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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<sup>19</sup> <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 6<sup>th</sup> 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.<sup>20</sup>

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 led to a small renaissance in the traditional economy of the people at Neyaashiinigamiing. Many have left welfare to make a living fishing.<sup>21</sup>

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.<sup>22</sup>

A second, four-year Fishing Agreement was signed July 5<sup>th</sup>, 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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<sup>20</sup> Nawash elder Donald Keeshig to Ipperwash Inquiry Commissioner Sidney Linden at Nawash Community Forum, Sept. 8, 2005.

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

<sup>22</sup> <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 “Ahnish aen-anookeeyin?” we are asking what you do for a living. The Anishinaabe word for “work” (*anookeewin*)<sup>23</sup> 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,<sup>24</sup> 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).<sup>25</sup>

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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<sup>23</sup> Personal correspondence with Basil Johnston, Anishinaabe story teller and linguist. Also conveyed to Ipperwash Inquiry Commission during Community Forum at Neyaashiingamiing September 8, 2005.

<sup>24</sup> By which we mean the animals, the plants, the fish, the birds ... all living things on which we rely.

<sup>25</sup> 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.**<sup>26</sup>

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.<sup>27</sup>

### 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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<sup>26</sup> 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>.

<sup>27</sup> "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 Kahnstake 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 Kahnstake. 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 than 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” than 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.<sup>28</sup>

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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<sup>28</sup> 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.<sup>29</sup>

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 Colpoys Bay and Cape Croker. One acre of burial ground reserved.<sup>30</sup> As time goes on the settlers of Owen Sound also enter their relations at the reserved site. On the old maps of the original

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<sup>29</sup> 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.

<sup>30</sup> Treaty No. 82, 1857 regarding the Nawash reserve at Owen Sound. *Indian Treaties and Surrenders, Volume 1, Treaties 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 6<sup>th</sup> 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 6<sup>th</sup> 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 6<sup>th</sup> 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 6<sup>th</sup> Avenue West and at Indian River. Band members, led by Mel Elliott light a sacred fire on their land at 6<sup>th</sup> 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 6<sup>th</sup> 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 where it served as the office for our land claims research, literacy and communications programs.

There a number of insults and desecrations in 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.<sup>31</sup> 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 6<sup>th</sup> 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 in September 2005, Sheena Smith, who was one of the youth at the burial ground vigil, said that truckloads of people would drive past the 6<sup>th</sup> 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.

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<sup>31</sup> 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 6<sup>th</sup> 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.<sup>32</sup>

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

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<sup>32</sup> 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.

## ***2<sup>nd</sup> 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."

### ***3<sup>rd</sup> 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:<sup>33</sup>

“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.

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<sup>33</sup> 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.<sup>34</sup>

### **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.<sup>35</sup>

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.<sup>36</sup>

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<sup>34</sup> 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.

<sup>35</sup> Nawash elder Donald Keeshig to Ipperwash Inquiry Commissioner Sidney Linden at Nawash Community Forum, Sept. 8, 2005.

<sup>36</sup> 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.<sup>37</sup>

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

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<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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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<sup>38</sup> 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.

<sup>39</sup> At the OFAH AGM February 27, 1993, Davison Ankney, then President of the OFAH, took credit for getting that story to air.

<sup>40</sup> Personal Correspondence.

<sup>41</sup> 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. Clouter 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.”<sup>42</sup>

Mr. Morgan took his audience on a slide show trip through Ontario listing one “atrocities” 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<sup>43</sup>, 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.<sup>44</sup>

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<sup>42</sup> Transcript of “Emergency Public Meeting on the Future of Fishing, Hunting, Tourism and Lumbering in the Ottawa Valley”, Pembroke, February 10, 1992.

<sup>43</sup> 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*.

<sup>44</sup> 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.<sup>45</sup>
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.<sup>46</sup> 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.<sup>47</sup>

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<sup>45</sup> 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.

<sup>46</sup> Reproduced in Polly Keeshig-Tobias, *The Illustrated History of the Chippewas of Nawash*, Chippewas of Nawash Unceded First Nation, 1996, p.82.

