# PART I

# NISHNAWBE-ASKI NATION

## FORWARD

In 1905, the grandfathers of the Ojibway and Cree Nations in northern regions of Ontario signed a peace Treaty # 9, a treaty of co-existence with Canada and Ontario on behalf of the Queen of England. An adhesion to Treaty # 9 was signed in 1929. In 1875, the Saulteaux-Cree Nations of Manitoba, and what is now referred to as northern Ontario signed Treaty #5 with Canada. Those treaty First Nations within Ontario are part of Nishnawbe-Aski Nation (NAN).

Grand Council Treaty # 9, a political territorial organization was established in 1973 to pursue the political governmental rights of the First Nations in northern Ontario. Prior to Grand Council Treaty # 9, the communities were politically represented by the parent organization known as Union of Ontario Indians. In 1977, the Chiefs issue the Declaration of Nishnawbe-Aski outlining their rights and claims to their homelands to Canada and Ontario. In 1981, Grand Council Treaty # 9 organization was replaced by Nishnawbe-Aski Nation representing 49 First Nations.

Nishnawbe-Aski Nation covers about two thirds of the province of Ontario. The territory stretches across the north about seven hundreds miles in length and four hundred miles in width; from the Manitoba border on the west to the Quebec border on the east; from the Hudson's and James Bay watersheds in the north to roughly the Canadian National Railway Line to the south. NAN land mass is equal to the size of France. Treaty # 9 territory encompasses certain parts of the districts of Cochrane, Timiskaming, Sudbury, Algoma, Thunder Bay and Sioux Lookout.

Of the 49 communities located within the territory, 30 are completely remote and are dependent upon some form of airline transportation for access to markets. During the winter months for a period of six weeks, the communities are connected with winter roads system. The over-land transportation provided certain level of reprieve from high costs of goods from their usual rates. The winter road transportation rates are still extremely high compared with access to goods and services provide by all weather roads systems.

Most people would refer to northern Ontario wilderness as bush, and why would anyone desire to live in such rugged terrain? Yet, to the people of Nishnawbe-Aski Nation, it is not bush country, but a homeland that they have occupied for centuries. Nishnawbe-Aski translated means the people and the land. The very lives of the people are intertwined with the land. Truly they are one together.

## Land Tenure of First Nations

The treaties entered with the foreign Sovereign by First Nations clearly establishes the fact that First Nations are the original owners and occupiers of the lands referred to as Canada. These treaties may be of pre-confederation or post confederation that may be numbered or named treaties. Throughout the years, First Nations have always maintained the original intent and spirit of the treaties. First Nations have always realized, recognized and advocated certain rights have been affirmed by treaties. These are referred to as treaty rights. First Nations whose ancestors signed the treaties have direct relationship with the Crown governments by virtue of the treaties. What has been so obviously absent from this relationship is the lack of recognition by the public in general represented by the Crown governments that they are also treaty people and have rights directly as a result of the signed treaties. The most glaring tragedy of this relationship has been the failure of the Crown Governments to live up to the original intent and spirit of the treaties. Instead by its actions towards the original peoples, one would think that they had conquered the original nations of Turtle Island. There was no conquest.

The treaties signed with the foreign Sovereign compelled the British Parliament to enact special legislation under the British North America Act 91 (25) with six simple words “Indians and lands reserve for Indians”. With this particular legislation the settler government established what now have as ‘Indian reserve system”. Thus, the original settler government (federal) and at latter stages in collaboration with provincial governments did set aside certain lands for exclusive use by First Nations. Reservation system was imposed by settler government as a means of disenfranchising the First Nations from their original and rightful occupation of their lands and resources.

It is important for one to understand the original occupation and land tenure systems of First Nations that predate the arrival of the settlers in Canada. The original occupiers were not merely nomadic in a sense that infers people who are homeless or with people that have no permanent connection to particular land base as it implies in the history texts. First Nations would appear to be nomadic to settlers as they traveled great distances for various purposes, such as commerce, intertribal defense arrangements and protocols, social engagements and so forth.

At the same time, it is important for people to understand that First Nations had their own forms of governance with various instruments and regimes implemented to meet their unique local and regional needs and demands. For purposes of this document, there are two key characteristics or elements that need to be explained that will provide understanding to issues of land tenure.

Firstly, First Nations just like any other nations of people throughout the world maintained systems of commerce. Commerce was conducted through various

transactions, such as trading and bartering. These transactional forms were not foreign concepts as people may have been made to understand through history texts. Trading and bartering were inclusive transactional forms inclusive of First Nations commerce. The trading and bartering was not limited to transactions of certain commodities, but included, whatever goods and services were required by the local consumers or consumers from other communities.

Aside from trading and bartering, the First Nations practiced an additional element or dimension to their commercial undertakings. Sharing became a key factor in all aspects of First Nations existence, and it included in their commerce. Sharing was and is today an obligation; sharing came with respect and honour. Whenever there was a trade or barter concluded, the supplier of the goods or commodity would ***"Aah-Kah-Hah-Ma-kay". Aah-Kah-Hah-Ma-Kay*** translated means to provide above and beyond or top-off. This was a natural practice to demonstrate honour and respect in the trade or barter transactions.

Selling was not totally foreign concept as trading and bartering were forms of selling. The practice of trading and bartering hinged on the premise that one had to take the goods and services with the consumer. If one bartered or traded wood supply in exchange for certain meat supply, then there was the actual physical transaction of goods or commodities. All goods, commodities and services were subject to trading and bartering based on consumer and community needs and demands. First Nations never viewed land as a commodity that could be sold, traded or bartered. If you traded or bartered lands, then they would have dislocated themselves and their clans or families for ever from those territories. They could not sell lands because there was no physical means of taking the land with you.

Secondly, the First Nations had a form of defense systems to maintain and protect their territories. One of the governance responsibilities of each nation was to ensure the protection and integrity of their lands. The lands of each nation were clearly recognized and marked off by key landmarks. These were observed and protected by each nation. The classic example of First Nation defense of traditional lands is the episode of the clash between the Sioux warriors at Sioux Narrows. Defense was a legitimate part of the governance of the First Nation.

### *1. Traditional, Customary Lands*

First Nations land tenure was based upon a system of land occupation wherein the clans systems determined the size and location of the territories. The First Nations land tenure required clans and families to live in the defined territories year round. This was the practice. Families and clans established year round traditional occupation of lands. The head of the clan and or family heads would allocate and designate areas or territories amongst members of the clan. Certain areas may be set aside for different purposes such as fishing sites or specific hunting areas. The

clans and families had systems of land tenure maintenance to ensure continued survival and dependence on the territory.

This land tenure system was in effect and maintained prior to the arrival of settlers. The clans would refer to these clan territories as "***Nee-Tha-Kee-Miin-Nan".*** The translation is in possessive context meaning "our lands, our territories" denoting custodial ownership and responsibility.

Every summer the clans and families would travel to the summer gathering places. These gathering locations had family sites designated. The summer gathering marked time for celebrations, feasts and ceremonies. This was the time for renewing acquaintances, socializing and marriages. It was time for strengthening relationships and planning of inter-clan support systems.

One of the other major functions of the summer gathering was to stabilize the region's leadership. The First Nations government was in fact in place. The gathering would review incidents or disputes that occurred at different locations. If the disputes or any incidents had not been resolved, then the families as a community undertook a process to resolve outstanding disputes and issues. If other First Nations from different territories had infringed on the traditional territories, this would be reviewed. A process would be planned as to how to resolve such external intrusions.

One of the key issues was to ensure continuance of understanding or protocols of members from other tribes or regions that came through the territories. Passage was always recognized and respected that included for these people to use, hunt or fish while they are traveling through the territories. During the summer gatherings, people from other regions may visit the summer gathering places, and at which time, more celebrations and feasts would be conducted, especially if marriages were arranged.

Once all businesses were concluded whether they be celebrations, feasts and of governance nature, the clans and families would begin to return to their traditional territories. With the advent of missionaries and Christianity, the families and clans began to return to the summer gathering places to celebrate Christmas. Once celebrations were completed, the families returned to traditional territories. The emergence of the fur industry kept families pre-occupied with an economy based practice. The fur industry did not create occupation of traditional lands, the lands were occupied prior to the emergence of the fur industry. The industry sort of just fit in with the existing occupation of lands.

First Nations original land tenure structure and practices have been altered by federal and provincial legislation and policies. Ontario

government land policies have had the most negative impact on First Nation land tenure and practices. Every act that has been enacted in Ontario has had traumatic impact and in many cases devastating. Traditional lands, ceremonial and burial sites and even reserve lands have been desecrated, destroyed, expropriated, sold by both levels of governments.

The Ontario government legislation and corresponding polices as they are legislated and implemented basically presumes unfettered ownership of all lands within Ontario other than what is classified and designated as Crown lands. Crown lands included the setting aside of lands reserved for Indians as specified in the British North America Act. First Nations have always differed with every succeeding government on such legislative measures and policies.

In historical perspective, it was just recently when Ontario government imposed their trap-line systems. The trap-line systems altered the traditional/customary territories but not to the point of totally realigning the existing traditional and customary land tenure structures. The trap-line system and application of provincial policies have been challenged. First Nation trapper was charged for trapping under provincial permit system for trapping in someone else's trap-line. He challenged the charges in court and the court found that Ontario did not have the jurisdiction to impose trapping regulations or trap-line systems with Treaty # 9 territories. (Cheechoo v R, 1982).

Today, especially in the northern regions of Ontario, families still maintain and occupy their traditional territories. These traditional territories have real significance to families and communities. Each family has re-asserted their right to those lands according to the prior occupation by their ancestors. Any forms of disconnecting traditional lands or territories will be challenged by the families whose lands will be impacted from development or extraction of resources. If anyone or any group is to benefit from the resources within those territories the traditional occupiers will need to be factored into the equation not simply as a matter of token accommodation. It must be remembered that the First Nations leadership may be involved in the dialogue in any sectors dealing with development but the community leadership can not and will not ignore the owners of the traditional territories. In the end, the traditional land occupants will have the final say on the proposed resources development that will impact their traditional territories. In some cases, First Nations have designed protocols on how to involve traditional land occupants, and some cases, the Chiefs and Councils are expected to provide leadership.

### *2. Reserve Lands*

During the treaty undertakings with the Crown, the treaty commissioners representing the Queen made numerous promises that were recorded and other understandings that were omitted. One of the key elements was the setting aside of lands for the specific use by the First Nations. In order to fill this commitment under the treaty, the foreign Sovereign's Parliament enacted the section 91 (25) of British North America Act stating "Indians and lands reserved for Indians". Thus governments began the process of establishing reservation systems.

In some cases, the federal government established reserves at the traditional gathering sites of the people. In other cases, where First Nations may have had their summer camps, the settlers would infringe upon the sites because they were ideally located, and in such cases the Indian agent allocated lands for Indians away from the settlers. The settlers would have taken the prime lands and First Nations in most cases found themselves establishing a community that was not conducive to healthy surroundings. One of the most consistent complaints of First Nations has been that most of the lands set aside by government were mostly swamp lands.

Measures were taken by federal government to have the First Nations traditional land occupiers to permanently relocate to the reserve sites. These measures included the building of day schools accompanied by threats to families if they did not have their children in school that government assistance would be with be jeopardized. During these stages the only government assistance would have been welfare, but First Nations were more concern with the agreements that they had agreed to under the treaties.

Along with federal government intimidations for First Nations to live in reservations, the Ontario government began to impose its legislative land policies. Throughout the years, the Ontario government land policies became the most intrusive instrument to have the most negative impact on First Nations.

## Treaties

The spirit and intent of the treaties have never been examined although First Nations have called on successive governments to undertake measures to have the exercise implemented. First Nations have recommended processes whereby the federal government can participate in good conscience of the proposed concepts for reviewing the spirit and intent of the treaties. There has been words used such as "renovation" of the treaties. At this time, there has not been any significant movement on the proposed initiatives.

There are many reasons why First Nations feel it is time to examine and advance a more realistic approach to dealing with the issues that arise from the treaties. Two key issues that need to be addressed are lands and resources. It must be remembered that most of the treaties were about maintaining peace and sharing of lands and resources. First Nations never relinquished or signed off their governance. If the original intent and spirit of the treaties had been implemented, First Nations would not be in such state of economic marginalization; resulting in abject poverty.

When the treaties were signed with the Queen, First Nations were occupying their traditional lands, and they were quite satisfied with their own economies. The advancement of the settlers, along with the fur trade further spurred the economy. Through the fur trade, Hudson's Bay Company thrived and reached the pinnacles of the corporate society. The public does not know the price the First Nations paid to participate in such industry. For example, at one location and this may have occurred in various Hudson's Bay trading posts where First Nations trapper was demanded to pay for a gun by stacking beaver pelts the length of the rifle. Not the stock only or the length of the barrel but the total length of the rifle.

The First Nation signatories to the treaties would have never and were never in the position to dispossess the traditional land tenants from their responsibilities and especially their tenure. It must be remembered that selling of lands by First Nations was not an option. They could not sell it. They could trade or barter because it was a common practice. They could not trade or barter lands that were occupied by their people but they could share the lands and its resources.

## Land of Natural Resources Wealth

The territories are rich with untapped natural resources mostly due to unfeasibility caused by isolation and inaccessibility. The NAN territories and communities adjacent to urban locations have witnessed the continual exploitation of most of the natural resources. The accessibility and harvesting of the renewable resources without concrete sustainability planning have resulted in over-exploitation. The First Nations whose territories have been directly impacted by resources development remain in state of perpetual poverty. Resources development has had no positive impact in the quality of their existence.

### 1. *Mining*

In spite of remoteness, certain industries, mining in particular, have demonstrated profitability consistently with their operations in the regions. It is no longer just gold and copper that draws interest from the mining industry, but other minerals that are or will be in high demand such as platinum. Technological and scientific advancement will require new

minerals and resources to support growth and development. It could be assured that those natural resources abound within the NAN territory.

***2. Forestry***

Forest industry has expanded operations to northern locations where at one time such undertakings would have been deemed unfeasible. For example, Nakina Forest Products produces SPF dimension lumber. Their woodlands operations and other contractor operators harvest all wood fibre required for the mill the heartland of Aroland First Nation traditional territories. Other forest industry interests are now discussing wood harvesting options with various First Nations. It is just a matter of time before we see accelerated forestry development within NAN territory. The expansion will be driven by eventual improvement of the international markets and by the need to secure additional forest fibre to support mill operations.

***3. Tourism***

Tourism operations can be located from the Manitoba border to the far reaches of Hudson Bay and east to the Quebec border. Majority of the operators and owners are non–aboriginal. First Nations have made major in-roads in the northern Ontario tourism industry. They have their own marketing network promoting unique Aboriginal tourism through Northern Ontario Native Tourist Association (NONTA). Tourism opportunities have not been exhausted, and First Nations are poised to participate more so than ever before. Expansion of tourism is not only open to First Nations, but to whoever should get the license from the Ministry of Natural Resources. Competition for sites will happen.

***4. Water Power***

All remote First Nations communities other than Fort Albany, Kashechewan, Attawapiskat and Cat Lake depend on non-renewable fossil fuel generators to supply the required hydro power community needs. The present supply system is unfeasible. The risks from fuel spills and carbon contamination are extremely high. First Nations and external hydro development interests are exploring various options for developing energy resources for local use and for marketing purposes to general public. With the availability of new and proficient technology the supply of electricity will increase especially as interests tap on the green power generation. There will be no shortage of markets that will required such hydro power.

The territories occupied by First Nations in NAN region holds vast renewable and non-renewable natural resources base. These resources will be required by industry sooner or later. The Ontario government will need to have these resources developed as the resource base in southern Ontario edges towards depletion. The First Nations will not allow any further economic or social

marginalization from natural resources development from their lands. Governments must take heed to NAN's Declaration of rights issued in 1977 where they stated as one of their inalienable rights…." to receive compensation for our exploited natural resources". Almost three decades have elapsed since the Declaration. We now find ourselves at the crossroads.

## Legislative Measures, Policies, Regulations Impeding First Nations Opportunities

First Nations have accused governments of intentionally marginalizing them through legislation, policies and regulation. First Nations continue to express outright frustration of existing legislation that under-mine their interests. A number of First Nations have now refused to participate in such processes because they realize and recognize that their interests cannot be accommodated within existing processes. They know their concerns will be dismissed. The following processes have led to distrust, suspicion and fragile relations.

### *1. The Mining Act*

The Mining Act infringes directly on First Nations Treaty and Aboriginal rights and title. The present licensing practices of the Ministry of Northern Development and Mines seriously and adversely impact and infringe upon Aboriginal interests while at the same time providing exploration interests to proceed without addressing Aboriginal concerns. In reality, First Nations right to exercise their aboriginal and treaty rights are being inferred by mining exploration. When the Crown infringes aboriginal rights and title, it is obligated to justify that infringement by consultation and accommodation with respect to the infringing legislation, decision or activities in a manner that is consistent with government's fiduciary relationship with First Nations and the honour of the Crown.

The issuing of license by Ontario to third party interests for mineral exploration and development give rise to appearance that third party interest have exclusive right to explore, develop and own mineral resources within the traditional territories of NAN. The approvals granted under the Mining Act are often automatic, and the Act gives the government little or no discretion to refuse or consider First Nations interests. Some of the more objectional provisions include:

- Section 19 of the Act entitles an individual to carry out mineral exploration activity on Crown land by granting a prospector's license. The Minister has no discretion to refuse where prospecting may take place in areas subject to Aboriginal interests.
- Section 27 allows prospecting and staking on all Crown lands, regardless of whether those Crown lands are subject to Aboriginal interests.

- Section 28 and 44 through 48 allow for the creation of a mining claim and does not provide any guidance whatsoever for consideration of Aboriginal rights or interests.
- Section 8, which entitles a claim holder to lease a claim, does not contemplate aboriginal rights and interests.
- Section 30 (e) pertains to Indian reserves but the Act makes no reference whatsoever to Aboriginal rights in the issuance, regulation or management of mining exploration and development. In light of ***R.v.Adams***, the Mining Act stands questionable as to its constitutionality.

### *1.1 Ontario's Mineral Strategy*

The First Nations of NAN have concluded that the Ontario's Mineral Strategy will continue to marginalize First Nations, and it will not provide real and meaningful opportunities. At this time, NAN is facing a multitude of First Nation grievances triggered by mining exploration that could at any time lead to an explosive conflict. A number of NAN First Nations have declared moratoriums on mining exploration and development.

The central issue is the so-called free entry system. The ownership of the land itself is in dispute. The Crown takes the position that, on its reading of the Treaty, it has the unilateral right to remove land permanently from the area within which the Treaty # 9 hunting and trapping rights may be exercised in favour of mining exploration and development. Accordingly, Ontario acts "as if "is unfettered by an obligation to consult, to negotiate, or even to give advance notice to the First Nations of the Nishnawbe Aski Nation when the lands of the Nishnawbe Aski Nation are "taken up" for mineral exploration and development.

The Nishnawbe Aski Nation takes a different view of the Treaty. The signatories of Treaty No. 9 did not surrender their aboriginal title and aboriginal rights in and to the natural resources, but signed a treaty of peace and friendship.

### *1.2 Ontario's Best Practices Manual*

The Best Practices Manual to guide the development process fails the test of adequate First Nation Consultation. The Mineral Strategy places the consultation burden on the mining companies and is silent on the Crown's consultation obligations.

Nishnawbe-Aski Nation view and position squarely puts the obligation of the Crown to consult First Nations before mineral exploration commences. Furthermore, NAN takes the position on the recent Supreme Court Mikisew decision, that the Crown has an obligation to inform itself in advance of the impact mineral exploration will have on the exercise of an affected First Nation's treaty hunting, fishing and trapping rights and to

communicate its findings to the affected First Nation. Infringements must be accommodated.

There is no process set out in the Mineral Strategy for the Crown to inform itself in advance on the current exercise of an affected First Nation's treaty hunting, fishing and trapping rights, let alone on the impacts of mineral exploration on those rights. One generally accepted way for the Crown to solicit and listen carefully to the affected First Nation's concerns regarding mineral exploration, and to attempt to minimize adverse impacts on its treaty rights is through a land use planning process.

Nishnawbe Aski Nation has been demanding a land use planning process since at least the time of the Royal Commission on the Northern Environment.
NAN participation and land use planning does not mean "talk and stake". Mineral exploration must be suspended while land use planning is carried out. Land use planning must factor in the First Nations land tenure systems which will account and plan responsibly for their traditional territories.

The Mineral Strategy places the onus on the First Nations to request the withdrawal of culturally sensitive areas. This is not consistent with the court-articulated principle of "consultation in advance of interference with existing treaty rights" or the guidance that the Crown solicits First Nation concerns

### *1.3 Economic Benefits from Mining*

Mineral exploration and development are not delivering economic benefits to the First Nations of the Nishnawbe Aski Nations. Despite billions of dollars in mineral exploration and development spending over the past 100 years, there have been limited economic payoffs for the First Nations of the Nishnawbe Aski Nation. Mineral exploration and development in Ontario has led to a unilateral expropriation of the lands and resources of the Nishnawbe Aski Nation.

York University economist Fred Lazar has stated that the magnitude of this wealth transfer greatly exceeds the present value of past and future government transfer payments, even if the current levels of transfer payments increase annually at the rate of inflation and are made in perpetuity. In Lazar's model, a model based on a 50/50 sharing of all land and resource based revenues (excluding income and property taxes), the First Nations aggregate historic losses of their fair share of resource revenues easily exceed $250 billion.

The Nishnawbe Aski Nation continues to demand revenue sharing legislation and legislation to require compulsory impact and benefit

agreements. The Mineral Strategy is silent on resource revenue sharing. Furthermore, the Mineral Strategy is silent on impact and benefit agreements.

It is important to note that two of the First Nation signatories of the Musselwhite Agreement have declared a moratorium on mining exploration in their traditional lands. One of the communities is demanding an independent review of the agreement. Impact and Benefit agreements are clearly not a panacea for promoting the benefits of mining for First Nations.

## 2. Ontario's Forest Management Process

The Ministry of Natural Resources utilizes an elaborate process to determine the allocation of licenses to forestry industries. All tracks of land for wood fibre harvesting must be reviewed and meet the tests required under Ontario's Forest Management Planning Process.

The findings, decisions and other results of Ontario's Forest Management Process have almost completely frustrated First Nations, and they are rendering the process to be very much adversarial. Many First Nations have totally lost confidence in the process as the scope and nature of the concerns of First Nations cannot be addressed at these forums. When the First Nations table legitimate concerns according to established criteria still, they experience rejection. It is important to note the following:

The previous FMP (forest management plan) manual, dated September 1996, included a provision for a separate native consultation process. The process was to be used during the preparation of a new FMP. The consultation process basically consisted of a series of open houses spread over a year or more. First Nation communities never found the process to be meaningful resulting in boycotting the process.

When the FMPM (forest management planning manual) was re-vamped, the OMNR revised the wording of the native consultation section in the new, current manual (dated June 2004). The new manual (page A-130) states that, "The MNR District Manger will contact each Aboriginal community at least 6 months prior to the commencement of the formal public consultation process for the preparation of the forest management plan to invite the community to discuss the development of a consultation approach for forest management planning with the community (Part A, Section 1.1.8). The MNR District Manager will make ongoing reasonable efforts to engage each Aboriginal community in the development of an agreed upon consultation approach". While this sounds nice and, it is

admittably a small step forward, there are really no gains for First Nations because:

1) It has to be an "agreed upon" approach. This gives the MNR what amounts to a veto on native consultation.

2) The manual has basically pre-defined the issues that will be addressed by community consultation. The manual (page A-130) states that "The consultation approach will normally address the community's involvement in the production of the forest management plan, the planning operation for the second five-year term, contingency plans, annual work schedules and insect pest management programs. In the development of the consultation approach, the information and timing requirements of the formal public consultation process will be considered to ensure that the schedule for plan production and implementation is maintained". This directs the First Nations to be consulted on issues that, while they may be important, do not touch upon the elements that First Nations see as being the prime aspects of "meaningful consultation. For example, Impact on/ mitigation of the impacts on Aboriginal and Treaty rights; compensation; revenue sharing; and mitigation of land claims; etc.

3.The aspects of "meaningful" consultation, as outlined in point #2 have been further alienated from becoming part of an FMP's consultation process by: the alienation of Aboriginal & Treaty Rights from the FMP process (MNR's State of the Forest Report, 2001); OMNR verbal comments that Aboriginal and Treaty rights, compensation, revenue sharing, mitigation for loss of land use, in this case, trapping, etc would not be dealt with as part of the FMP planning process. This was presented to the audience attending an FMPM open house in Thunder Bay (NorWester) on Dec. 3rd, 2003; and in an OMNR letter (dated September 9th, 2004) to NAN whereby the OMNR stated that, "The forest management planning process is not an appropriate forum to discuss outstanding issues such as revenue sharing, compensation and land claims". Furthermore, the same document also stated that, "the determination of Aboriginal and Treaty rights are not appropriately resolved at the forest management planning table". It is important to note that these aforementioned Aboriginal and Treaty rights and other "issues" have formed the prime reason and expectation for First Nations wishing to be involved in the FMP planning process in the first place.

4)The First Nations rationale for wishing to discuss the aforementioned issues (from point #3) is that it is the same FMPM, the FMP's prepared and authorized under the FMPM, and the subsequent, approved forestry operations (e.g. timber harvesting) that impacts upon Aboriginal and Treaty rights and causes the First Nation concerns in the first place. In essence, these processes such as the FMP planning, and including the

forest operations infringe upon Aboriginal and Treaty rights but, at the same time, will not (point #3) deal with the issues that they create.

5) To compound point #4 further, there is not a forum elsewhere for First Nations to have their FMP concerns etc. resolved. This point has been raised on several occasions to the OMNR, but to no avail. At one point the OMNR tried to set up a meeting with the NAN office regarding Aboriginal and Treaty rights etc. However, NAN refused to partake in this meeting because the OMNR was still not willing to enter into meaningful consultation with the communities. Consultation has to be with those who hold the Aboriginal and Treaty rights (IE. the communities) and not with a body (IE. the NAN office) who does not, as an organization, have any Aboriginal and Treaty rights.

At one point, a few years back, NAN officials and some chiefs met with upper echelon OMNR staff in the OMNR Toronto head office. We still were not able to get the aforementioned forum established and, on many issues, we were told that we were still not dealing with the right people (IE. we had to go to the ministers' level). NAN has had several discussions about a bipartite/tripartite table ever since, but these negotiations have still not borne fruit. In the meantime, Ontario's FMP process continues to infringe upon Aboriginal and Treaty rights. The province dragging their heels is at the expense of First Nations, and benefits the province. First Nations are forced to resort to blockades etc. to try to get their issues resolved. It is not until the forest industry and/or the province begin to get hit in the pocketbook, do they take First Nations concerns in a more serious note.

It should also be noted that when it comes to Aboriginal and Treaty rights, the response that First Nations get is:

- the province of Ontario says that Aboriginal and Treaty rights are a federal responsibility (despite the fact that the province is a co-signer of Treaty #9),
- the federal government states that they cannot intervene because the FMP process deals with Crown (provincial) lands, and they have no jurisdiction over Crown land and,
- the forest industry states that Aboriginal and Treaty rights are an issue of the governments and not the industry. The province has authorized them to harvest Crown lands and that (to them) this is basically all the authority that they need. Aboriginal and Treaty rights and associated issues are not their problem.

6) NAN has developed a meaningful consultation process for use with their communities. The process has been ratified for use in NAN territory by the NAN chiefs. It is published and edition #2 was released in 2004.

Unfortunately, the Province of Ontario has officially rejected NAN's consultation process and they will not utilize or recognize the process. This rejection was via a letter dated August 20th, 2002. The letter stated, "Ontario's interpretation of its obligations differs from NAN's interpretation of the Crown's obligations as set out in the NAN consultation Handbook". The ramifications of this, in regard to the FMP process, is that if a NAN community insists upon the NAN consultation process being used for their community, they will never get it as a MNR District Manager is not going to authorize, for use, a process that head office has rejected. There have been instances where a District Manager has said that he/she would look at the NAN process to see if components of it could be use. However, they always rejected the Aboriginal and Treaty rights component of the process. It is this same Aboriginal and Treaty rights component that forms the basis/need for the NAN process in the first place. NAN's process revolves around Aboriginal and Treaty rights, mitigation of same, etc. etc. By a District Manager not agreeing to use the NAN process, this takes us back to the veto power of the OMNR from Point #1 and raises the question of, "Who is in the best position of knowing what constitutes meaningful consultation for First Nations – the people who are being consulted in the first place, First Nations or the Province of Ontario"? Unfortunately, the inability of the MNR District Manager to be able to agree to the full NAN process, including Aboriginal and Treaty rights, places the First Nation community at a disadvantage. They will never receive meaningful consultation, unless they agree to re-defining meaningful consultation as something less than that as outlined in the NAN process. Other than that, a community's only other options are to participate in a non-meaningful process or go without consultation and these have been the usual, two results with past FMP planning processes.

7) The FMP manual also has a section ( page A-132) regarding what happens if a community either does not use an agreed upon approach, or a consultation approach cannot be agreed upon. Basically, what happens is that **the MNR reverts to offering the community the public information consultation process**. It is the same consultation process that First Nations have engaged in (in the past) and, for the most part, have not found meaningful. It is highly likely that a community, if it engaged in consultation discussions with a District Manager, has already rejected this open-house process. The likely scenario is that, either a District Manager would ask them (before the planning process even begins) if the community would like to engage in a process similar to the public consultation process (and the community has said "no") OR the community has already experienced such a process and is not interested in pursuing such a process again in the future (and has probably already made that clear to the MNR). In any event, this sequence of events again places the communities at a disadvantage. It puts pressure on them to agree to a process less than acceptable since, if they do not do that, all they will be offered in the end is a process that is even less

meaningful (and the same one that they probably already rejected months before).

8) The FMP time table puts added pressure on the First Nations to agree to a less than acceptable consultation process. While "negotiations" are going on so is the FMP planning process. The planning process of a new FMP will start whether or not a consultation agreement has been reached with First Nations. If negotiations are still going on as the planning process unfolds, this puts added pressure on the First Nations to reach an agreement. As the scheduling for the public consultation draws near, this is when the OMNR/industry would engage First Nations in a similar process. Revisiting the results (e.g. making potential changes) of a two year FMP planning process is NOT going to happen by starting a First Nation consultation process at the end of the FMP planning period**.** When it comes time to approve the new FMP and start its field operations, this will happen whether or not First Nations have been consulted.

The bottom line of the current FMP process is that First Nations ARE NOT IN CONTROL. The need for OMNR consent to a consultation process gives the province the ability to determine what the process will consist of. If the MNR doesn't approve a process, this fact will not stop the planning of the FMP or, ultimately, future forestry operations in the forest. And if First Nations are not consulted, this very fact will not stop the planning of the FMP or, ultimately, future forestry operations in the forest. If First Nations insist upon having their Aboriginal and Treaty rights as part of the consultation OR planning process …. It's not going to happen.

Therefore, meaningful consultation for First Nations, is not something they are going to get (whether they insist upon it or not). If First Nations agree to participate in a less than meaningful process, then the OMNR document will specify that the communities WERE consulted. The fact that the communities may not find the process meaningful, and might have even documented this, becomes a mute point. Over the past seven years, First Nations have documented numerous issues, virtually all of which are still unresolved.

The MNR, in trying to reword the new FMP manual to make it look like progress is being made, and this still doesn't change that fact that the issues are still unresolved, and no real progress has been made towards them. The aspect of a meaningful consultation process will only be resolved once a First Nation designed process is put into use, and the ability of the MNR or forest industry to reject such a process is no longer there. In the meantime, the trees are still coming down and Aboriginal and Treaty rights infringed. First Nations are being denied real opportunity to benefit from their resources**.**

## 3. TERMS and Condition 77 (T&C)

T & C #77 has been causing concerns for First Nations almost as soon as it was written. The concerns include:

1. An implementation plan was to have been developed by the OMNR in conjunction with First Nations. Instead the OMNR chose to develop this plan themselves (draft was issued on January 19, 1996). First Nations were never consulted on this plan.

2. How T & C #77 was implemented varied not only between OMNR districts but also within individual districts. It was up to the individual OMNR district managers to decide how, when, where etc. to implement it. Consistency was definitely lacking.

3. The wording of T & C #77 included development of programs with Department of Indian and Northern Affairs (INAC). Despite this "commitment" in the wording, there was no legal basis for committing the federal government to T & C #77. As a result, the feds were virtually never involved and they pointed out the fact that they had no legal commitment on more than one occasion. In all of the T & C #77 meetings convened over the years, INAC official attended one meeting (Prince Arthur – Thunder Bay). After he got lambasted by First Nations for not doing anything (regarding T & C #77) he never came back.

4. At least one legal opinion has been undertaken. Findings from this opinion (e.g. "The purpose behind the intent is clearly to allow Aboriginal communities to develop the necessary tools to assist in their economic situation by providing to them licences and opportunities for employment and income while ensuring Aboriginals have a strong voice in forest development to preserve culture and community" and "Condition 77 does require that MNR conduct serious negotiations with First Nations and Aboriginal communities" – (Petrone Hornak Garofalo Mauro – 1998)) have, generically, not materialized in a favourable fashion for First Nations.

5. The forest industry was not mentioned in the wording of T & C #77. However, the majority of the economic opportunities/development (especially after the establishment of SFL's in which the OMNR downloaded the responsibilities of forest management, silviculture, all road construction etc. onto the industry) lied with the industry. The only thing the OMNR really retained responsibility for was fire fighting. So we had a situation where the OMNR was to "conduct negotiations at the local level with Aboriginal peoples" (as per the wording of T & C #77) and yet the OMNR had no control over the economics of the forest industry (which is where most of the actual jobs existed). How much the industry got

involved with T & C #77 depended on how much force the OMNR exerted on them. This again, depended upon the efforts of individual district managers. At one point, one District Manager from Nipigon district informed First Nations in 1998 that "the company has a responsibility to help the Crown meet Term and Condition 77". So, their existed some efforts by the OMNR to download the responsibilities of creating economic opportunities for Aboriginal peoples onto the forest industry. This also caused some tensions between the industry and the province. First Nations became caught in the middle of this.

6. By the late 1990's, the OMNR began to report (in their Annual Reports) how they were meeting T & C #77. This was done on a district by district basis. What was reported over the years was a poor excuse to cover up a failed Term and Condition #77. It certainly was a failure, generically speaking, from the First Nations perspective and aspirations. The Annual Reports mentioned things such as First Nations picking up copies of tender applications (this did not necessarily mean that First Nations even applied for, much less received a contract); the number of First Nations working at a certain spot (even if these jobs were obtained by the efforts of First Nations and not due to the efforts of the OMNR); contracts being offered to First Nations (even if First Nations did not accept the contracts); number of jobs, contracts etc. being awarded to First Nations (they never reported upon the high number of First Nations businesses etc. that went bankrupt, shutdown etc. because the contracts offered were too small in both quantity and quality to sustain their businesses) etc. etc. etc.

7. Numerous meetings occurred, beginning in the latter half of the 1990's, regarding T & C #77. In north-western Ontario, the North-western Ontario Aboriginal Forestry Association (now defunct) took the lead at organizing meetings between the OMNR and First Nations and, later on, between First Nations and the forest industry. Expectations and hopes of First Nations were high and at the initial OMNR/First Nation meetings we had numerous communities and representatives attending. However, nothing tangible ever materialized out of these meetings, and they gradually became forums to express frustrations. The results were that after a couple of years or so, First Nations attendance dropped to virtually zero. Thus, these meetings have ended.

8. In September 1999, a draft "Condition 77 – Revised Interpretation and Guidelines Timber Class Environmental Assessment" document was released by the OMNR. First Nations again were not consulted during the preparation of this document.

9. The industry's unions were often barriers to the successful implementation of T & C #77. The OMNR was not willing to force the unions into anything (saying that unions were a responsibility of the

industry), and the industry usually lacked the will or power to force the union to concede/agree to etc. anything (their usual response was that "we are bound by union contracts"). As a result, many potential opportunities fizzled out because agreements could not be reached with the unions.

10. All of these concerns went on into this century. It was just a repeat of repeats. In July of 2002, (as one example) the Chiefs of Ontario sent the OMNR a letter outlining the ongoing concerns with T & C #77.

11. By the time the province went through it's Timber Class Environmental Assessment renewal process (2003 and earlier) First Nation concerns regarding T & C #77 had not only remained the same, but they had actually intensified. The concerns (as well as numerous others) were continually reported to the OMNR and Ontario Ministry of Environment (OMOE) during the renewal process. The basis results were that the OMNR denied First Nation claims, the OMOE supported the OMNR views and not First Nations (this seem to be basically because they chose to believe what the OMNR told them and not what the First Nations told them) and that, ultimately T & C #77 was carried over (it is now T & C #34 and the wording is virtually unchanged) into the new, approved Timber Class Environmental Assessment. NAN continually challenged T & C #77 during the renewal period.