<sup>47</sup> *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.<sup>48</sup>

**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 Warton 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.

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<sup>48</sup> 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 27<sup>th</sup>, 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.<sup>49</sup> On returning home we learn the MNR had *already re-imposed the ban* late Friday afternoon on June 12<sup>th</sup>.

**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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<sup>49</sup> 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 difficulty 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.<sup>50</sup> 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".<sup>51</sup> 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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<sup>50</sup> *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.

<sup>51</sup> "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.<sup>52</sup>

**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.<sup>53</sup>

**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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<sup>52</sup> 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.

<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

**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

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<sup>54</sup> Letter from Minister of Natural Resources Chris Hodgson to Chief Ralph Akiwenzie, June 24, 1996.

<sup>55</sup> 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.<sup>56</sup>

**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.<sup>57</sup>

**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.<sup>58</sup>

**August 25, 1997:** Nawash releases Dr. Stephen Crawford’s report criticizing salmon stocking by the MNR and the local sportsmen’s clubs.<sup>59</sup>

**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.<sup>60</sup>

**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.<sup>61</sup>

**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.<sup>62</sup> 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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<sup>56</sup> 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>.

<sup>57</sup> 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.

<sup>58</sup> Ibid, “Can MNR manage Ontario’ fisheries?” <http://www.bmts.com/~dibaudjimoh/page31.html>. 24 July 2005.

<sup>59</sup> Ibid, “Media Release: Nawash releases study on Salmon introduction”, <http://www.bmts.com/~dibaudjimoh/page15.html>. 25 July 2005

<sup>60</sup> 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.

<sup>61</sup> Ibid, “Nawash and MNR still negotiating over fisheries”, at <http://www.bmts.com/~dibaudjimoh/page25.html>. 25 July 2005.

<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> This is one of a number of missives from Bill Murdoch (MPP), Larry Miller (MP) and local municipal councils

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<sup>63</sup> Ibid, “Nawash, Saugeen, Canada & Ontario sign landmark Fishing Agreement” at <http://www.bmts.com/~dibaudjimoh/page102.html>, 24 Jul 05.

<sup>64</sup> 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.

<sup>65</sup> 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.<sup>66</sup>

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?"<sup>67</sup>

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<sup>66</sup> Excerpt from a letter to the editor of the Owen Sound *Sun Times*, David McLaren, June 18, 1991.

<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup>

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.<sup>70</sup>

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.<sup>71</sup>

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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<sup>68</sup> 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.

<sup>69</sup> Personal correspondence, Kathy Beamish, Barrister and Solicitor, Sioux Lookout ON, 23 November 1993.

<sup>70</sup> Personal records of David McLaren.

<sup>71</sup> 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.<sup>72</sup>

#### **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)**

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<sup>72</sup> At the Nawash Community Forum Sept. 8, 2005.

### **Saugeen Ojibway Begin to Plan for the Future**<sup>73</sup>

**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

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<sup>73</sup> 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 were 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.<sup>74</sup>

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.<sup>75</sup>

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

<sup>75</sup> 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:<sup>76</sup>

- 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.

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<sup>76</sup> 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?<sup>77</sup>

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.<sup>78</sup>

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).<sup>79</sup>

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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<sup>77</sup> Chief Vernon Roote, “Indian Outrages” in *Bruce County Marketplace*, July 1991.

<sup>78</sup> 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*.

<sup>79</sup> 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<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup>

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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<sup>80</sup> 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)

<sup>81</sup> 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.)

<sup>82</sup> 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.”<sup>83</sup> 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”<sup>84</sup>, 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.<sup>85</sup>

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.<sup>86</sup>

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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<sup>83</sup> Ontario Federation of Anglers and Hunters, “Problems Arising from Sparrow: Politics vs. Conservation”. p.13, 1994.

<sup>84</sup> 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>.

<sup>85</sup> 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.

<sup>86</sup> Ibid, p.3.

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

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.<sup>90</sup>

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<sup>87</sup> 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-20<sup>th</sup> Century. The aboriginal population of Canada at the 2001 census (Métis, Registered Indian and non-registered Indian was under 1 million ([www.statscan.ca/english/census01/](http://www.statscan.ca/english/census01/) accessed October 20, 2005).

<sup>88</sup> Estimates of Haudenosaunee villages approximate 10,000 people, Ronald Wright, *Stolen Continents* op cit, p 118.

<sup>89</sup> 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.

<sup>90</sup> 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.<sup>91</sup> 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.

<sup>91</sup> 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.<sup>92</sup>

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 were endangering it. Mayors and members of

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<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup>

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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<sup>93</sup> Letter to Mike Harris from David McLaren, June 19, 1991. This was not responded to.

<sup>94</sup> 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.<sup>95</sup>

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."<sup>96</sup>

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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<sup>95</sup> "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.

<sup>96</sup> "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.<sup>97</sup>  
[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.”<sup>98</sup>

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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<sup>97</sup> Saskatchewan Conference Church Society Committee, *Beyond Ethnocentricity* in Saugeen Ojibway Nations, “Toward a Definition of Racism,” September 1993, reproduced in Appendix E, below.

<sup>98</sup> 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 Wiaraton. 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 a 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 Wiaraton 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 Wiaraton 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 Warton 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.<sup>99</sup> 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)**

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<sup>99</sup> 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.<sup>100</sup>

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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<sup>100</sup> 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 2<sup>nd</sup> 1995 edition of the Warton 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.<sup>101</sup> Others, such as the editorials written by Darryl Choronzey in his *Ontario Fisherman* magazine were pretty close to the line.<sup>102</sup>

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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<sup>101</sup> 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.

<sup>102</sup> 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.<sup>103</sup>

### **1) 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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<sup>103</sup> 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:<sup>104</sup>

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

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<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup>

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.<sup>107</sup>

### **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<sup>108</sup> 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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<sup>105</sup> 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.

<sup>106</sup> 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.

<sup>107</sup> 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).

<sup>108</sup> 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?<sup>109</sup>

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.<sup>110</sup>

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*.<sup>111</sup> 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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<sup>109</sup> 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*.

<sup>110</sup> Letter from Hon. Ron Irwin to Chief Ralph Akiwenzie, 17 June 1996.

<sup>111</sup> 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*<sup>112</sup> 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.<sup>113</sup>
- 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.<sup>114</sup>

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.<sup>115</sup>

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<sup>112</sup> Melvin Smith, *Our Home OR Native Land?*, Stoddart, 1995 and Tom Flanagan, *First Nations? Second Thoughts*, McGill-Queen’s University Press, 2000.

<sup>113</sup> 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.

<sup>114</sup> Marshall Nadjiwon, Nawash fisherman to Hon. Sidney Linden, at the Nawash Community Forum Sept. 8, 2005.

<sup>115</sup> 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<sup>116</sup>, 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

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<sup>116</sup> 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.<sup>117</sup>

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.<sup>118</sup>

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.<sup>119</sup>

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.<sup>120</sup>

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<sup>117</sup> “MNR-OFAH Blame Nawash for Trout Stocks at SOS meeting”

<http://www.bmts.com/~dibaudjimoh/page27.html> 1 Aug 2005

<sup>118</sup> *Regina v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182. (Prov. Div.)

<sup>119</sup> 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](http://www.gov.on.ca/opa/en_h98/309.htm). 26 Jan 00.

<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup>

Finally, in July 1997, the MNR agreed to a federal government suggestion that all parties try mediated negotiations.<sup>124</sup> 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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<sup>121</sup> 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.

<sup>122</sup> "Nawash forges academic partnerships to study fishery", <http://www.bmts.com/~dibaudjimoh/page97.html>, 2 August 2005.

<sup>123</sup> 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."

<sup>124</sup> 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.<sup>125</sup> 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 the 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,

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<sup>125</sup> 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.<sup>126</sup>

The Nawash Fisheries Assessment Unit, in September-October 2005, conducted a telephone survey of First Nations in Ontario regarding their fishing activities.<sup>127</sup> 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);<sup>128</sup>

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<sup>126</sup> 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.