From the Aboriginal perspective T & C #77 has been a dismal failure. Provincial government claims that T & C #77 was of great benefit to First Nations is not true. First Nations have once again experienced marginalization directly as a result of T & C # 77.

## 4. Ontario's Timber Class Environmental Assessment

### *4.1 1994 Timber Class Environmental Assessment (EA):*

The EA document was released on April 20, 1994. This was based upon the results of a hearing which lasted 1.5 years. In turn, the hearing was based upon the Environmental Assessment Board having to review the OMNR's request to have 385,000 square kilometers of Crown Land reviewed and approved for the undertaking of timber management (this request was made on Dec. 23, 1985).

Attending the hearings were representatives from Grand Council Treaty #3, Nishnawbe-Aski Nation, Windigo First Nations Council and OMAA.

First Nations made the following key recommendations regarding what they considered as being the necessary component of the Environmental Assessment.

1.“Aboriginal interveners argued that their Treaty and Aboriginal rights to some of the timber resource are constitutionally entrenched and exist as an obligation of the Crown which is inherent as well as owed through treaty, affirmed by section 35 of The Constitution Act and upheld by the Courts.” (page 350)

2. Aboriginal interveners also argued that the board must “recognize these rights in our decision by denying approval unless these rights are recognized and accommodated”. (page 350)

3. Aboriginal peoples presented “evidence on the concept of Aboriginal communities co-managing timber resources with the MNR”. (page 366)

4. Other Aboriginal comments included that the MNR must be prevented from “ignoring or perpetually deferring Aboriginal and Treaty rights”, and that the MNR be required to enter into “good faith, compulsory, bona fide negotiations to identify and to mitigate or remedy effects of the undertaking on the environmental rights of the Ojibway” (page 368)

5. Other Aboriginal comments included, “require the establishment of a process or forum for the negotiations and resolution of land claims and other claims based on Aboriginal or treaty rights”

6. That there be “an elected community based forestry management authority with significant assured Aboriginal participation set up in unspecified regions with the authority to manage timber cutting and to issue timber licences”

7.“That the MNR designate 25% of land identified for timber harvesting in each of MNR’s districts to be allocated for the exclusive use of Aboriginal peoples, who would elect their own representatives to manage this land” (page 369)

The Environmental Assessment Board made the following observations:

1. The board stated that, “we believe that if treaties were honoured and fulfilled, Aboriginal peoples could have the lands and resources necessary to support their governments. Sharing of resource rents through royalties and an expanded land base could be the basis for economic self-sufficiency.” (page 352)

2. The board stated that, “we believe that off-reserve timber must be made available for harvesting to the Aboriginal communities, or they cannot begin to improve their economic situation” (page 362)

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3. The board stated that, “we recognize that there are cultural factors outside of timber management planning that may prelude Aboriginal peoples from taking advantage of forestry employment” (page 364)

4. A concern of the board was that “We acknowledge that we do not have evidence in front of us to define exactly what these treaty and Aboriginal rights are; they encompass many matters outside the timber management planning undertaking” (page 372)

Some of the resulting actions taken by the Environmental Assessment Board were as follows:

1. The board rejected the notion of allocating a percentage of the timber licences or timber harvest lands to their members citing that the granting of licences is decided pursuant to the Crown Timber Act.

2. The board ordered the creation of T & C #77 (now T & C #34) to address the social and economic issues facing Aboriginals.

The synopsis of the aforementioned material is that an EA must recognize, respect and accommodate Aboriginal and Treaty rights; treaties need to be honoured and fulfilled; off-reserve economic opportunities must be made to Aboriginals while accommodating cultural factors; Aboriginals must be co-managing the forests with the province and negotiations are required to identify, mitigate and remedy impacts upon Aboriginal and Treaty rights as well as land and other claims. It appears that Aboriginal and Treaty rights need(ed) to be defined or re-defined in the courts to accommodate an EA (when government and other parties are reluctant to acknowledge defining what these rights consist of). Note: Since the release of the EA in 1994, there have been many court cases regarding Aboriginal and Treaty rights etc.

### *4.2 Aftermath of the 1994 Timber Class Environmental Assessment:*

The aftermath of the EA also contains some important details. These are:

1. Despite the recommendations of the EA board, Aboriginal peoples have seen little improvement during the last 10+ years.

2. T & C #77, generically speaking, has been a dismal failure for Aboriginals. Major barriers exist towards successful implementation. These include a reluctance on the part of the governments and private

sector to significantly change a system of management that has been in place for decades and gives them the control and authority. No meaningful implementation plan for T & C #77 despite an EA board order that the OMNR was to co-develop an implementation plan and have it in place for 1996 which did not happen. Instead, OMNR chose to develop a plan on their own which was released long after the 1996 deadline. More insulting was OMNR offering Aboriginals contracts that were lacking in either quantity or quality, and often for materials such as wood fibre that no-one else wanted.

3. Meaningful consultation was never afforded Aboriginals in forest management planning and related issues.

4. Native values concerns regarding inadequate funding, definitions, mapping, protection and other issues continue to exist.

5. Aboriginal and Treaty rights were, and continue to be, ignored by Ontario's forest management planning process. This continues to pose problems for Aboriginals (e.g. unresolved land claims, lack of compensation for infringement of rights etc.).

The synopsis of the aforementioned material is that these are all necessary issues to be incorporated into, and resolved by EA's if the system is to accommodate the needs of Aboriginal peoples. Despite the realizations and recommendations of the original EA board, these (and the original 1994 EA concerns of Aboriginal peoples) are still valid and unresolved issues.

### *5. Timber Class Environmental Assessment Renewal:*

On July 17, 2002 the OMNR submitted a document to the Ministry of the Environment. This document (MNR's Timber Class EA Review) was the OMNR's submission to have their EA renewed. Aboriginal people were afforded numerous difficulties during this process. These difficulties included:

1. No meaningful consultations with Aboriginals were held during the review.

2. No funding or other capacity was offered to Aboriginals to attend open houses etc.

3. Aboriginal comments were "considered" by the OMNR (but little if any meaningful changes were made to the EA review and documents because of these concerns).

4. At times, the OMNR outright rejected Aboriginal proposals, statements etc. For example, the province officially rejected (for use in Ontario) NAN's Consultation Policy. This was despite the fact that the NAN chiefs ratified the document. The province's main concern with this document seems to be that it incorporates A & T rights into the process.

5. Aboriginals challenged the actions etc. of the OMNR to the OMOE. The result of this was that the OMOE took the word of the OMNR over that of Aboriginal peoples.

6. During this renewal (as well as on other occasions) the OMNR stated that Aboriginal and Treaty rights do not have a place in forest management planning. However, this is a fallacy since it is Ontario's forest management planning manual, the forest management plans approved under this manual, and the subsequent, approved forestry operations that cause the infringements of Aboriginal and Treaty rights in the first place. As such, the process that causes the problems in the first place should have a method of resolving the problems. This does not exist in Ontario's EA and forest management planning.

The synopsis of the aforementioned material is that despite all of the attempts to recognize and include Aboriginal and Treaty rights into the EA that this is still not being done. Many court decisions have been concluded since the original board's statement regarding the need for Aboriginal and Treaty rights to be defined. However, the province refuses to acknowledge, consider or use these same rights. Ontario also refuses to acknowledge the progress made by Aboriginal peoples in the courts regarding rights. As such, an EA that accommodates Aboriginal and Treaty rights needs a process whereby these same rights, as defined by the courts are recognized and accommodated by the EA process. This must be an automatic recognition that must be distant from the powers, influence etc. of ministries. Furthermore, EA reviews/renewals cannot be conducted by one ministry and ruling on another ministry. This puts Aboriginal peoples at a distinct disadvantage as the province is not inclined to rule against itself (e.g. the OMOE is not inclined to listen to Aboriginal peoples or rule against the OMNR in favour of Aboriginal interests).

# PART II

## CONSIDERATIONS TO ADDRESSING FIRST NATIONS ISSUES

For one to find solutions related to First Nations, it is imperative to look towards their own cultural composition and character. What elements of their character provided their survival and sustainability? It has been the experience of Canada's effort to integrate the indigenous societies into mainstream Canadian mosaic without recognizing or appreciating the First Nations. These approaches included the imposition of assimilation policies that were associated with other regimes like the churches. These efforts have only accomplished untold misery, dislocation and failure. It is important to note certain critical elements that may provide options for improved understanding.

### Matters of Existence, Harmony and Security- First Nations Communities

Historically, the First Nations communities had governing structures that responded to the needs of the total community. To an outsider, these structures may not have been elaborate, but the actual workings were complex that required total community involvement as it was the responsibility of the whole community. These structures met the demands of the day and ensured the continued survival of First Nations societies.

Under these regimes or structures, each function of community governance was clearly identified. The responsibilities of a specific function were assigned to families and in most cases the families would assign or designate the most capable and responsible individual(s) to provide leadership in the designation. Prior to designation by the community of the function, the families considered for the designation would have demonstrated a high level of competency in the specific field of the assignment or responsibility. The communities maintained various structures that covered social, economic, political and spiritual functions. In these structures, all families became part of governance, thus fulfilling the Canadian equivalent concept of "discharging one's social responsibility".

Although the First Nation communities were small and scattered throughout vast territories, the Nation devised methods and systems to maintain social order that ensured growth and maintenance of their society. The clan systems were the central key element in the governance structures that provided the community with socially accepted environment through promotion of positive community development based upon their traditions, culture and lifestyles. As with any community, they faced daily struggles and contention over problems of individuals or of community nature that may require intervention. The interventions responded varied to each different situation and circumstances; all were applied with great care and compassion supported with monitoring and follow-up.

The people were totally dependent upon the practice of living off their traditional territories on year round basis. The only time the clans or families would gather as a community would be during the summer to meet and perform traditional practices and festivities. At the same time, governance regimes and responsibilities would be acted upon. One of those responsibilities was the protection and defense of the Nation's traditional territories. The traditional territories were jealously guarded and defended. All traditional territories were clearly identified with certain key landmarks. These territorial lands were recognized, observed and respected. The First Nation force be it military or otherwise would be summoned for explicit purposes of defense of traditional territories. The First Nation was responsible for protecting its territories as it was the base of their existence and survival.

During the War of 1812, the Sioux Nation who had allied with the British Crown were driven north into Canada. The Ojibway Nation heard about the advancing of the Sioux war parties into their territories. At Wah-Naw-Wangang, the Ojibway Nation of the present day Lac Seul region established lookout out posts for the on-coming Sioux warriors. It is reported that not one traveled as far north to the Lac Seul region or Wah-Naw-wagang. Today, Wah-Naw-Wagang is appropriately named Sioux Lookout. The Sioux warriors travelled as far north as the present location of Sioux Narrows where they met their demise. The Ojibway Nation was merely protecting their traditional territories.

## Policing, A Foreign Concept

Policing was a totally foreign concept to First Nations as introduced and implemented by the then settler governments. First Nations had their own forms of maintaining community social order through peace-keeping measures. Policing and peace-keeping concepts were diametrically incompatible aside from the fact that First Nation concepts or practices were never even considered as an option by the settler governments.

The first contact between First Nations and police occurred with the signing of treaties between First Nations and the British Sovereign. Since the signing of the treaties, the Royal Canadian Mounted Police (RCMP) has and was a party present for all subsequent annual treaty payments. At the signing of most treaties, the Treaty Commissioners representing the Crown were accompanied by the RCMP. The RCMP became part of the symbol of honour in the treaty making process. It was through exchanged understandings that First Nations were assured that RCMP would provide protection from any encroachment by settlers. The Queen's children would be protected.

The history between police and First Nations is one of tragedy, disgrace and dismal failure. Policing of First Nations people turned into suppression of their cultures and traditions. Police became an arm of Canada's assimilation policies through enforcement of laws prohibiting and outlawing the original people's

customs, culture and practices. Today Aboriginal peoples have on-going conflict, distrust and antagonism against police. The distrust and suspicion of police is widely accepted because of the horrendous negative experiences encountered over the past hundreds of years. It is unfortunate for First Nations people to have concluded that the one understood to have been their protectors have become their tormentors.

The Ipperwash Inquiry mandate is to determine why a protestor was fatally shot by a police officer. This is not a first incident where an Aboriginal has died in a demonstration or other similar situations. Every province and territory has had their Dudley George. Why has this situation existed so long? Society has solved some of the most complicated and complex mysteries related to medicine, industry and now technology. Yet, we are failing to find solution to alleviate police-First Nation relations. Judicial inquiries have been launched to determine the relations between Aboriginals and police. Hundreds of recommendations, if not thousands have been made on "ways and means" to improve police and Aboriginal relations. Time might be appropriate now to examine policing through the Aboriginal understanding and worldview.

**Police, Euro-Canadian Enforcement System**

In order to examine, understand and appreciate the difficulty of acceptance by First Nations on the Canadian concept of law enforcement as carried out by the police, it is important to try to understand the circumstances impacting on First Nations. First Nations do not dispute or even question the rule of law. First Nations had their own systems of laws and application of such laws. Application of laws is not foreign or strange.

Aside from the tragic history between police and First Nations, we need to address why policing has failed so miserably with the original peoples of Canada. Language determines and defines who you are. In the language of the Oji-Cree, there is no word for police. When the first encounter happened with the police, the people had to describe the function of the person. The Oji-Cree word or description of police is " ***Shee-Mah-Kan-Ish***" that being literally translated as " the one who holds the weapon, the one who holds the weapon over you".

When the Plains Cree were engaged in defending their territories, the lead warrior would carry the lance or some other weapon. The warrior was recognized and referred to as "***Shee-Mah-Kan-Ish***" denoting that he would use his lance or weapon to defend and kill if necessary. The same word " ***Shee-Mah-Kan-Ish***" is used in Oji-Cree to describe a person who is in the armed forces denoting that this person can use the weapons to kill.

In the language of the Moose Cree, along the James and Hudson Bay, the Cree use the term " ***Ooh-Kee-Boo-Way-Zeah***" and the literal translation being" the one who locks you up or the one who binds you".

In the Ojibway language, "***Tak-Koh-No-Way-Win-Nee-Nee***" for police is translated as "the one who apprehends you or the one who takes you away"

Our First Nations languages consistently confirm that policing as introduced by Canadian governments was foreign to our people. The policing enforcement practices or processes were different, very intrusive and if not outright threatening. The literal translations of First Nations words describing police portray clear intimidation. In the language of Oji-Cree, it implies the use of weapon to kill. In the language of the Moose Cree and Ojibway, the words are very descriptive clearly defining what the police do. From the language perspective of First Nations the literal translations describing police show intent with militaristic actions and implications, and imply direct and swift action resulting in some form of detention and or apprehension. Is it possible to relate First Nations people with the friendly neighbourhood policeman concept or attitude? The language, and perception coupled with hundreds of years of negative experiences with police make less than ideal for positive relations.

The challenge facing governments and First Nations is to begin a process whereby First Nations can have more direct impact in the field of policing. Is policing what First Nations are aspiring to promote or is it peace-keeping? If we should decide to keep forging forward with the Canadian policing concept, then the following will happen.

Firstly, the recent establishment of First Nations policing institutions under Canadian policing system will not have any significant improvement with First Nations and police relations. All that is accomplished is the transfer of policing stained with a stigma of horrendous tragedies experienced by Aboriginals. It will be First Nations administering a police system that has failed the Aboriginal population. It will be a classic example of administering our own miseries. First Nation police or constables will still be straddled with the same title and referred to as " ***Shee Mah-Kan-Ish, Tak-Koh-Nee-Way-Win-Nee-Nee*** and ***Ooh–Kee-Boo-Way-Zeah***. Aside from the fact that our First Nations policing institutions will be under the direction of First Nations board members and our policemen are aboriginal, will policing have changed? The change of titles or names of our First Nations constables will not impact changes in policing, but if changes should come about to reflect Aboriginal forms of peace-keeping, then we will be on the right path to make significant changes.

Secondly, First Nations community policing is virtually non-existent. Where attempts have been made to foster community policing, the results have been minimal creating frustration and apathy. People who have made efforts to facilitate community policing at First Nation communities must be commended. But the odds of success and mobilization of a community to rally behind "***Shee-Mah-Kan-Ish, Tah-Koh-Nee-Way-Win-Nee-Nee*** or ***Oh-Kee-Boo-Way-Zeah"*** will be extremely difficult. The language is fundamentally at odds with the concept of community policing. The First Nations would be more responsive and

supportive with their traditional forms of peace-keeping. The concept of the friendly policeman does not exist within First Nations culture instead it describes the policeman to be very intrusive, intimidating and threatening.

Lastly, First Nations must be commended for taking the responsibility for the policing within their territories. The First Nations accept and recognized that the rule of laws must be enforced impartially by their police institutions, and at all times, maintain and up-hold the public trust that comes with the responsibility. Presently, there exist no venues whereby First Nations and governments can conduct real and meaningful dialogue on measures to increase public security and community harmony. It is possible to alleviate enforcement measures within First Nation communities. For instance, the tragic incident in Kashechewan where two people held in custody for drinking led to their demise could have been prevented. First Nations must have access to resources that will support their policing initiatives demonstrating less intrusiveness in the enforcement. The dialogue and opportunities for new and innovative First Nation approaches will eventually narrow the gap of irreconcilability of relations between the Aboriginal peoples and the police.

**Peace-Keeping, Alternative with a Difference**

As previously stated, First Nations communities were subject just like any other community through the world with struggles; struggles that often result in the need for direct intervention. First Nations maintained certain level of community norms that membership were expected to up-hold. The premise of such expectations was based upon respect for rule of law or traditions/customs. When direct intervention was required, the First Nation communities had people who were assigned the responsibilities as peace-keepers or monitors. The approaches exercised were not intrusive but included counseling, reconciliation and healing.

In many of the First Nations communities where peace-keeping measures were not successful, then the community had to take progressive measures to ensure security and protection of the community members. Such measures required community support and agreement. The most extreme measure taken would have been banishment from the community. Banishment measure was not a surprise tactic as all members were aware of potential consequences for continued disrespect of community norms.

The direct intervention measures were less intrusive as to ensure the individuals confidence that measures taken was for the good of the individual and the community. The intervention was about healing and restoration. There were two main forms of intervention;

### *1. Ooh-Naa-Naa-Kah-Chee-Chee-Cake*

As in all communities, there would be various incidents of disturbances or incidents that certain communities would report that would not be acceptable to community norms or standards. Certain individuals from certain families would be assigned the responsibility of being "***Onh-Naa-Naa-Kah-Chee-Chee-Cake"***, the literal translation being "the watcher or observer". His or her responsibility would be to keep an eye on the potential problem and monitor the situation. The person who is being monitored would be informed of the responsibility of the watcher. He would be given the responsibility to assess and counsel the person creating the infractions or disturbances. The individual would be encouraged to request assistance from the watcher.

### *2. Ooh-Kaa-Naw-Wen-Jih-Cake*

Whenever there was a more serious incident or some form of altercation that required direct intervention, the ***Ooh-Kaa-Naw-Wen-Jih-Cake*** would have the responsibility of providing direct intervention. The selection of the ***Ooh-Kaa-Naw-Wen-Jih-Cake***, the literal translation being, "the Keepers" was not assigned to one particular family head but this form of intervention required the greater community involvement and response.

Peace-keeping responsibilities varied from each nation and community. These responsibilities were determined by the community as a whole and what measures were required to resolve the issues that give rise to the need for direct intervention. The recent road blockade at Caledonia demonstrates how peacekeeping can work. Peace-keeping is about finding solutions to contributing problems. The Ontario Provincial Police maintained order and ensured safety for the public at large and for the occupiers. The police do not have the answers to problems but in the case of Caledonia, the police become instrumental in facilitating opportunities for dialogue and eventual negotiations.

On the other hand, the public became disenchanted with the work that the police were doing to find a resolution of the dispute. The public became angry because they believed that the police was being manipulated, and that they were siding with the occupiers. The people become angry when they feel inconvenienced or when they feel that their rights and freedoms are being compromised by another group. Justice must be for all and that includes justice for occupiers. A serious examination must be undertaken to critically determine why such occupation had to happen. It was the last and only resort left open for answers for the occupiers.

Peace-keeping practices and traditions of First nations will need to be fully explored where meaningful dialogue must happen. Peace-keeping approaches will ultimately change the character and nature of policing. This cannot be accomplished within short timeframe, but dialogue is a beginning that is sorely needed by First Nations. It will be for the betterment of Canada as a whole.

# PART III

## Direct Actions, Asserting of Rights and Jurisdictions

The following examination of direct actions by four separate First Nations over a short period of time signals a new approach by leadership, traditional land practitioners and people in general. The government processes that have manipulated the treaty and aboriginal rights of First Nations have totally exasperated the patience and goodwill of First Nations. The price of doing nothing is too costly to First Nations. The cost to First Nations is to live in continual abject poverty, high mortality rate, declining health status and a hopeless future. The new approach is a wake up call to governments, private sector and public at large that First Nations will not tolerate marginalization while society continues to experience wealth from their resources.

The territories and the natural resources will be protected by the First Nations as demonstrated by KI (Big Trout Lake). In the future, protection measures undertaken will be aggressive and concerted through the remote regions to ensure meaningful benefits to the communities. The communities will exercise their rights and custodial ownership of lands and resources.

First Nations will no longer be intimidated by government policies, court injunctions and litigation measures to accept a lesser or no role in the development of resources within their traditional and customary lands. The resorting to erect road blockades is not taken by the communities with any presumption of light heartedness or simplicity but they recognize that their options are limited if any options are worthy of considering at those stages.

Direct action is a statement by the First Nation of asserting their rights and jurisdiction over the territory. The traditional land tenure systems that have been dormant by choice of First Nations to demonstrate honour on their part of the treaty making undertakings are now being revitalized and implemented. Not onlu are they being implemented but the rights and jurisdiction over lands and resources will be protected, defended and developed by the same people.

The following communities have acted in response to suffering continual economic marginalization in spite of the fact, the private sector interests exploiting their resources have failed to factor the First Nations need for economic development and wealth generation from those same resources. At the same time both federal and provincial governments have failed to respond to First Nations issues of infringement of treaty and aboriginal rights in areas of resource development sectors.

## Aroland First Nation

The Chief and Council of Aroland First Nation erected a blockade on secondary Highway 643 that runs through their reserve in March of 2003. The Chief and Council were compelled by their people to take extraordinary measures to secure the employment commitments that were made to the First Nation by Nakina Forest Products. The people were frustrated, angered and completely disappointed with the lack of any progress on the agreements made with Nakina Forest Products on the mill operations. Nakina Forest Products appeared to undermine the concerns or expectations of the First Nation. The blockade was erected to force the company to settle or re-negotiate the terms of the agreement which the First Nation felt the company breeching.

The anger and frustration was mostly due to lack of any tangible benefits accrued to the First Nation from the operations of the mill. The real tangible benefits expected were employment and business participation in the woodlands operations. During this period, it was becoming evident that the people from the community would not realize any benefits, and what little returns they were provided would only further exasperate their situation.

There are three major issues that led to the extraordinary actions of Aroland First Nation to erect the blockade;

### *1. Employment*

When Buchanan Forest Products was securing support from various community sectors from the region for mill development, the owner and president met with the leadership of the community. The owner made commitments of employment opportunities to the effect that there would not be enough people from Aroland to meet the demand for employment positions at the new mill.

Once the mill was constructed, and the recruiting commenced for the employment positions, then the First Nation was informed that the only applications to be considered were for applicants who had successfully completed a grade twelve level. Basically, the criteria eliminated seventy to eighty percent of the available workforce from Aroland. The First Nation claims that the highest number of people employed continually from the community at any given time is 10. This figure fluctuates between 8 to10 full time employment positions.

The mill had hired prospective candidates with the understanding that these candidates would take the necessary courses to attain the grade twelve level. Unfortunately, this effort failed to realize any successful results, thus, resulting in terminations or resignations at or before expired agreed upon timeframes.

Nakina Forest Products does not have any Aroland First Nation members employed at their woodlands operations. The First Nation claims that only four people are employed by Kimberly Clark at their woodlands operations.

### *2. Woodlands Operations Opportunities*

One of the key opportunities, the First Nations wanted was to establish the woodlands operations to feed the wood fibre demands of the Nakina Forest Products. From the onset of the original planning, Aroland First Nation had pursued to seek the forestry license for Ogoki and Nakina North Forest Management areas. In the end, Aroland First Nation was granted 17,000 cords to cut and supply annually from the Nakina North Forest Management Unit. Ebamatoong and Martin Falls First Nations, located north of Albany River were also granted 17,000 cords.

Aroland First Nation tried to secure financing to establish their woodlands operations based upon the 17,000 cords annual cut only to be turned downed by every financial institution because the allotted wood cut would not be able to support the proposed woodlands operations. The First Nation examined every option to realize how they could benefit from the allotted wood cut granted to them but in the end all options were not economically feasible.

Ebamatoong and Martin Falls First Nations proceeded to establish their own woodlands operations. This operation provided the allotted cut for a few seasons but eventually had to shut down their operations. This is a classic example of setting up a First Nation enterprise to fail.

In order to maintain the allotted wood cut allowance on yearly basis, the wood fibre must be cut and delivered to the mill site. Aroland, along with Ebametoong and Martin Falls First Nations have sub-contracted their allotted wood cuts to another contractor. Aroland claims that on the first year of operations by the contractor they did not realize a profit as the contractor had to incur additional costs for organization and development. Since then there has been limited returns from the contractor.

### *3. Harvesting of Natural Resources*

Kimberly Clark has had the forest management licenses in the region, and still harvests the wood fibre in the region. Nakina Forest Products and other forestry contractors have to transport the wood fibre through the Aroland reserve. On daily basis, the community estimates approximately 100 to 120 truckloads of wood fibre pass through the community at the height of any given season. At normal times, the community estimates approximately 80 truck loads of wood fibre transported through their community. There is a growing sense of deep frustration and anger as

they watch their natural resources been exploited with the realization that they are not benefiting from the industry.

## Aroland Road Blockades

The access and exploitation of wood fibre in the traditional territories of Aroland First Nation have resulted in two blockades to draw attention, response and action on the flight of the community. Nakina Forest Proucts saw mill was built 15 kilometers from the reserve with much anticipation that such development would improve the quality of life of the people from Aroland. Instead there has been growing disenchantment, frustration and anger resulting in two road blockades since 1991.

### *Blockade # 1*

In 2001, Aroland erected two strategically located blockades that were within the reserve thereby completed choking access and exits to the woodlands operations for all companies. The main blockade was located in front to the First Nation administration building and the second blockade approximately three kilometers blocking the Kimberly Clark industrial road. Although there is an easement on the two roads, Aroland First Nation had no option but obstruct the access in order to draw attention to their flight. The blockade was deemed to be a peaceful action. The residents, along with the leadership, maintained 24 hour manning of the sites.

Nishnawbe-Aski Police Services maintained observation of the blockade at both sites as these blockades were being conducted in the reserve. OPP were observing the site from a distance, and if support was required by NAPS officers, the OPP were readily available. OPP had only one vehicle at their location and two vehicles at any give time at the most. OPP maintained a vehicle at the junction of Highways 584 and 643 informing the traffic of the blockade. The blockade became a community event with residents congregating at the site. The blockade instituted measures to ensure peaceful activity.

The blockade allowed non-forestry people such as fishermen and vehicles to pass and exit the blockade without undue inconvenience. All other personnel could not access or exit their camps or operations. It was reported that certain woodland operations had to use aircraft to transport goods to their sites.

NAPS officers monitoring the blockades were not treated unruly or criticized but they were allowed to monitor without any difficulties. NAPS officers informed the leadership the role and responsibilities they had to maintain peace and order which was respected by the community. The OPP officers did not encounter any problems with the blockade. The officer in charge of the Geraldton detachment met with the leadership to

determine the nature and scope of the blockade. The long term relationships that had been established with the officer-in-charge and many of the community members played a critical role in the police monitoring of the blockade.

The blockade lasted for approximately one month at which time negotiations were held with Nakina Forest Products. At the same time, Nakina Forest Products had served court injunctions as well as lawsuits claiming damages and company financial hardships and losses. As part of the negotiations for settlement, all lawsuits were dropped against the leadership and certain number of key participants. As part of the settlement negotiations, Nakina Forest Products made part of the settlement that the Chief and Council had to agree not to erect any future road blockades. On the positive note, no charges were laid against the people erecting the blockade.

### *Blockade # 2*

In December of 2002, the people of Aroland erected the second blockade choking access and exit for traffic involved with the woodlands operations. The reasons for the road blockade were numerous including the lack of any good faith from Nakina Forest Products on the agreements. The community was again exasperated by the lack of progress or results from the agreement.

Secondly, the people wanted some action taken by Indian and Northern Affairs Canada (INAC) with their education concerns. The education issue became one of the dominating factors to the blockade as the people were extremely concerned with the safety of their children who were being transported daily back and forth to Nakina to attend classes. The truckers hauling full loads and school busloads of children were using the same road system. Highway 643 is a secondary provincial highway which does not have the same maintenance and or quality as other highways. Safety became the critical factor.

Lastly, the people erected the road blockade to demonstrate support of Asubpeeschoseewagong (Grassy Narrows) First Nation blockades that were happening at that time. The people erecting the blockade expressed intimate realities being faced by Asubpeeschoswagong people.

The blockade lasted ten days when negotiations were reached by impacted parties to address the concerns of the community. INAC agreed to begin the process of planning to have a school constructed at the community. The school is now under construction.

It appears that road blockades have become a process to force the Buchanan Group of companies back to the negotiating table. There are

no improvements with employment at Nakina Forest Products saw mill operations for the people. The communications between the mill and First Nations continue to lessen. Relationships that may have been there are almost non-existent.

In the last road blockade, the Chief and Council did not participate directly as they had agreed from the first road blockade that they would not blockade the road. Instead the Chief and Council were available at all times to their people who were the driving force on the second blockade.

## Future Direct Actions

It is just a matter of time before the people will rise once again to take extraordinary measures to address the lack of benefits from the resource industry of their region. Continual harvesting of wood fibre from the traditional territories of the traditional land holders will not remain unchallenged. People will demand accountability on such resource exploitation. Future road blockades may not be as peaceful as the previous actions.

## ASUBPEESCHOSEWAGONG FIRST NATION
## (Grassy Narrows)

### Defense of Traditional Territories

On December 2002, the people of Asubpeeschosewagang Netum (First Nation) launched their initial road blockade five kilometers north of their community on Highway 671. The actions precipitated are in direct response to five year cutting licenses granted to Abitibi Consolidated by Ontario that will permanently alter the landscape of the customary lands of the people. Furthermore, the people were totally frustrated by existing Ontario government processes in the forest management planning systems wherein they would be continually denied or rejected. The road blockade became the only option as a means to draw attention in order to protect their traditional territories. Asubpeeschosewagang people took direct action to defend their lands. The action was deemed to be a peaceful undertaking by the people.

This action was people driven undertaking; the Chief and Council were not involved in the road blockade. The people recognized that the Chief and Council had no authority whatsoever within the traditional territories as they are restricted by the Indian Act. The people felt that Chief and Council would be in better position to respond and represent them once the road blockade was erected with proper authorities. The Chief and Council became the buffer thus being put in a place to better advocate for the people and the people blockading the highway.

The people realized and recognized that Treaty # 3 was signed with Canada in right of the Queen. The Minister of Indian Affairs had stated that the Minister had no jurisdiction over the lands external to appropriated reserve lands. Therefore, the Minister of Indian and Northern Affairs Canada who has the fiduciary responsibility to protect treaty and Aboriginal rights was ducking their responsibilities by claiming no jurisdiction.

The Ontario government through the Ministry of Natural Resources was granting long term cutting licenses to pulp and paper companies without taking into consideration the reasons why First Nation people were vehemently objecting to these licenses. The processes conducted by MNR in forestry management became one of the key elements that gave the Asubpeeschoewagang people with no option but to close down the roads in their territories.

Two years after the initial blockade on Highway 671, the following message was delivered to Abitibi Consolidated Inc.

**MESSAGE TO ABITIBI CONSOLIDATED INC.**
**FEBRUARY 5, 2004**
**ABITIBI and ABITIBI LOGGERS:**

> ***You are hereby advised that you have until 5:30 p.m. Friday, February 5, 2004 to cease all logging activities and vacate the Anishnabe Lake area and the whole Grassy Narrows Traditional Territory.***
>
> ***Failure to comply will result in your workers and your equipment in being blocked in the area.***
>
> ***Signed:***
> ***X***
> ***Signatory Indians to Treaty #3, 1873.***

Abitibi Consolidated Inc. had recently commenced clear cutting timber near Anishnabe Lake which is approximately 60 km north of the community. A long time trapper in the area reported to the community that his trails and traps were completed destroyed by the clear cutting in the region. On February 4, the people erected a blockade on Deer Lake road leading to Anishnabe Lake; thereby completely blocking all logging trucks exiting and accessing the area.

Since the original blockade of 2002, the community has had endless meetings with governments resulting in further frustration for the First Nations. For example, the forest management units must have an independent forest audit conducted as part of the license. KBM forestry consultants from Thunder Bay conducted the Kenora Forest Management Unit for the period 1991-1998 which was finally made available to Asubpeeschosewagang. The report stated and concluded that the First Nations issues advanced by First Natios were well beyond the scope of the Independent Forest Audit, and these would have to be dealt with at the highest levels of governments. It wasn't surprising when the Kenora provincial office was quoted in the report stating that there was no room for new harvesters, contractors or request from natives for timber and resource allocations. The report further concluded the District MNR did not have good communication or relationships with First Nation that is essential for implementing the government's terms and Condition 77 policy. MNR disregarded the protocol established under the forestry environmental assessment guidelines in 1989.

The only recourse available to the people of Asubpeeschosewagang is the present their views to the MNR forest planning processes where their issues cannot be accommodated. The people began demonstrations at the planning process locations to inform public of the lack of concern to their issues. The people participated at the consultation processes before, and it never made any

difference, cutting just continued. The District Manager with the MNR in Kenora had stated that the consultation process and the forest management plan will continue regardless of non-participation from the people of Grassy Narrows. A delegation of protestors went to Toronto to try to meet with the Ontario government but returned home without having being heard from the Minister of Natural Resources.

The protestors viewed Abitibi Consolidated Inc. and MNR operating as partners because they were operating and supporting each other in concert in every process. First Nation believed their presentations or alternatives were not being considered therefore there would not be any positive changes through the MNR or any other government forum.

Joe Fobister, one of the protestors held a hunger fast to protest the clear cutting and the sham of the governmental processes that were appearing to legitimize consultation. He expressed his anguish for the sufferings the people had to face such as the small pox epidemic in the 1900s, residential segregation that began in 1916, the flooding of their lands and sacred burial grounds in 1958, forced relocation in 1963, then the discovery of mercury pollution and poisoning on the English River system in 1970. Now , they were facing the clear cutting of their lands that will once again devastate their homelands. He stated ***"… that's enough! We're broken almost….You just can't live like this anymore….there is no dignity there to become a beggar in your own land".***

The actions taken by the people of Asubpeeschosewagang to draw attention to their concerns were not confined to the road blockades to the forestry sites, but they held peaceful demonstrations at MNR offices, at the paper mills, Kenora MP's office, traffic slow down on Trans Canada Highway, public presentations and fast (hunger strike). During the course of these actions, Ontario government represented by MNR and Ontario Native Affairs Secretariat (ONAS), paper companies and at times with INAC representatives would convene meetings or negotiations with the Chief and Council of Asubpeeschosewagang, but very little came from these meetings. The people manning the road blockades continued to believe that the central issue of their protest was not being addressed adequately to convince them that all proponents understood their issue. The protestors were defending their traditional territories.

The people of Asubpeeschosewagang have clearly marked out there territories that they are defending. Since the blockade was erected, all logging operations have ceased in the territory. The people continually monitor their lands to ensure that no logging takes places in those lands. The road blockades remain. At the first instance where the loggers begin to encroach upon the traditional territories, the road blockades will be manned immediately.

## Organization and Support

The Asubpeechosewagang road blockades are by far the longest undertaking of this nature, the most committed and certainly the most well organized in so many ways. The protesters have garnered and maintained their support base from various institutions. The Grassy Narrows Solidarity Coalition comprised of Toronoto University Native Students Association, Native Canadian Centre, Anti-Racist Environmental Coalition (AREC) Earthroots, Heads Up Collective, University of Toronto Women's Centre and the Ontario Public Interest Research Group.

Along with these public interest support groups, the protestors secured political backing of Grand Council Treaty # 3 and the Chiefs of Ontario. The Ontario leadership comprising of all political territorial leadership continued to monitor developments of the protest. Along with the support of the First Nation political leadership and public interest groups, the regional warrior group monitored the various demonstrations undertaken providing sideline vigil to ensure safety of the demonstrators.