<sup>127</sup> 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).

<sup>128</sup> 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 19<sup>th</sup>

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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<sup>129</sup> 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 2<sup>nd</sup>, 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.<sup>130</sup>

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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<sup>129</sup> 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.

<sup>130</sup> 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.<sup>131</sup>

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

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<sup>131</sup> 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.<sup>132</sup>

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.”<sup>133</sup>

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<sup>132</sup> Personal correspondence, August 2005.

<sup>133</sup> 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.<sup>134</sup>

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.<sup>135</sup>

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

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<sup>134</sup> Personal correspondence with Nathan Keeshig, 31 August 2005.

<sup>135</sup> 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 6<sup>th</sup> 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 marker 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.<sup>136</sup>

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 6<sup>th</sup> 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

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<sup>136</sup> 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.<sup>137</sup>

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."<sup>138</sup>

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."<sup>139</sup> The Crown (both Ontario and Canada) have now rejected alternative or parallel processes and, instead, are relying on "established legislative mechanisms"<sup>140</sup> to resolve Native cultural and heritage issues that those very mechanisms are clearly not designed to address.

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<sup>137</sup> Eric Johnston at Nawash Community Forum, September 9, 2005.

<sup>138</sup> Letter from Doug Carr, Assistant Deputy Minister, Secretary for Aboriginal Affairs to Don Scott, Chair, Niagara Escarpment Commission, August 9, 2005.

<sup>139</sup> Letter from Hon Andy Scott, Minister of Indian Affairs and Northern Development to Don Scott, Chair, Niagara Escarpment Commission, July 27, 2005.

<sup>140</sup> 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.**<sup>141</sup>

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.<sup>142</sup>

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.<sup>143</sup>

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<sup>141</sup> UN Draft Declaration of Indigenous Rights, Article 13.

<sup>142</sup> Ibid, Article 39.

<sup>143</sup> 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.<sup>144</sup>

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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<sup>144</sup> 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,<sup>145</sup> 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 signed 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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<sup>145</sup> 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.<sup>146</sup>
- 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.<sup>147</sup>
- 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

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<sup>146</sup> 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.

<sup>147</sup> 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.<sup>148</sup>
  - 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.

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<sup>148</sup> 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**<sup>149</sup>

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

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<sup>149</sup> 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.<sup>150</sup>

Earlier we had recognized that to be successful, a First Nation had to have four things in place:

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<sup>150</sup> 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 9<sup>th</sup> 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.<sup>151</sup>

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.<sup>152</sup> 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.”<sup>153</sup> Once a bad decision (*ie*, one which is rooted on cultural misunderstandings) is made, it enters

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<sup>151</sup> See section 2(c) above: “Why the burial Ground Vigil was successful”.

<sup>152</sup> See, for example, John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster,” *American Indian Law Review*, Vol. 22.

<sup>153</sup> *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.<sup>154</sup> 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.<sup>155</sup>

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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<sup>154</sup> 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).

<sup>155</sup> 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.<sup>156</sup>
- 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

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<sup>156</sup> 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.<sup>157</sup>

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?"<sup>158</sup> 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,<sup>159</sup> 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.<sup>160</sup>

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<sup>157</sup> John Ibbitson, "Making Sense of Native Rights", *Globe and Mail*, July 21, 2005.

<sup>158</sup> 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.

<sup>159</sup> 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>.

<sup>160</sup> 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;<sup>161</sup>
- 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.<sup>162</sup> 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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<sup>161</sup> 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.

<sup>162</sup> 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.<sup>163</sup>

## 5. The Importance of the Honour of the Crown

The response of the federal government to our vigil of the burial ground at 6<sup>th</sup> 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.<sup>164</sup>

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<sup>163</sup> 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.

<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup> 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.<sup>167</sup>

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:<sup>168</sup>

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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<sup>165</sup> 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.

<sup>166</sup> In Malcolm Gladwell, *Blink: the Power of Thinking Without Thinking*, Little, Brown & Co. 2005, p 32.