## Police and Public Security

Historically, the relations between the police and First Nations in Kenora region can be categorized as one of dismal failure and tragedy. Past police interactions with Aboriginals have only resulted in greater distrust and suspicion. This sentiment is affirmed and entrenched with Aboriginals because of the continued mistreatment claimed and proven with the Kenora police. Although most of these actions and sentiments have been caused by the Kenora police, the OPP is painted by the same brush because they are the police. Aboriginals do not distinguish police from one police service to another. Police are police.

At the on-sight of the road blockades, the protestors claim the OPP wanted to take the usual high handed approach to dismantle the road blockades but through the persistence, knowledge and organization, it became apparent to the police that the protestors had a legitimate right to lawful assembly. The most number of vehicles noticed by the protestors at any given time would probably be two except when shift changes were been done or at special meetings where police were required. The police were present to ensure public safety for the protestors, and truckers. Their main function was to monitor the blockades, but distrust and suspicion grew by the protestors.

To what extend the police recognized the claims of First Nations cannot be determined, but it was clear by the actions of the police that they were sympathetic to the truckers and loggers that were being inconvenienced by the road blockades. At one point, when the truckers did not meet the imposed deadline to evacuate the area to be blocked the police officer in charge of monitoring the road blockade convinced the protestors to allow the truck to pass so that the truck could turn around. Instead the trucker proceeded to ignore the

instructions only to be blocked, by a secondary road blockade down the road. The lead police officer lost all credibility and trust with the protestors.

The protestors had informed the police that they were maintaining their own security which the police appeared to undermine and dismiss. At the same time, the protestors maintain constant vigil of police presence and became aware of continual police intelligence activities.

The protestors had the responsibility to maintain the blockades under the principle of "peaceful action." The protestors had to organize and maintain security functions so that their peaceful intent was not compromised. The security had to ensure that participants and supporters did not enter the protest sites without some form of check, therefore, it came to a point where individuals that were not known had to be checked behind the lines. One supporter arrived and when checked was found to have had a rifle. He was questioned as to the purpose of the rifle and answered that he wanted to go hunting while he was at the protest site. The protest security and leaders had the person leave the site.

**Christian Peace-Makers**

Christian Peace Makers (CPM) is a coalition of churches committed to non-violent advocacy support for Grassy Narrows' efforts to protect their traditional homelands. The CPM were invited by the Grassy Narrows Environmental Committee to maintain full time presence at the road blockades which they did until the summer of 2004. Then they relocated their operations to the Town of Kenora. The CPM became the source of daily information to the public on the happenings with the road blockades. The CPM became the critical link for the protestors. The CPM was not there to influence or direct the protestors but maintained their integrity as the third party interest with a specific role.

It is believed by the protestors and leadership that the presence of CPM made a difference to how the police dealt with the road blockades. The actions and advocacy support of CPM provided credibility to the concerns expressed by the protestors. The CPM was able to reach interests that the protestors would have had difficulty securing for their cause.

**Future Direct Actions**

The traditional land holders have not dismantled their road blockades. The lines have been drawn and if any efforts are made to cut wood fibre within the traditional territories of Asubpeechosewagang the road blockades will be manned. The Grassy Narrows direct action is the longest road blockade in place. The people of Asubpeechoosewagang will continue to defend their lands.

## CONSTANCE LAKE FIRST NATION

## STRUGGLE FOR BENEFITS FROM RESOURCES DEVELOPMENT

Within a short span of three years, Constance Lake First Nation launched three different protests on three different resources based interests that have directly impacted their traditional territories. Elder Richard Ferris stated***, " the protests taken by First Nations at these sites were not to block or fight against development but we were trying to fight our way into the development. Our youth and people need the employment instead the developers were not sensitive to our needs and situation. We have to share in the development".***

Constance Lake First Nation is located approximately 30 kilometers northwest of Hearst, Ontario. It is about 8 kilometers of Trans-Canada Highway 11. In the mid forties, Constance Lake First Nation (CLFN) was relocated by Indian and Northern Affairs Canada (INAC) to their present location with the promises employment opportunities from the resources development in particular, the forest industry. A forest access road was constructed through the reserve close to the community site. Throughout that period, the people watched thousands upon thousands of truckloads of wood fibre being extracted from their traditional territories. The road was not only utilized by one forestry operation, but various interests capitalized on the access road to the wilderness. Recently, the forest company constructed another access road as the original road through the reserve which is now being used by the community as part of their town-site.

In 1997, Constance Lake First Nation (CLFN) staged a protest and roadblockade at two entrances to Lecours Lumber Company (LLC). LLC is located on the First Nations reserve. CLFN was claiming their traditional livelihood and practices were being infringed upon by the third party wood cutting contractors that supply the timber to the lumber company. The traditional land practitioners would find their trapping and hunting grounds completely stripped of forest. The lands would no longer support their traditional vocation. At the same time, Constance Lake First Nation was not being considered nor offered contracts for woodlands operations Furthermore, CLFN claimed that the federal government was not protecting their constitutional responsibility to the First Nation as it pertains to the Supreme Court decisions especially with the Sparrow decision. The First Nation was totally isolated from having any say as to how the lumber interests were exploiting their natural resources. Tree planting contracts were the only opportunities given to the First Nation. Although the LLC was located on their reserve, they felt that they were not gaining benefits in any meaningful manner.

In February of 2002, CLFN staged a peaceful protest opposing a phosphate mining exploration project conducted by MCK Mining in their traditional territory. Negotiations were held between the mine and First Nation which resulted in both

parties left the negotiations with no results. The First Nation pursued undertakings to ensure employment, options for compensation for people whose traditional lifestyle would be up-rooted by the mine. The issues of treaty and aboriginal rights were one of the key elements the First Nation wanted to protect. Eventually, the mine closed its exploration and mine development prospects due to uncertainty with the First Nation.

In January of 1999, Trans Canada Pipelines Limited (TCPL) terminated construction of a $ 45 million, 30 kilometer pipeline loop near Hearst, Ontario after negotiations failed to end the dispute with Constance Lake First Nation.
A week prior to the failed negotiations, CLFN had erected a blockade at the access road to the site as a protest because of the limited number of jobs and opportunities and economic spin-offs that project would provide to the First Nation. CLFN was prepared to let the construction proceed as long as TCPL was prepared to go to arbitration on the benefits package discussed between the two parties. TCPL refused to have any arbitration process involved in their dealings with the First Nation.

The direct benefits to the Town of Hearst over a three to four month window was projected an estimate four million dollar economic spin-off. The protest and the eventual shut down of the project created tensions between the town's people and the citizens of Constance Lake First Nation. Although this incident had occurred in 1999, there was very limited interaction between the First Nation and the town to resolve the uneasy relations that evolved through the shut down of the project. Presently, the Chief and Council of Constance Lake and the Town Council have been moving forward to establish healthier relationships. Both parties are meeting regularly to review and assess economic opportunities for the region.

### 1. Police and Security

The police maintained a neutral role and provided peace keeping role during the protest. The police were seen basically monitoring the site and ensuring that traffic on the main highway was not blocked. The police had prior relationships established with the First Nations Council, and this relationship played an important factor in maintaining order and safety at the blockade. The people that were at the protest could not find anything to say negative about the police role at the blockade.

### 2. Constance Lake First Nation Direct Actions

The actions taken by the leadership and people of Constance Lake had slightly different reasons why such actions were necessary. The people of Constance Lake have been facing on-going resource development exploitation of their traditional territories by numerous resource industry interests. The resource industry interests continually ignored First Nation's expectations to see and experience a major quality of life changes from all resources development occurring within their traditional lands. The perceived or promised employment

and benefits were negligible from these developments. The industry proponents had the basic notion that as long as they provided certain low level employment positions, then they felt that they were meeting their obligations. .

One of the key issues creating frustration and anger was the continued silence of the federal trustee who has the legal obligation to ensure the treaty and aboriginal rights of Constance Lake First Nation was being protected from any infringement. The position taken by the trustee was that the responsibility of issuing permits for resources development was within the provincial government mandate therefore it was not within their jurisdiction to act on behalf of the First Nation. Basically, this approach is to acknowledge the off-loading of legal responsibilities to Ontario without recourse for impact parties namely the First Nations. The First Nations have expressed in various forums of federal governments continual abdication of constitutional responsibility.

It is interesting to note that Canada had signed the Migratory Birds Convention Act with United States and Mexico which protected migratory birds. First Nations hunters were continually charged under this law in Canada. When the Minster of Indian Affairs was questioned, his response was that***…." the right hand did not know what the left hand was doing".*** This statement or acknowledgement of ignorance was made close to three decades ago. Today the federal government is still refusing to acknowledge their responsibility. By now, one would think that governments would understand their responsibilities. The government should be able to walk and chew gum at the same time regardless how difficult that may be or at least try.

Constance Lake direct actions were not only centered on the daily employment needs but there is a genuine concern that their future generations will not have the economic base. With their growing population, the community and leadership had to ensure that the seven future generations are factored into the equation for survival and sustainability. Constance Lake First Nation continued to pursue meaningful participation which was being continually turned away by industry proponents. This has led the First Nations to take direct action as stated by elder Richard Ferris about ***"…fighting our way into resources development."***

## 3. Future Direct Actions

Constance Lake First Nation had responded with action sending a clear signal that it wants to participate in the development of resources. The direct action approaches may have been interpreted with disdain by external interests. Presently, the Chief and Council are pursuing partnerships, development opportunities and strategic planning opportunities with municipal interests and with private sector. The First Nation is taking more proactive measures as they have been on record of their positions on development. If they should be excluded or marginalized then direct action becomes the option.

## Kitchenumaykoosib Inninuwug (Big Trout Lake)

In February 2006, Kitchenumaykoosib Inninuwug (KI) blockaded a winter road that provided access by a junior mining company, Plantinex to the traditional lands of KI. The First Nation is asserting their custodial and customary responsibility over lands that are within their traditional territories. Furthermore, KI claims the free entry policy on mining by the Ontario government totally and blatantly undermines the constitutional protected Treaty and Aboriginal rights of First Nations. More specifically, the free entry policy violates the treaty relationship between KI and Ontario. KI places an immense value on their lands because it is central to their existence, survival and economic well-being of their future generations.

### 4. Background

The people of KI have exercised their treaty and aboriginal rights as a means of surviving off their customary lands. The relationship with their lands is very fundamental to their present existence, their past occupation and future plans for their unborn. They have the archeological confirmation believed to date back some 5000 years of their occupation of the territories. Historically, the people resided in the territories year round, and it is just recently with the encroachment of Canadian society that people commenced staying at the community.

The KI people had signed the adhesion to Treaty # 9 in 1929 with Canada and Ontario. The limits imposed by Ontario Ministry of Natural Resources officials altered the dependency on land to government programs. In January 13, 1999, KI put all relevant government departments and Ministries of the Ontario government, and Plantinex on notice that a Treaty Land Entitlement (TLE) claim would be filed shortly, and that any resource development decisions should be made with due consideration of this fact.

### 5. KI and Ontario Mining Permits and Plantinex Exploration

On October 28, 2005, in spite of the notice by KI to Ontario government that the Ministry of Northern Development and Mines (MNDM) granted an Exclusion of Time Order on all of the 221 Plantinex claims comprising the Big Trout Lake property. The Exclusion of Time Order provided relief from the requirement to submit assessment work to keep claims in good standing until July 17, 2000, on which date $ 400.00 per claim in assessment work was required to keep the claims in good standing. An application for a second Exclusion of Time Order was submitted on March 17, 2000. On March 30, 2000, a second Exclusion of Time Order on all of the 221 claims was granted by MNDM to keep the claims in good standing until July 17, 2001.

In May of 2000, KI submitted the TLE claim calling for settlement of outstanding lands from the treaty settlement and appropriation. In spite of the TLE, it is believed that MNDM granted a third Exclusion of Time Order to 63 Plantinex claims on July 11, 2001 which kept the claims in good standing until July 17, 2002. A further Exclusion of Time Order was granted on July 2, 2002 giving

Plantinex until July 17 2003 to perform work on the property. Another Exclusion of Time Order was granted by MNDM on July 30, 2003 giving Plantinex until February 2, 2004 to perform work on the property.

On April 20, 2006 Chief Donny Morris received a letter from the Director of Negotiations Branch from Ontario Secretariat for Aboriginal Affairs informing him that the TLE claim has progressed through the review stage and now proceeding forward to the legal review stage, which should be completed buy April 2007. Once the legal review stage has been completed, then it would proceed to the policy review stage.

After KI had submitted their TLE claim, they issued a moratorium on resource development on their traditional lands. The KI people would not consider and neither were they willing to have their traditional territories carved out, exploited and developed while the government was reviewing their claim in such snail pace. ON February 7, 2001 Chief Donny Morris forwarded a letter to Plantinex informing him of the moratorium and the reasons for such action.

The community of KI conducted an internal consultation on resources development within their traditional lands, even with the moratorium in place, the Chief and Council were prepared to discuss the possibility of mineral exploration on the lands. During the course of the consultation some members of the KI community expressed support for the exploration. As Chief, Donny Morris claimed he did not and could not give permission to Plantinex for any exploration. The KI community undertook the consultation process under the KI Consultation Protocol.

A survey was conducted in KI as part of the consultation resulting in greater number of people opposing the resource extraction from the traditional territories. Reasons for the opposition included lack of consultation, endangerment of waterways, desecration of lands and interference with traditional activities. The opposition to resource development at this stage included for the following reasons;

- destruction of trap-lines,
- destruction of fur-bearing animals,
- deformities in the wild-life,
- excessive garbage,
- lack of proper decommissioning of work-sites and poor clean-up,
- disruption of migratory routes of moose and caribou, and
- disruption of plant and animal habitats, such as moose feeding grounds.

A meeting was scheduled in January of 2006 which was later cancelled by PLantinex. Plantinex objected to the format of the proposed meeting. In such meetings, the community had to be involved which further offended the First Nation claiming Plantinex of not respecting their political and decision-making process. Planitinex continued to prepare for winter drilling without an

understanding or agreement with KI. In February 19, 2006, Chief Donny Morris and Deputy Chief Jack McKay delivered a letter and a notice informing the drilling team that they had four days to cease their operations and leave.

## 6. Peaceful Protest

February 2006, KI officially began their protest near the drilling campsite whereby the protestors had a trailer parked on the road side and the traffic on the road was passable. The Chief informed the drilling operations that no equipment would be allowed into the site. The Chief and Council order the ice access by planes be limited by ploughing ridges near the site, yet maintaining certain areas for planes to land and take-off safely. The community maintained the peaceful protest until such time as the drilling team realized that further drilling efforts at the site cannot continue.

During the protest, tensions escalated unnecessarily by different parties such as;

1. When the Chief addressed the drilling team at the campsite, the Chief raised his voice so he could be heard over the sounds of ski-doo engines and other machinery. The drillers took this as a form of verbal intimidation by the Chief.

2. The OPP shipped in a plane load of officers claiming their prime purpose was to monitor winter road for contraband traffic. Never in the history of KI has there been such police presence to monitor the winter road for any purpose. As a matter of fact KI never really insisted OPP to be present to monitor as OPP never really had the manpower and the resources to do such monitoring. Their First Nation constables maintained the monitoring responsibilities.

The OPP were conducting searches on residents leaving the reserve which was very unusual for monitoring contraband traffic. Usually searches are conducted on traffic entering the reserve. The searches on elders offended the community. It was concluded that OPP were there basically to monitor the protest. Actually the OPP were present at the campsite when the eviction notice was delivered by the Chief and other meetings with the drilling camp.

KI is not policed by Nishnawbe-Aski Police Services but is policed by First Nations constables through the Ontario First Nations Policing program which is supported and administered by OPP under First Nations policing program. It is highly, unlikely NAPS would have conducted itself in the same manner that OPP had done at KI.

3. Plantinex had hired a former Britiish army officer based in USA, with an office in Canada to provide security at the campsite. It was reported on CBC Today radio program and named Paul Gladstone as the security

agent with experience in providing security to mines in South America and Middle East. The security agent created uneasy atmosphere and relationship with the community. The security agent criticized the OPP's unwillingness to provide the workers with security. The community views such actions as the engagement of such security measures as raising the intimidation tactics of the mining company.

## 7. Legal Actions

Plantinex had filed for a court injunction to have KI people removed and forbidden at the drilling sites where they have mining claims so that they could conduct their exploration with unfettered access. Further to this court injunction, Plantinex has filed for $ 10 billion in damages against KI.

KI has counter filed a lawsuit claiming damages for $ 10 million. They have taken legal measures to defend themselves in courts. The legal actions will create further complications in an already complex environment dealing with treaty and aboriginal rights.

## Future Direct Actions

KI and other First Nations in the remote regions will take more aggressive actions to defend their lands and resources. The present benefits negotiated with private sector interests are no longer desirable as they do not impact the quality of life of the communities. The actions by Plantinex have only strengthened the resolve and commitment of First Nations and traditional/customary land practitioners to vigorously defend and protect the lands and resources. It must be understood that First Nations want development but development must be done that provide more meaningful benefits to the people. Government programs will not suffice.

## Factors Heightening Potential Direct Actions

It is interesting to note the grievances of the protestors, and why they felt compelled to resort to undertaking such drastic measures. Although all participants were committed to a peaceful demonstration, they understood that there was they ever present looming concern of possible tragedy, violence and certainly incarceration. They accepted the responsibility to protest under their principles as "peaceful" demonstration, taking every precaution to ensure safety of the protestors and community as a whole. Aside from the safety issues, the protestors had similar over-arching issues that they felt ware fundamental to their very existence and continued survival as individuals and as a people.

### *1. Poverty*

Each community participating in the road blockades suffer poverty levels that are unacceptable to Canadian standards. Poverty affects every aspect of their daily lives. The cycle of poverty is a tragedy in itself. First Nations face the highest incidence of youth suicides. The question most commonly asked question is why such high rates and why the continuance of such phenomena? When one examines the conditions of existing and growing poverty levels of First Nations state, then it is not inconceivable or far stretched conclusion that these young people have come to realize that their future may be hopeless and despair embraces. Poverty is a direct contributing factor to the violent end of one's self in most of the First Nation communities. The tragedies will continue as long as poverty remains at such deplorable levels.

It is important to understand why poverty has such emotional and spiritual negative impact upon First Nations people. First of all, one must understand or try to conceptualize the make-up of a First Nation person. First Nation people have a common pride and respect of themselves as the original peoples of the Turtle Island. With the originality comes with specific cultures, traditions and lands. The oral and family histories speak of their wealth and independence. Their histories speak of their exemplar health and strength characteristics. They recount stories of heroic examples of strength and accomplishments unparalleled by none.

The grandfathers freighted for Hudson's Bay Company travelled hundreds of miles inland from the shores of James and Hudson's Bay. These same grandfathers would pack two to three hundred pounds and portage over two to five mile portages without stopping to rest. Their feats could never be matched by the strongest man accomplishments of today. Today's First Nation population is ravaged by diseases, succumbed by years of abuse of alcoholism, drugs and substances and totally economically marginalized. Directly attributable to diabetes, people have lost limbs and require prosthetic devises and supports in order to just get around. High majority of rehabilitation centres clientele are aboriginal peoples with

missing limbs of all nature; they appear to have barely survived modern day war torn country. Poverty prevails and the emotional impact in the daily lives of the people is indescribable.

One of the key glaring injustices committed by Canada on aboriginal peoples is the direct attack on aboriginal spirituality. The government sponsorship of churches to completely eradicate aboriginal spirituality shook and nearly decimated the foundations of aboriginal peoples' existence. Outlawing spiritual practices and beliefs rendered disconnection with the very heart of the matter but more appropriately the matter of the heart. Forced conversion has resulted in confusion and further disenfranchisement as a people. The new conversion found our people and communities divided, confused and remained unaccepted by settler society. For hundreds of years, the First Nations were subjected to spiritual poverty.

It is only recently that the Euro-Canadian society has accepted the reality that aboriginals have a right to their own spirituality. Today, the aboriginal spirituality is expressed or practiced through various church institutions or through aboriginal traditional practices. The expression of spiritual freedom for First Nation people have been a source of strength, revitalization, restoration and healing. From the depths of ridicule, misconception and suppression, spirituality for First Nations is on the rebound.

The poverty that exists within First Nation community is all consuming and impacts every citizen directly and indirectly by the nature of the imposed reservation system. Under the British North America Act Section 92 (23) six simple words "Indians and lands reserved for Indians" have created more social, economic, spiritual and political havoc on once very independent people. Thus, First Nations are commonly referred as a collective interest by virtue of this section. In Canada, it is recognized that individual rights are paramount thus creating an illusion that First Nation rights may not have equal recognition before law and society in general. The reserve system as imposed was successful because it perpetuated dependency on government and at the same time stripped all self reliance responsibilities from the First Nations people.

For example, children attending residential school would have their new clothes that they wore from home those same clothes stripped off their backs and destroyed. This was done systematically to all residential school children so that they will accept the notion that they cannot ever own anything. The housing on reservations are dilapidated and many are mould ridden creating health hazard. The resources provided for housing only provide enough to build wood match box units for shelter purposes.

The housing units provided through government has become both a fire and health hazard.

The houses are assigned to First Nation members of the community, but they have no real ownership rights. The First Nation as a collective is supposedly the owner. It is only recently First Nation communities have the water and sewer infrastructure, and these systems are plagued with substandard services and maintenance resulting in continued uneasiness of potential outbreak of viruses caused by certain contaminants. The Kashechewan evacuation is an example of the potential crisis looming within most of the First Nation communities in the north.

The cost of goods is exceptionally high among the First Nation communities. Remoteness and access are the key factors that determine the price of necessities. Healthy eating is not a consideration when household grocery shopping is being done, instead affordability becomes the determining factor as to what is purchased. Healthy eating and healthy lifestyle should be the predominant factor of people plagued by diabetes but with First Nation people daily survival dictates and pre-empts every other consideration. When the former Harris Conservative government slashed the social assistance rates and services, the First Nation people suffered incalculable personal hardships.

### *2. Unemployment*

The rate of unemployment remains staggering among the First Nation communities. The rates quoted for unemployment remains in the high 80s. The only and probable only stable form off employment is available through the First Nation initiatives. These initiatives are financed and support through fiscal arrangements with Canada or with Ontario. Indian and Northern Affairs Canada is the mainstay source of all government programming. In such cases, then it could be fairly stated that the only employment for First Nations is direct linked to government programs. If the government decided to discontinue or recall programming, then existing employment at First Nations would be automatically be terminated. There is no employment security.

At the same time, it must be understood that First Nations have accomplished unparallel success with limited resources. Most of the First Nations have qualified teachers and administrators in various disciplines to meet the demands of their people. Most of the educational institutions are governed and operated by First Nations. Although the quality level seems to lag behind provincial standards, each First Nation continue to improve. These standards lag not because the quality of education, service and promotion is lacking, but more so directly related to stringent or lack of financial resources to meet the requirements. All First Nation education proponents and advocates have continually voiced their

concern about the lack of resources to support quality education opportunities. Education initiatives at all communities are an example where First Nations are succeeding in providing opportunities for children resulting in brighter futures that will make a difference in the lives of the people.

Resource development has not made any changes to the dire unemployment situation of the First Nations. Yet resources development continues to grow and corporations continue to profit handsomely. The shareholders continue to enjoy the dividends from their investment. Contractor and corporate woodlands operations continue to harvest wood fibre to supply the demands of existing SPF dimension mills and other pulp mills in northern Ontario. Most of the positive impact from the development of resources within the region benefit the surrounding municipality. The First Nations do not benefit directly from the developments, and if they do, it is very minimal where very few may be employed.

First Nations want resources development to happen, and they want to participate and benefit from such enterprises. They want employment for their people so they could improve the quality of their lives, the lives of their children and their community. Whenever prospects for resources development to happen, the community and leadership must weigh factors to determine the economic and social impacts? The assessment of the potential impacts is not based upon the immediate impacts of the present, but they are considered and weighed in light of impacts to the seven generations in the future.

The two significant considerations factored into the assessment equation on the development of resources are environmental and economic impacts. The first and foremost consideration is the environmental impact from the development. First Nations environmental concerns are not centered specifically on the immediate negative impacts, but they are more concerned on future impacts that rise from the present development. Mercury poisoning suffered by Asubpeeschoseewagong First Nation (Grassy Narrows) and Wabaseemong First Nation (White Dog) from the pollution of the English River system by the pulp and paper mill in Dryden remains a glaring example of potential harms for future generations. First Nations are compelled never to allow such travesty and devastation to come upon their future.

The present processes engaged by MNR to determine the uses of forestry resources do not meet or even begin to address the fundamental issues of First Nations. The predetermined processes of governments do not allow First Nations to express, describe or explain the potential conflicts between government planning and First Nation realities and relationships

to lands. The First Nations are of the belief that the bureaucrats implementing the forestry planning exercises have predetermined results and outcomes. The planners have no understanding and appreciation of First Nation traditional territories concepts and occupation. Occupation of traditional territories is recognized and respected land tenure of First Nations. Governments do not and have failed to recognize such tenure practices. Thus, planning is done by bureaucrats without opportunity to enter such First Nation fundamental regime into the planning equation.

Environmental organizations have commonly and most readily allied themselves with First Nations without fully understanding First Nation positions other than the fact that First Nations expression of concern on the proposed development. First Nations have supported and understood the concerns of the environmental institutions. Many of these environmental institutions have played significant role that have led to positive results for First Nation issues and for environment in general. They are commended for their participation and support.

The second important factor is the economic impacts from the resources development not only to the First Nation but to the region. The employment opportunities become very important to First Nations. Employment is one of the key sources to improve one's quality of life. Sadly to state, resources development has not made any real significance in the quality of life of the people especially when the resources development is happening at their door steps.

Historically, promises and commitments have always been made to First Nations
by developers and governments especially in the field of employment and training. The government's role is to deliver training and the required capacity building under various training programs as it relates to the particular resource development. The level of employment of First Nations people at all all resources development sectors continues to be at nominal levels. Musselwhite Mine has made strides to meet targets of employment according to agreements with First Nations that are directly impacted by the development. The lumber company located at Constance Lake First Nation has maintained a certain level of employment for community members. Other communities have not realized
any real meaningful employment from the resources development happening within their traditional territories.

When Nakina Forest Products, a division of Long Lake Forest Products, located in Nakina, Ontario met with Aroland First Nation to secure their support for the establishment of an SPF dimension sawmill that will be built 8 to 10 kilometres from the First Nation community? The company promised employment for Aroland First Nation. Once the recruitment

commenced, it was then that Aroland members applying for employment were informed that they required a minimum Grade 12 level to be considered. The criteria eliminated the majority of the potential available workforce. Presently, it is estimated that there may be 8 to 10 community members employed full time at the mill from a total work force exceeding 200. Aroland First Nation believes that most of the employees are imported from other mill sites that have been closed by the parent company.

Asubpeeschowawong First Nation (Grassy Narrows) have no community members employed by the licensed operators or independent contractors in the woodlands operation. Yet every day, they see the continuous extraction of wood fibre from their traditional territories. Constance Lake viewed the proposed arrangements by Trans Canada Pipelines border-lining tokenism. Each of the communities expressed anger, frustration and distrust with the developers because they viewed employment offers made to imported workers. In large part, they remain unemployed and watch their resources to be exploited by external interests.

### *3. Threat of Further Disenfranchisement of Traditional/Customary Lands*

First Nations cannot and will never accept the notion that their forefathers would have sold or given-up the right of first occupancy of their lands. The traditional lands of the peoples were and are the very life-line and existence of the peoples. Recently First Nations have become more vocal and assertive in the protection of their traditional territories. The protection of these traditional territories is critical to future survival of the First Nations. Thus, recent engagements in the form of road blockades or protests are premised of protecting and asserting jurisdiction/rights over those traditional territories. The recent expulsions of mining explorations team from the remote communities of Big Trout Lake and Sachigo Lake are an example of such defense.

For the past few decades, First Nations families have begun to re-institute their occupation to those lands through various approaches. These approaches include building traditional occupation homes what might be referred to as trapper cabins, but these serve more than for trapping purposes. These cabins are no longer referred to as cabins but homes for the families whose traditional territory it occupies.

At one time, MNR was persistent that First Nations request permits for any structures to that needed to be built; formal request were to be made and formal permission would be granted in a form of a permit, if it pleased the MNR.. Furthermore MNR wanted First Nations people to report all timber cut down for any purpose. Now people have ignored requirements and are rightfully occupying their traditional territories as owners. They will and are committed to defending their territories.

Today, families have come to realize that they possess awesome responsibility to maintain and occupy their traditional territories. The return to the traditional territories is not a weekend relaxation past-time. It is occupying, utilizing and protecting long held traditional land tenure structures. Children are being raised to accept the responsibilities as stewards of these lands. The return to the traditional territories is more focused in the northern regions. Governments and private sector interests will not only have to contend with the Chiefs and Councils but with the traditional land owners or occupiers. These people will eventually decide if they will consent to resources development and at what cost.

It has been the standard practice or understanding that the community leadership would be relied upon to make the right decisions for the community and lands. Hundreds of years of distrust, failed promises and complete lack of recognition and honour has now bought to the forefront the traditional land occupiers. They will decide and how.

### *4. Disempowerment*

The hundreds of years of colonialism, governmental control on every aspect of First Nations lives have rendered havoc on the self reliance responsibilities of once very independent people. It is said, and is a fact that once one is born into First Nation lineage, then government and or governments have direct impact or influence on their lives to the day they die. Once the child reaches certain age, government through its programs began to intrude into one's familial structure. There are countless tragedies involving residential schools, child apprehensions, abuses by churches, untold unjust incarcerations and constant intimidations by every government institutions. First Nations history is accurate when they claim that they, as a people, have been governed more than the rest of the society. First Nations became disempowered through government policy and administration of colonial policies. Dependency became the norm.

Prior to the repatriation of Canada's Constitution, treaty and aboriginal rights were merely claims by First Nations that were totally ignored by government institutions. MNR in the enforcement of wildlife regulations became one of the most dreaded enforcement agencies. The Conservation Officers were authorized to charge, seize and prosecute you for exercising your rights to hunt unmolested. Most of the hunters were forced to hunt under the cover of darkness, forced to sneak so they could feed their families and hide their rifles. The enforcement regulations and administration caused honest people to become dishonourable when they want to exercise their rights to hunt. Even after the repatriation of Canada's Constitution, wildlife game wardens were still laying charges. Intimidation continued as if the recognition of Canada's own constitution

did not mean a thing. Today, there are cases before the courts dealing with the charges stemming directly with treaty and aboriginal rights.

One of the people who were involved with the road blockades concluded that their road blockade was successful for many reasons. One of those reasons was that the people felt they no longer had to be intimidated by conservation officers. They will and now hunt openly whenever and however they want to practice their rights. They are prepared to challenge the game wardens. He stated it is good to see our young people practice their right and practice their right without fear of intimidation. Many participants agreed the road blockade empowered the people to stand confidently on their central beliefs of protecting their lands and resources. They felt a sense of accomplishment.

### *5. Resources Harvesting*

The allocations of resources such as forestry are done without any meaningful participation of First Nation communities and even if they participate in the processes, their presentations and concerns are mostly ignored. When the resource development commence the actual operations, the First Nation people do look forward to some form of employment that do not materialize to expected levels.

From the initial operation of the mills, First Nation people see on daily basis the continual extraction of raw forest products trucked from their traditional territories. In the community of Aroland, a secondary provincial highway runs through the community which the logging operators use as main truck route to deliver the wood fibre to the saw mill located 8 to 10 kilometres from the reserve. The mill operation in Constance Lake First Nation used the road that was constructed through the reserve to hauls logs to the mill. It has been only a few decades that they constructed a by-pass.

The First Nations people saw the effects of logging, and how such industry was impacting their own livelihood. The trappers would find their traps destroyed, hunting grounds totally in complete disarray and the landscape altered. Aside from the frustration of direct impacts to their traditional territories; the First Nations are frustrated that the resources from their traditional territories are being developed from which meaningful employment is gained by society at large, profits are being generated by forestry industry, governments are receiving royalties and revenues from the development. They see the regional municipalities benefiting from the development. They see and feel the frustration of economic marginalization.

The First Nations are now committed to change the present balance of benefits accrual from all resources development undertakings within their

territories. The governments, especially Ontario government will need to address development under new regime reflecting the sharing of resources and revenues. The sharing of revenues will provide real sources of revenues that will make impact on the quality of life for First Nations. Such shared undertakings will encourage and foster long term development that will be supported by First Nations. Through this form of participation, First Nations will become part of the development industry contributing to their own economies, and the economy of the province.

**Treaty and Aboriginal Rights Impact Assessment**

Governments are compelled by the electorate to establish processes to address concerns of the public. Federal and provincial governments have created mechanisms for thorough review of projects, and how it will impact environment. Therefore, governments have instituted regulated official environmental assessment processes for all major projects. The process reviews the impacts and answers public concerns as it relates to projects and environment.

The First Nations have presented their issues and unique concerns under MRN forest management planning process to which they have been continually ignored and more insultingly rejected of their notions. If the governments are undergoing through such an elaborate review of projects and environmental concerns, then it is fitting that there be resources allocated to conduct treaty and aboriginal rights assessment within the areas of undertaking. In order for such measure to be agreed upon by First Nations, the process must be negotiated under very specific and explicit terms to ensure that First Nation processes are respected. The process should not necessarily be within government, but the government should negotiate a relevant and appropriate mechanism with First Nations. It is of vital importance that the mechanism to be designed and implemented with the impacted First Nations.

The proposed concept or initiative will clearly provide opportunity for First Nations, public and private sectors and the public in general to review and dialogue on issues that may lead to conflict. The forum will be able to address issues pertaining to existing land claims, burial sites, traditional hunting territories, significant and minor aboriginal ceremonial sites and so forth. How will development impact treaty and aboriginal rights of the adjacent First Nation or regional First Nation interests? The proposed Treaty and Aboriginal Rights assessment will not only provide opportunities for First Nations direct input to development concerns but once the assessment has been completed then development can proceed with full support of all interests including First Nations.

## PART IV

## DUTY TO CONSULT: THE LEGAL FRAMEWORK

### Catherine Beamish, Lawyer

In *R v. Van der Peet,* the Supreme Court of Canada explained why the rights of Aboriginal people received explicit recognition in s. 35(1) of the *Constitution Act, 1982.*

It was:

"because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[1]

This premise has triggered the development of a legal framework that has extended constitutional protection to the rights that characterize Aboriginal peoples' cultures and societies. This involves a *sui generis* analysis that respects the uniqueness of the Aboriginal people's place within Canada.

This has led the Supreme Court of Canada to take steps including the determination of the historic rights of Aboriginal peoples, giving Aboriginal rights constitutional force to protect them against legislative powers, [2] precluding mainstream governments from extinguishing Aboriginal peoples rights, [3] sanctioning challenges to social and economic policy objectives embodied in

[1] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 17-20

[2] *R. v. Sparrow* [1990] 1 S.C.R. 1075

[3] *Delgamuuk v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 2

legislation when that legislation affects Aboriginal rights, [4] undertaking reconciliation between the sovereignty of the Crown and the rights and of aboriginal people[5] and providing a solid constitutional base for recognition of Aboriginal rights, and for negotiation and settlement of Aboriginal claims. [6]
These developments all reflect the constitutional principle that courts and governments must give Aboriginal rights a generous and liberal interpretation in favour of Aboriginal peoples.[7] The Court has linked these interpretive principles with the Crown's fiduciary obligation toward Aboriginal peoples. [8] It has held, as well, that the honour of the Crown is always involved in dealings between the government and Aboriginal peoples.

One of the most current themes in aboriginal law is the development of a legal framework to reflect the duty to consult and accommodate aboriginal and treaty rights. This has recently been the subject of three cases at the Supreme Court of Canada namely, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) [2005] S.C.J. No. 71, Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, 2004 SCC 73, and Taku River Tlingit First Nation v. British Columbia, (Project Assessment Director)[2004] 3 S.C.R. 550, 2004 SCC 74.).*

The duty to consult and accommodate is rooted in the Crown's honour, arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect that interest. Consultation and accommodation before claims are resolved

[4] *Sparrow supra* at 1110

[5] *Delgamuuk supra* para. 186

[6] *Sparrow supra* at 1105

[7] *Van der Peet, supra* at para. 23:

[8] *Van der Peet, supra* at para. 25

preserves the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982,* demands.

*Haida Nation* [10] and *Taku River* [11] dealt with the duty to consult in an aboriginal rights context while *Mikisew* [12] applied the framework to a treaty situation.

**HAIDA NATION**

For more than 100 years, the Haida people claimed title to all the lands of "Haida Gwaii" and waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm Licence" to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii. The Minister replaced the license several times and the Minister approved a transfer of the license. The Haida challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the licenses be set aside. The B.C. Court of Appeal declared that both the government and the forestry company had a duty to consult with, and accommodate the Haida with respect to harvesting timber from the land in question. The Supreme Court of Canada clarified that the duty to consult rests with the federal and provincial crown and not with the companies.