<sup>167</sup> 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).

<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup>

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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<sup>169</sup> 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.

<sup>170</sup> 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.<sup>171</sup>

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.<sup>172</sup>

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.<sup>173</sup>

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).<sup>174</sup> Although progress at the table

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<sup>171</sup> “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.”

<sup>172</sup> 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.

<sup>173</sup> 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.”

<sup>174</sup> 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 seem 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.<sup>175</sup>

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

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<sup>175</sup> 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.<sup>176</sup>

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.<sup>177</sup>

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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<sup>176</sup> “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.”

<sup>177</sup> 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 (*Gitksan 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 (*Gitksan 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.<sup>178</sup>

## **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 8<sup>th</sup>, 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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<sup>178</sup> 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.<sup>179</sup>

### **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)<sup>180</sup>. 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

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<sup>179</sup> This rest of this section was contributed by Roger Townshend, of Olthius, Kleer, Townshend, Nawash counsel, Memo to David McLaren, October 6, 2005.

<sup>180</sup> *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.<sup>181</sup>

There are also criminal prohibitions concerning defamatory libel.<sup>182</sup> 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.<sup>183</sup>

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*.<sup>184</sup>

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<sup>185</sup>, 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)<sup>186</sup>, as were the defamatory libel provisions<sup>187</sup>. 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.<sup>188</sup> However, the false news provision of the *Criminal Code* was struck down as an unjustified infringement of freedom of

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<sup>181</sup> Personal correspondence between David McLaren and Pat McVicar, OPP Hate Crimes Unit, April 15, 1992.

<sup>182</sup> *Criminal Code*, ss. 297-317.

<sup>183</sup> See *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 723.

<sup>184</sup> [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.

<sup>185</sup> 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.

<sup>186</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>187</sup> *R. v. Lucas*, [1998] 1 S.C.R. 439.

<sup>188</sup> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130.

expression.<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup>

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.<sup>192</sup> 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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<sup>189</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731.

<sup>190</sup> See *R. v. Zundel*, [1992] 2 S.C.R. 731 at 771 per McLachlin J. and at 806 per Cory and Iacobucci JJ (dissenting).

<sup>191</sup> See the discussion in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 768-70 and 852-4.

<sup>192</sup> *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.<sup>193</sup> 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

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<sup>193</sup> 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.<sup>194</sup>

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.<sup>195</sup>

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*.<sup>196</sup>) 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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<sup>194</sup> 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").

<sup>195</sup> *R. v. Adams*, [1996] 3 S.C.R. 101 at para 53-4.

<sup>196</sup> *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.<sup>197</sup>

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<sup>198</sup>, and he recommended "significant systemic changes".<sup>199</sup> 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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<sup>197</sup> *Police Services Act*, R.S.O. 1990, c. P.15 as amended, ss. 56-80.

<sup>198</sup> 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](http://www.attorneygeneral.jus.gov.on.ca/English/about/pubs/LeSage/en-fullreport.pdf).

<sup>199</sup> *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.<sup>200</sup>

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

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<sup>200</sup> 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.<sup>201</sup> 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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<sup>201</sup> "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.<sup>202</sup>

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 than 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.<sup>203</sup>

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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<sup>202</sup> 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.

<sup>203</sup> 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,<sup>204</sup> 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

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<sup>204</sup> “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**<sup>205</sup>

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

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<sup>205</sup> 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<sup>206</sup>**

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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<sup>206</sup> “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 province's 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.<sup>207</sup>

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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<sup>207</sup> 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;<sup>208</sup>
- (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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<sup>208</sup> 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.<sup>209</sup>

***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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<sup>209</sup> 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"<sup>210</sup>

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.<sup>211</sup> 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 be *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

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<sup>210</sup> Saugeen Ojibway Nations, "Issues of Jurisdiction", op cit. 1993

<sup>211</sup> 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<sup>212</sup> 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

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<sup>212</sup> 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<sup>213</sup>. 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.<sup>214</sup>

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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<sup>213</sup> See the section on “Rights and Responsibilities”, above.