**TAKU RIVER**

[10] *Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, 2004 SCC 73*

[11] *Taku River Tlingit First Nation v. British Columbia, (Project Assessment Director)[2004] 3 S.C.R. 550, 2004 SCC 74.*

[12] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) [2005] S.C.J. No. 71*

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation objected to the company's plan to build a road through a portion of their traditional territory. The Province granted the project approval certificate and the First Nation brought a petition to quash the decision on grounds of its Aboriginal rights and title. The judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the First Nation's concerns. She set aside the decision and directed a reconsideration. The B.C. Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the First Nation.

**MIKISEW**

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to pass outside the boundary of the reserve. The Mikisew objected to the road because of the impact it would have on their traditional lifestyle which was central to their culture.

The following is an outline of the law as determined by the Supreme Court of Canada in these three cases:

**1. Triggering the government's duty to consult with aboriginal peoples.**

The Government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown and its

obligation to respect the existing treaty rights of aboriginal peoples.[13] "The historical roots of the principle of the honour of the Crown suggest that it be understood generously."[14] The duty to consult and accommodate also applies to the provincial government.[15]

"The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty [to consult] arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[16] "One cannot meaningfully discuss accommodation of a right unless one has some idea of the core of that right and its modern scope".[17] The Crown needs to know that the rights may exist, or they may have no duty to consult or accommodate. The Crown must then respect these potential interests. It is important to note that the cases recognize that the treaty and aboriginal rights are not frozen in time but must be recognized and adapted to a modern content.

In order to trigger the duty, a First Nation must outline their claims with clarity, focusing on the scope and nature of the rights they assert and the alleged infringements.[18] "In the case of a treaty, the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult."[19] This does not necessarily

[13] *Mikisew, supra* at para. 51.

[14] *Haida, supra* at para. 17.

[15] *Ibid*.

[16] *Mikisew, supra* at para. 33.

[17] *Haida, supra* at para. 36.

[18] *Ibid*.

[19] *Mikisew, supra* at para. 34.

mean that whenever a government proposes to do anything within treaty surrendered lands, it must consult with all signatory First Nations.[20] However, the duty to consult is triggered at a low threshold.[21]

"The Crown is not rendered impotent simply upon there being established "a duty to consult". It may continue to manage the resource in question, but the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. Consultation and accommodation before claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands."[22]

## 2. Satisfying the duty to consult.

"There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate."[23] "The flexibility of the Crown's "duty to consult" lies not in the triggering of the duty, but in the variable content of the duty, which varies with the circumstances."[24] "The duty has both informational and response components."[25]

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[20] *Ibid*.

[21] *Ibid*. at para. 55.

[22] *Haida, supra* at para. 38.

[23] *Ibid*. at para. 37

[24] *Mikisew, supra* at para. 34.

[25] *Ibid*. at para. 64.

At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice".[26]

"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 an 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." [27]

"The determination of the content of the duty to consult will...be governed by the context. The more serious the impact the more important will be the role of consultation".[28] "Another factor in a non-treaty case, will be the strength of the aboriginal claim."[29]

"Precisely what is required of the government may vary with the strength of the claim and the circumstances." "Parties can assess these matters, and if they cannot agree, tribunals and courts can assist." "Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty." "At a minimum, it must be consistent with the honour of the Crown."[30] "The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[31] "The Crown is not under a duty to reach

[26] *Ibid*. at para. 34.

[27] *Ibid*. at para. 64.

[28] *Ibid*. at para. 63

[29] *Ibid*.

[30] *Haida, supra* at para. 38.

[31] *Ibid*. at para. 39.

an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly."[32]

"[W]here the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor"... "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding".[33]

"...[W]here a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, then deep consultation, aimed at finding a satisfactory interim solution, may be required. The consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.

The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases. This list is neither exhaustive, nor mandatory for every case."[34]

"Each case must be approached individually and flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown

[32] *Ibid*.

[33] *Ibid*. at para. 43.

[34] *Ibid*. at para. 44.

and the Aboriginal peoples with respect to the interests at stake."[35] "The Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims"[36]. "Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty."[37]

"The Crown has a treaty right to "take up" surrendered lands for certain purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise of the [First Nation] rights, and to communicate its findings to the" First Nations.[38] "In occasional cases, when the impact on First Nation claims is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. In these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[39] Treaties give rise to procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights).[40]

[35] *Ibid*. at para. 45.

[36] *Ibid*.

[37] *Ibid*. at para. 18.

[38] *Mikisew, supra* at para. 55.

[39] *Ibid*. at para 61.

[40] *Ibid*. at para. 57.

At all stages, good faith on both sides is required to provide meaningful consultation appropriate to the circumstances.[41] "In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns". Sharp dealing is not permitted."[42]

"However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted."[43]

### 3. What may be involved in consultation?

"Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."[44]

The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides that "[Consultation] entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback...genuine consultation means a process that involves;

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[41] *Haida, supra* at para. 42.

[42] *Ibid*.

[43] *Ibid*.

[44] *Ibid*. at para. 46.

1. gathering information to test policy proposals,
2. putting forward proposals that are not yet finalized,
3. seeking [First Nation] opinion on those proposals,
4. informing [First Nations] of all relevant information upon which those proposals are based,
5. not promoting but listening with an open mind to what [First Nations] have to say,
6. being prepared to alter the original proposal,
7. providing feedback both during the consultation process and after the decision-process."[45]

## 4. The duty to accommodate.

"When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate."

"Consultation will not always lead to accommodation, and accommodation may or may not result in an agreement."[46]

## 5. Satisfying the duty to accommodate.

"Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably, with the potential impact of the decision on the asserted right or title and with other societal interests."[47]

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[45] *Ibid*.

[46] *Mikisew, supra* at para. 66.

[47] *Haida, supra* at para. 50.

[48]"Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim." "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." " Rather, what is required is a process of balancing interests, of give and take."[49] "Accommodation that may result from pre-proof consultation is seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. It does not require a duty to agree."[50]

The terms "accommodate" and "accommodation" have been defined as "an adjustment or adaptation to suit a special or different purpose" and a convenient arrangement; settlement or compromise".[51]

"It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[52] The government "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".[53] British Columbia has had a "Provincial Policy for Consultation with First Nations" to direct the terms of provincial ministries' and agencies' operational guidelines.

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[48] *Ibid*. at paras. 43-45.

[49] *Ibid*. at para. 48.

[50] *Ibid*. at para.49.

[51] *Ibid*.

[52] *Ibid*. at para. 51.

[53] *R. v .Adams* [1996] 3 S. C. R. 101.

## ONTARIO'S DRAFT GUIDELINES FOR CONSULTATION

In June 2006, the Ontario Government released a long awaited draft of its proposed consultation guidelines; "DRAFT GUIDELINES FOR MINISTRIES ON CONSULTATION WITH ABORIGINAL PEOPLES RELATED TO ABORIGINAL RIGHTS AND TREATY RIGHTS." These are being circulated to First Nations and organizations for input.

Ontario's Guidelines state that "Ontario is charting a new course in its relationship with Aboriginal peoples. We are committed to establishing constructive, co-operative relationships that are based on mutual respect and which lead to improved opportunities for all Aboriginal peoples".[54]

The principles that will influence the development of Ontario's final consultation guidelines are:

1. Respect for all Aboriginal peoples living in Ontario
2. A commitment to meeting Ontario's constitutional obligations to consult Aboriginal peoples
3. The development of effective and efficient consultation processes
4. Aboriginal participation in the process of developing the final consultation guidelines

Ontario recognizes that achieving effective guidelines will take cooperation, determination, understanding and commitment by all parties. Ontario states that it is committed to acting in a spirit of mutual respect and fairness, and to achieving an effective approach to consultation that will move Ontario and Aboriginal peoples toward a new era of cooperation and partnership.

[54]"Draft guidelines for ministries on consultation with aboriginal peoples related to aboriginal right and treaty rights."

Despite the lofty tone of its draft policy, Ontario has been criticized for its failure to implement a consultation policy in a timely way.

Nowhere is this more evident than in the recent decision of Mr. Justice P. Smith of the Superior Court of Justice in the Kitchenuhmaykoosib Inninuwug case;

*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation,* 2006 CanLII 26171, Justice Smith clearly outlines the fundamental issue at stake:
"This case highlights the clash of two very different perspectives and cultures in a struggle over one of Canada's last remaining frontiers. On the one hand, there is the desire to the economic development of the rich resources located on a vast tract of pristine land in a remote portion of Northwestern Ontario. Resisting this development is an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs. Each party seeks to protect these interests through an order for injunctive relief."[55]

The Plaintiff, Platinex Inc., ("**Platinex"**) is a junior exploration company. Platinex is in the business of exploratory drilling and is not involved in the mining or development of property.

The Defendant, Kitchenuhmaykoosib Inninuwug, ("KI"), formerly known as Big Trout Lake First Nation, is an indigenous Ojibwa/Cree First Nation, and is a Band under the *Indian Act,* R.S.C., 1985, c. I-5. The Band occupies a reserve on Big Trout Lake that is approximately 377 miles north of Thunder Bay, Ontario. KI is a signatory to the 1929 adhesion to Treaty#9. Platinex holds as its main asset a contiguous group of 221 unpatented mining claims and 81 mining leases covering approximately 12,080 acres of the Nemeigusabins Lake Arm of Big Trout Lake. Over the past 7 years, Platinex has engaged in ongoing discussions with members of KI respecting Platinex's claims on the Property and its intended

[55]*Platinex Inc. v. Kitchenuhmaykossib Inninuwug First Nation,* 2006 CanLII 26171 (ONS.C.)

exploration and development of those claims. Various Ontario government ministries have determined that the proposed work by Platinex will not impact negatively on the environment.

The company intended to undertake its Phase 1 exploration drilling in the winter of 2005/2006; however, it abandoned the site in February 2006 after being confronted by representatives of KI who were protesting against any work being performed on the Property.

KI's position was not opposed to development on its traditional lands, but KI wanted to be a full partner in any development and to be fully consulted at all times. Each proposal for development would be evaluated on the merits and whether the development respects KI's special connection to the land and its duty, under its own law, to protect the land.

KI has developed a procedural protocol which sets out the steps which would be required for Platinex to reach an agreement with KI. These steps are as follows: (1) initial discussion with Chief and Council; (2) discussions with the community; (3) consultation with individuals affected by the development; (4) follow-up discussions with the community; (5) referendum; and (6) approval in writing. Under this protocol, any decision to allow development on KI traditional lands is a community based decision and cannot be made solely by the Chief or Band Council.

Justice Smith discusses the principles laid out in the three Supreme Court cases previously discussed. He states that the objective of the consultation process, is to foster negotiated settlements and avoid litigation and that for this process to have any real meaning, it must occur before any activity begins and not afterwards, or at a stage where it is rendered meaningless.

Justice Smith endorses the comments of the trial judge and the B.C. Court of Appeal in *Halfway River First Nation v. British Columbia (Minister of Forests)*[56] that the Crown must first provide the First Nation with notice of and full information on the proposed activity; it must fully inform itself of the practices and views of the First Nation; and it must undertake meaningful and reasonable consultation with the First Nation. Justice Smith goes on to state that the duty to consult, goes beyond giving notice, and gathering and sharing information. To be meaningful, the Crown must make good faith efforts to negotiate an agreement. The duty to negotiate does not mean a duty to agree, but rather requires the Crown to posses a *bona fide* commitment to the principle of reconciliation over litigation.

In the Kitchenuhmaykossib Inninuwug case, the Ontario government was not present and the evidence indicated that Ontario was almost entirely absent from the consultation process with Kitchenuhmaykossib Inninuwug. Justice Smith felt that Ontario had abdicated its responsibility and delegated its duty to consult to Platinex.

In 1990, in *R v. Sparrow,* the Supreme Court of Canada first stated the Crown had a duty to consult Aboriginal people. For the past 16 years, courts in Ontario and throughout Canada, have applied and expanded upon this principle, sending consistent and clear messages to the federal and provincial Crowns that their position as fiduciaries compels them to address this duty in all Crown decisions that affect the rights of Aboriginal peoples.[57]

Justice Smith stated that despite repeated judicial messages delivered over the course of 16 years, the evidence available in this case "sadly reveals that the

[56] *Halfway River First Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 (CanLII) [2004] 3 SCR 511

[57] *R. v. Sparrow*

provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation."[58]

Justice Smith utilized the academic writings of Sonia Lawrence and Patrick Macklem who assert that, "the overall purpose of a remedy in the context of a breach of a duty to consult ought to be to facilitate outcomes determined by the parties themselves, without the need for subsequent litigation".[59]

If the Crown breaches the duty to consult, the ultimate remedy is a declaration that the action in question is unconstitutional. Alternatively, in cases involving compliance with statutory provisions, courts have ordered the Crown to take positive steps to ensure compliance.

Justice Smith granted an interim injunction to Kitchenuhmaykoosib Inninuwug for five months. He directed that KI immediately set up a consultation committee meet with representatives of Platinex, and Ontario to develop an agreement which would allow Platinex to conduct its drilling project at Big Trout Lake. [60]

Ontario's view of the rights of the aboriginal people in the province has been narrow and legalistic. The following quote from the Draft Guidelines for consultation is typical.

> "Aboriginal rights stem from practices, customs or traditions which are integral to the distinctive culture of the Aboriginal community claiming the right. Treaty rights stem from the signing of treaties by Aboriginal peoples with the Crown. Aboriginal rights and treaty

[58] *Platinex v. Kitchenuhmaykoosib Inninuwug*

[59] *Platinex supra* para. 98

[60] *Platinex supra* para. 139

> rights are protected by section 35 of the *Constitution Act, 1982."*[61]

The Kitchenuhmaykossib Inninuwug case seems to capture Ontario's typical response to the duty to consult - they just weren't there. One must question whether Ontario understands the meaning of the concept "honour of the Crown."

In contrast to Ontario, the aboriginal people of the Nishnawbe Aski Nation area have vastly different interpretation of their rights, and the interpretation of Treaty #9.

## NISHNAWBE ASKI NATION'S VIEW OF TREATY #9

In 1905, the Crown came to the Nishnawbe Aski Nation territory to make treaty. This process was dictated by the Proclamation of 1763 which recognized sovereignty and aboriginal rights in the land. In Nishnawbe Aski Nation's view the treaty was a Nation to Nation, or international covenant, since it was made between the Nishnawbe Aski Nation and the crown.

Nishnawbe Aski Nation does not see the treaty as a static agreement. The treaty should be a living agreement, connecting the two nations for their mutual benefit.

In Nishnawbe Aski Nation's view, the James Bay Treaty has three main components. First, the treaty was an agreement to live in peaceful co-existence. Second, in recognition of its great advantage in recognition of gaining access to lands and resources, the Crown, in right of Canada and Ontario, made specific promises of annuities and services and took on fiduciary responsibilities for the well being of the people. Third, there was an agreement to share the land, the resources, and the proceeds from their use. Nishnawbe Aski Nation's

[61] "Draft guidelines for ministries on consultation with aboriginal peoples related to aboriginal rights and treaty rights."

understanding of the treaty and Nishnawbe Aski Nation's intent in making treaty was that both Canada and the Nishnawbe Aski Nation should grow and prosper.

The Treaty Commissioners lead the people of Nishnawbe Aski Nation to believe that they would have everything they needed to survive while continuing to have full use of the lands. Instead, they are among the poorest groups in Canadian society. Rather than getting a fair share of the wealth realized from the land, and being assisted in the development of an economy, they depend on inadequately funded social support programs.

Treaty #9 territory is a storehouse of resources prized by Canada and the world: timber, minerals, hydro electric power, fresh water and untouched wilderness. In Nishnawbe Aski Nation's view the treaty should ensure that they benefit from the billions of dollars earned annually from resource development. Nishnawbe Aski Nation wants to share in all revenues generated in the lands, as Canada and Ontario, do now.

Nishnawbe Aski Nation is looking for a new, modern agreement. This new arrangement should reflect the spirit and intent of the original treaty, as well as the concepts of mutual benefit and peaceful coexistence that were left out of the written document by Canada and Ontario, in 1905. The new agreement must be beneficial for all of the treaty partners, not just Canada and Ontario.

To date Canada and Ontario have failed to respond to Nishnawbe Aski Nation's assertion that a new agreement is necessary. Perhaps Justice Smith's decision in the Kitchenuhmaykossib Inninuwug case will cause Ontario to become more serious in the discharge of its duties.

## CONCLUSION

First Nations and the Government need to ready themselves to begin and conduct meaningful consultation. A process needs to be established in order to effect meaningful, efficient and effective consultation.

First Nations should be pushing the Governments, both Federal and Provincial to begin and complete a consultation accommodation policy immediately and push for representation in the development of government procedure with respect to the duty to consult.

Ontario and Canada need to develop the political will to effectively implement their consultation and accommodation policies in a way which gives substance to the sentiments expressed in the various court cases and begin to conduct their affairs with aboriginal people in a manner which is consistent with the honour of the Crown.

# PART V

## NISHNAWBE-ASKI POLICE SERVICES

Policing has always been one of the most contentious issues negatively affecting First Nations not only within Nishnawbe-Aski Nation (NAN) but in similar fashion with other Aboriginals elsewhere. Annual reports substantiate the high population of Aboriginals in penal systems across Canada. The concern of such high incarceration rates have led to discussions on the possibility of designing an alternate justice system for Aboriginal peoples. Aside from the justices issues, Canada has witnessed clear examples of wrongful conviction and incarceration both to the Aboriginal and non-Aboriginal. Donald Marshall is a classic example of such tragic fate.

The relationships between First Nations and police forces have always been under tremendous strain. Royal Canadian Mounted Police (RCMP) had the responsibility of providing police services for First Nation communities in Ontario. Sometime in the mid 1960's an undertaking took place whereby the policing responsibilities were transferred unilaterally to Ontario Provincial Police. This transfer or down-loading of federal responsibility was not consented by First Nations. There was no consultation with First Nations. Efforts have been made to secure official records to determine how this transfer of policing responsibilities was conducted. The research has been fruitless.

During this period, Indian and Northern Affairs Canada provided First Nations with nominal financial resources for the purposes of hiring Band Constables. The Band Constables would be provided limited training to provide certain level of front-line policing for each community. The Band Constables took direction and supervision from the Chief and Council. Regular police were called in to over-see serious occurrences.

In the mid 1980's, the federal government announced the new First Nations Policing Policy. The Chiefs of Ontario negotiated the Ontario First Nations Policing Agreement (OFNPA) enriching the existing First Nation police program. Furthermore, the policing program would be jointly funded 52/48 % between Canada and Ontario. The OFNPA opened opportunities for other groups to negotiate stand alone policing institutions.