<sup>214</sup> 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.<sup>215</sup>

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

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<sup>215</sup> 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. .<sup>216</sup>

### **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”<sup>217</sup> 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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<sup>216</sup> See the section, “Potential for Future Confrontation: Around Burial Grounds” for the full context of this important insight.

<sup>217</sup> 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.<sup>218</sup>

**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.**

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<sup>218</sup> *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.<sup>219</sup>

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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<sup>219</sup> 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 3<sup>rd</sup>, 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 than most, that Canadians are not the conservationists they think they are,<sup>220</sup> and

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<sup>220</sup> 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 3<sup>rd</sup> 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.<sup>221</sup>

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**

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<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup>
- 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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<sup>222</sup> 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.

<sup>223</sup> 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 its 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.<sup>224</sup>

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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<sup>224</sup> 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 policies 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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## LIST OF APPENDICES

**A: Agenda for Nawash Community Forum**

**B: Bibliography of Reports and Research by the Saugeen Ojibway Nations**

**C: Three Public Relations Materials**

**D: Map of the Traditional Territories of the Saugeen Ojibway Nations**

**E: Toward a Definition of Racism**

**F: Call for an Inquiry into the Events of the Summer of 1995**

**G: MNR Conservation Officer Joel Tost Retires, Owen Sound *Sun Times* 27 April 2005**

**H: Best Practices ... What Works**

## 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 6<sup>th</sup> 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.*

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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

**O**n 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 Warton 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 renaissance 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 media 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 Kahn-tineta 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.



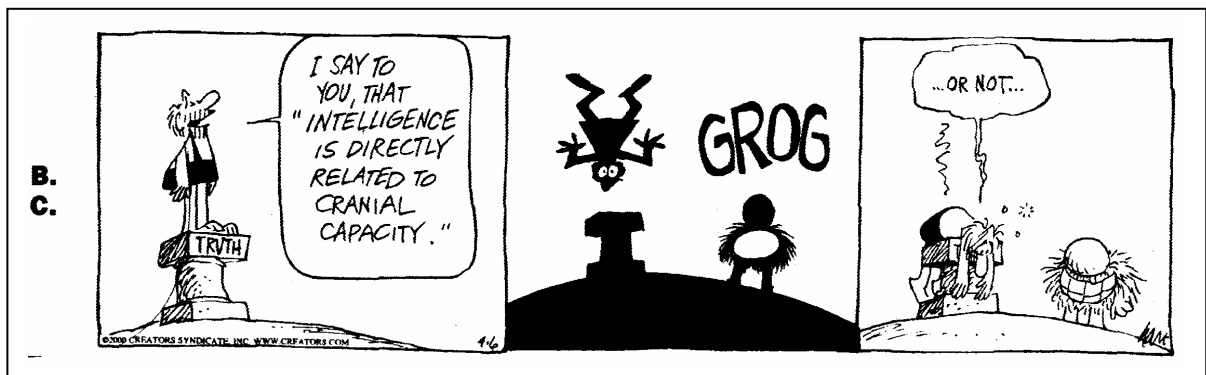
**A Cartoonist Looks at the Wisconsin anti-Native rights Lobby**

From the Green Bay Press Gazette, 1989. Reproduced in *Walleye Warriors*, by Rick Whaley & Walt Bresette, NSP, PA 1994.



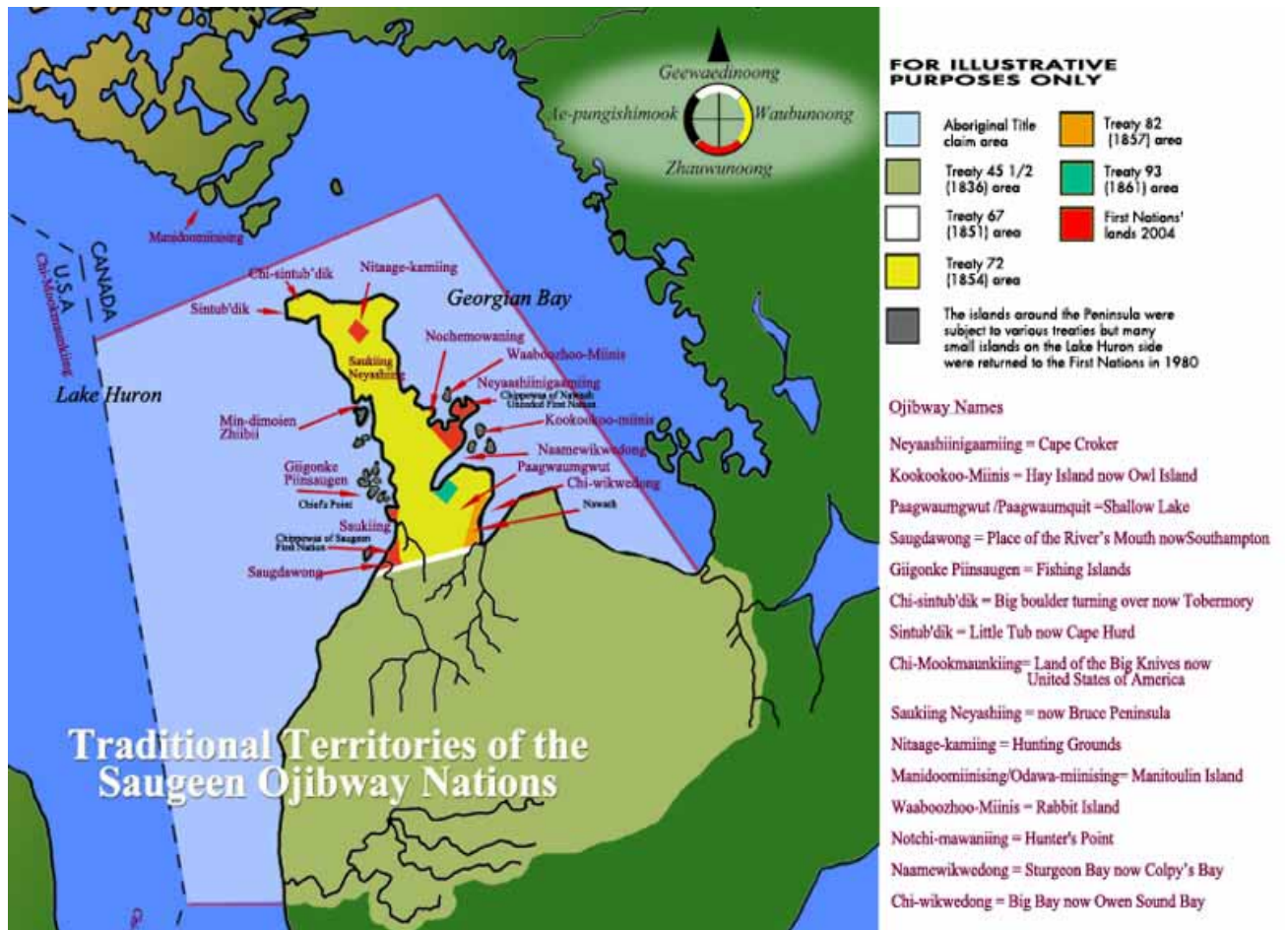
**Toronto Sun news story, April 4, 1997:**

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.



# 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 (Warton)
- 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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***<http://www.bmts.com/~dibaudjimoh>***

## 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 ethnocultural 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 NOH 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.



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.

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.

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

**He had poachers threaten to shoot him and tough characters threaten to stab him. Some he had to arrest after fisticuffs and brawls.**

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."

**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.**

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.

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.

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.

**"It was hard when the stress started on him. I wanted him to get another job."**

Joel's wife Diane

Next ↓ Page

Next ↓ Page

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

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.

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 cancels the whole operation.

At one point, former natural resources minister Bud Wildman was to speak to the Ontario Conservation Of-

ficers' 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.

## 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 (*Gitksan 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 (*Gitksan 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 avoid 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 purposes 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.