In 1990, the Chiefs of NAN passed a resolution to create an autonomous Nishnawabe-Aski Controlled Police Commission and Police Service. There was strong support from Ontario government for the initiative. NAN had proposed a generic stand alone police service with jurisdiction on and off the reserve. One of the key issues that NAN representatives on policing grappled with was traditional peace-keeping. NAN had envisioned an autonomous policing service without creating a police agency that will only continue to enforce federal and

provincial statues resulting in the same experiences with external police services. Their vision for First Nations policing included a more customary, traditional peacekeeping police service enforcing NAN laws within specified jurisdictional regions.

**Nishnawbe-Aski Police Service Development**

The intent of the first agreement was to establish an Aboriginal police service to provide effective, efficient and culturally appropriate policing to the people of Nishnawbe – Aski Nation. Phase one of the policing service included the provision of thirty three constables. The agreement was signed in the fall of 1993 and NAPS became operational as of April 1994. The Police Services Board consisting of ten directors was formalized with its own procedures and by-laws. An independent board referred as Citizens Review board was created for the purpose of ensuring police accountability to the public.

Furthermore, the parties agreed as part of the agreement that certain legislative changes are required to fully implement all of the terms of the agreement. It was agreed that the parties would commence and actively pursue those legislative changes of which would be chaired and monitored by the then Indian Commission of Ontario.

Subsequent to the signing of the initial agreement, the parties negotiated and signed follow-up agreements leading to NAN to realize a full complement of officers. First set of agreements are three and five years in duration. With the over-lap development of other police divisions, negotiations became a constant task for the police service. The negotiations with governments became most frustrating not only for the negotiators but for management and officers as well. The funds attached to negotiated undertakings would not be accessible for prolonged periods, therefore, negatively impacting the operations.

It is important to note a number of issues or parameters that impact on NAPS policing that give rise to its short-falls and more-so it aspirations. These are as follows:

**1. Federal Policing Policy**

The federal policy on Aboriginal policing is limited to provision of front-line policing. First Nations policing services and the leadership are frustrated by such a policy that is so limited and narrow in scope and nature. The very policy to promote improve policing at First Nations is now the very policy hindering and impeding further promotion and sophistication of the same police services.

The federal policy on policing does not and has not provided resources to address real capital needs of the police service. The first number of years of NAPS operation, the officers had to apprehend offenders which they detained in holding cells that were unacceptable and dangerous. The

recent Kashechewan tragedy where two detainees died in a fire has been an accident waiting to happen in most of the communities. It has been just recently that federal government has accepted the reality that capital is required to operate a police service. The Ontario government took the position that they did not have the responsibility to provide any kind of capital on First Nations community as it was the responsibility of the federal government. The political football game became the order of the day. NAPS became caught in untenable situation. The detainment of offenders for whatever the cause and nature might well have also resulted in outright compromise of civil rights of the detained persons.

## 2. Training

When NAPS began its operations for the whole region, there were existing band constables. These positions and Constables, along with the program enrichment, were transfer to its operations. These Band Constables were trained at the Ontario Police College (OPC)under the same training criteria as the OPP. Many of the original trainees hired under NAPS did not successfully complete the Ontario Police College nevertheless were hired because of the costs of recruitment. At one time, NAPS had in excess of 40% officers who had not successfully completed the required training.

The Board of Directors adopted police service standards that would equal or parallel OPP and municipal policing. As one of the first steps, the police service began a process of providing additional training and supports for officers that did not qualify. The Board established a policy stating a recruit who did not successfully complete the OPC training would not be hired as a NAPS police officer.

The training cost became one of the major expenditures for the police service. The attrition rate was extremely high. The low wages and postings in isolated regions contributed to high turn over. Interested people would apply for officer positions and secure training. Once trained, the officers would apply for police positions in the south where pay and location were more ideal. For awhile, it appeared that NAPS become a training depot for other police institutions including municipal.

The only training factored into the NAPS policing is the course content provided at the OPC. NAPS and most officers do not have any additional training such as crowd control and other specialty operations. Officers wishing to pursue career advancement take the necessary courses in order to qualify for positions.

## 3. Policing Objectives

The Chiefs and communities have always envisioned establishing a fully functioning police service under the premise of “stand alone” service within the territories of NAN. The stand alone terminology and thinking

describe the aspiration when in reality policing services require service partnering with each other in order to provide adequate services due to rising costs and higher specialty demands. NAPS will continue to participate with the broader policing community. The networking of services will enhance NAPS capacity and at the same time NAPS can become a tremendous resource to other policing institutions in areas of aboriginal policing.

NAPS became one of the first policing institutions to adopt policing standards as specified within the Police Services Act although they are not covered under the Act. The Chiefs represented by the Board supported the move as another step to developing a police service that would be comparable and above all equal to any other police service in Ontario and Canada.

NAPS has from its beginning operated with policing objectives as required according to the Police Services Act. The enforcement of laws is applied impartially.

**a. Enforcement**

NAPS has the responsibility to ensure enforcement of all federal and provincial statutes. The capacity to do so is hampered due to lack of financial resources from both governments. The federal aboriginal policing program is only interested in providing resources to First Nations policing institutions for front line policing services. Therefore, NAPS has rely on OPP to provide the specialized services in all aspects of policing. The federal government policy is stippling First Nations policing capacity development and growth.

NAPS has the responsibility of enforcing First Nation laws. These laws may be in a form of by-laws established through the Indian Act or through other legal instruments. As First Nations begin to develop their own legal structures then NAPS to institute more of their own laws then NAPS will need the resources to have the capacity to respond to enforcing such laws. The enforcement of First Nation laws and by-laws require additional manpower thus incurring high costs. The communities demand NAPS to respond to calls on these by-laws.

First Nations people are incarcerated at much higher rates compared to non-Aboriginal peoples. Even with First Nation policing initiatives in place, this trend has not changed, instead the numbers escalate. One option that is being considered is to provide additional training to NAPS police officers in the area of police discretion. In order for this to be effective and successful there will be need for additional field supports for officers.

### b. Community Policing

The essential ingredient to any successful policing is community policing. Community policing plays an important role in the provision of policing but unfortunately community policing is non-existent in the NAN communities. As previously explained the nature of Euro-Canadian policing is at variance with the culture and traditions of First Nations. This variance is described by First Nation languages for police. Although, this obstacle exists it does not prevent NAPS from developing unique community policing programs that will have the same effect and results as the present community policing programs. NAPS will require additional resources to design, develop and implement new community policing strategies focused on First Nation communities.

### c. Cultural Sensitivity

One of the key challenges facing the management and administration of NAPS deals with cultural sensitivity of the police service. NAPS officers have to contend with cultural sensitivity in the daily application of law enforcement at every community. One might assume cultural sensitivity would be a natural with a First Nations police service.

The laws enforced at each community are laws enforced every where in Ontario. These same laws and their application have been one of the reasons why penal institutions are over-populated by Aboriginals. The transfer of policing to First Nations may only result in Aboriginal police officers now incarcerating Aboriginals. Aside from major over-hauling of the justice system, NAPS, First Nations communities and governments must examine alternatives. It is important that NAPS maintain public trust in the administration of the police service. Enforcement cannot be compromised. One of the alternatives is to invest in the training and support of NAPS police officers in the area of police discretion.

The communities have legitimately questioned NAPS as a First Nations police service. They are concerned NAPS being just another police service. NAPS has provided the officers with training and awareness of community cultural environment and ways and means of being culturally sensitive. There is a constant need to provide front line officers with new and more effective means in policing services at the community. Peace-keeping may be the instrument that will make the difference.

## 4. Jurisdictional Dilemma

NAPS has been operational as full standing police service now in excess of a decade yet the jurisdictional issues and responsibilities that were noted in the offset still continue to exist. NAPS and the OPP have entered into operational protocols renewed from time to time to address

crisis and issues as they arise. The protocol framework has been refined to meet operational objectives and satisfy the legal requirements of policing between the two police services.

The jurisdictional issues are many and complex but not insurmountable. One of the key jurisdictional issues is the policing responsibility of First Nations constables. Canada, as their 52% contribution to policing costs insist that First Nations constable duties are restricted to within reserve land proper. Any policing outside the reserve boundaries falls within the purview of OPP. This supposition is not practical and certainly does not promote the policing aspired by First Nations.

For example, in most reserves alcohol is banned as a means to curve abuse resulting in numerous community social and familial disruptions. Drugs are banned substance and enforced accordingly. Persons wishing to traffic banned substance have chartered small planes to deliver contraband to other sites off the reserve proper where OPP who has the policing jurisdiction should be policing such areas is not possible. Aside from that band by-laws are of no effect off the reserve, the OPP do not have the resources financial or human to be able to provide the policing within the vast remote regions of NAN territory. If First Nations officers were compelled to police according to federal policy then policing would be a disservice to public and property security of people in general.

If OPP had to provide such policing, the costs would be prohibitive and the required resources unmanageable. First Nations governments have the responsibility to provide security and protection to their people while they are occupied their traditional territories. Traditional territories are external to reserves. People occupying traditional territories have property within their sites. BNA Act 91(24) states “Indians and lands reserve for Indians”. Federal government has always taken the position that they will and only accept fiduciary responsibility for Indians on reserves. They have never acknowledged that Indians can and in most cases be off reserve lands because First Nations people had their permanent land tenure regimes off the reserve boundaries.

It has been the accepted practice of federal government to promote the notion that the treaty and aboriginal rights of First Nations are not portable but that once you leave reserve lands that your rights become non-existent. The First Nations leadership has fought against such notion politically and in defense in courts. First Nations believe such notion is of the remaining colonial vestiges of Canada. Ontario, MNR are still legally challenging lower court decisions favouring First Nations in their aboriginal and treaty rights practices. Both governments have failed to recognize and appreciate First Nations rights and freedoms that have fuelled anger, distrust and continued suspicion between First Nations and governments.

At the same time, the Commissioner appoints and issues the warrant cards for NAPS constables. Under this appointment, these same police officers have the duty and responsibility of enforcing laws both on and off reserves. The capacity is there.

One of the more recent jurisdictional disputes involved the traffic on the winter roads system. The OPP were enforcing the Highway Traffic regulations through warnings of non –compliance to drivers. Most of the drivers do not have the necessary licences or insurance coverage as required. This lead to blockading the winter road as such enforcement was creating hardship for people. The winter roads provided opportunity for people to access goods and services at lower costs. The people driving know and recognize that within regular road systems that they cannot drive vehicles without license and insurance. The enforcement of highway regulations created unnecessary problems that now have been resolved through intervention of First Nations leadership NAPS and OPP. The policing services operate under the winter roads protocol identifying public education and steps and opportunities for northern residents to meet highway traffic requirements.

The OPP does not enforce band by-laws which is consistent with non-enforcement of municipal by-laws. Prior to the establishment of NAPS the band by-laws were technically non-enforceable. At the same time, Indian Act provisions made it possible for First Nations Councils to develop and adopt by-laws that were consistent with other laws and regulations. The irony of this exercise was that the Minister of Indian affairs was and is still approving such by-laws. When Canada unilaterally off –loaded policing responsibilities to Ontario either they willingly and knowingly decapitated any possibility of enforcement of by-laws within first Nations reserves in Ontario or it was done with complete ignorance as such other measures where the right hand did not know what the left hand was doing.

Thus one of the key jurisdictional issues that need to be addressed has to do with territorial designation. The territorial designation is the responsibility between NAN leadership and with the Ontario government. The Commissioner of OPP and the Chief of Police for NAPS have accomplished what could be termed as transitory steps that meet potential gaps in steps. The territorial designation will have numerous implications including the costing of services. NAN preference is to provide total policing coverage for all remote communities, with certain specific exceptions such as Pickle Lake, Moosonee, highway and railway points. Policing for First Nations adjacent to municipalities would be done by First Nations with negotiated protocols for surrounding areas.

The territorial designation is not a new concept with NAN. NAN negotiated a major Child and Family services undertaking with Ontario that included territorial designation. Under the designation Tikingan and Peyukewtano Child and Family Services provide care for child regardless of race. It is important to note that the Child and Family Services Act has special provisions in the services to Aboriginal families including Part X of the Act. The present form of the Act, although much more Aboriginal friendly than predecessor acts is still viewed very intrusive by First Nations.

The jurisdictional issues will need to be negotiated between First Nations and Ontario under government to government undertakings. In most cases, the undertakings by Ontario will require legislative changes to existing Ontario Police Services Act.

Under the accountability sections of the Polices Services Act, the Special Investigations Unit (SIU) is charged with the responsibility of investigating police services in Ontario where fatality or serious harm has been rendered by police in the course of their enforcement of their responsibilities. First Nations constables are exempt form such legislation because they are classified as constables. Although this might be referred as an accountability measure, such measure has jurisdictional implications with First Nation government. By amending the Police Services Act to authorize a form of SIU regime to be designated with the responsibility similar to Ontario technically is accepting Ontario legislation to be implemented on the First Nations. Chiefs of Nan do want clear accountability measures to be instituted so such amendments can be view and understood as transitory. In the end police legislation must be within First Nation legislation.

## 5. NAPS, A Policing Program

As stated earlier, the creation of NAPS is from negotiated agreement between Canada, Ontario and NAN. The policing agreement exists at the pleasure of the three parties subject to availability of financial resources to provide to program. Canada and Ontario will maintain the program as long as are readily available but if funds should become restricted then NAPS is subject to down-sizing or even dismantlement. Canada or Ontario can determine the fate of NAPS in isolation. NAPS is incorporate under Ontario incorporation laws. As long as NAPS is a program then there is no real certainty.

The power to enforce federal and provincial laws including the power to arrest is made possible through an agreement by principals who have the legislative authority and mandate being Canada and Ontario. This is referred to as delegation. The slippery side to this particular delegation process is the governments have the right of recall on the delegation.

The First Nations policing institutions are the only policing services in Ontario that have no legislative base. The municipal policing services have greater degree of autonomy and recognition than First Nations.
The program nature of the policing service renders all aspects of its functions and services to be program oriented. For example, NAN Citizens Review Board supposedly to parallel the accountability requirements of policing in Ontario does not have compelling authority therefore constables and public have responded under goodwill measures. All decisions of the Citizens Review Board can be challenged because they have no legislative base. The Board of Directors do not have similar mandates or authorities as municipal boards under legislation.

Various First Nations that are located adjacent to municipalities have approached the First Nation to discuss joint policing initiatives. These relationships between the First Nation and municipalities have been fostered through many year s of co-existence and through many difficulty periods and incidents but yet the people from sides see the need for closer working relationships in such areas policing being one of them. Unfortunately, the Board of Directors and the administration cannot enter into contractual relationship with such municipalities as they have no legal capacity to do so. NAPS can only perform services according to the confines of the tripartite policing agreement. Therefore contracting policing services with municipalities is not possible under present arrangements.

All First Nation constables are appointed and receive their warrant cards from the Commissioner of OPP. The Commissioner has utilized discretion and flexibility as to these appointments with various First Nation policing institutions. In the end, the Commissioner maintains liability for all those appointments for which she has no supervising responsibilities. The Police Services Act authorizes municipalities with the mandate and power to appoint their police officers.

## 6. Need for Legislative Change

The Chiefs of NAN have stated from the beginning that they wanted a police service under their control, a police service that would be culturally appropriate and a police service that would have the legislative base preferable under their own recognized legislative regime. The Chiefs had threatened at one time that they would not approve or sanction any further policing agreements between Canada, Ontario and NAN because they viewed the existing agreements as merely administrative agreements. As long as NAPS has a program designation under these agreements then they are administrative undertakings. The Chiefs were more focused and committed to their right and capacity to design, develop and implement a

policing institution responding to their peoples demand and needs under their governments.

The immediate legislative issues that need to be addressed are;

1. Appointment of NAPS police officers,
2. Territorial designation and resolving other jurisdictional issues with policing,
3. NAPS board responsibilities and authorities,
4. Mandates and authorities (police accountability) for NAN Citizen's Review Board,
5. Police contracting powers.

The need for legislative change is to accommodate the NAN policing. Legislative changes will have implications that will need to be worked through with NAN. Most of the Ontario First Nations have fundamental differences in accepting provincial legislation as a means to meet or improve present capacity and service. Many of the First Nations political organizations will oppose any attempts by Ontario government to enact provincial legislative measures over First Nations policing. NAN is unique to this particular conundrum. Ontario is a signatory to Treaty # 9, therefore NAN is in a position to negotiate legislative undertakings that respond to their peculiar needs. In this case, NAN would negotiate a special recognition clause within the Act that specifically states that Ontario recognizes the First Nations to design, develop, control and implement policing as recognized under section 35 of the Constitution Act of Canada. This recognition, along with reference that amendments to the Police Services Act be a transitory mechanism to the First Nations own legislation.

Without the recognition clause, it is inevitable that the Chiefs of NAN will not accept any form of inclusion into the Police Services Act. Ontario had supported and are signatory to the Constitution Act. Ontario has already enacted Child and Family Services Act that is forerunner in recognizing cultural, traditional and governmental rights of First Nations. The government of Ontario is seen as one of the leading proponents supporting the First Nations government development. With the historical background, the recognition would simply be the next step to the unfolding of First Nation governments.

**NAPS - Policing a Unique Territory**

As previously described NAN territory covers two thirds of the Ontario land mass. It is compared to the same size as the country of France. Most of the communities are isolated year round and even with a six week period of winter roads system, policing becomes a very costly operation and service.

### *1. Travel and Logistics*

Travel costs and logistics become a critical factor in determining deployment. If you have a hostage taking situation in one of the remote communities combined with civil unrest where additional officers have to be transported to maintain support and security in a volatile environment, NAPS would have depleted present budget allocations. Any prolonged period of such events would actually bankrupt he police services. For example, an officer transported from Sachigo Lake to Sioux Lookout (return trip) on regular schedule flights is anywhere from $560.00 to $660.00. Same distance with road accessibility would lessen the costs by two thirds. Mobilizing a ten man unit to respond to crisis will be extremely costly. Furthermore, NAPS would have to call in either the OPP E.R.T or T.R.U. to respond to critical situations. NAPS would eventually have to underwrite the costs of such units.

NAPS lease their own plane in order to minimize travel costs but also to have the available means to respond quickly to crisis. The operational and maintenance costs must be factored into the equation adding to already high costs of travel. Regardless of what transportation mode is taken the cost is still there.

Whenever a person is apprehended, the offender is transported to a safe holding cell either in Sioux Lookout or Kenora. NAPS has to underwrite the transportation costs. When the court hearing is convened then NAPS has to transport the offender to the community for hearing and if the case is remanded for some reason then NAPS has to transport the offender back to Sioux Lookout or Kenora. In other jurisdictions, once the offender is delivered to court, then the justice system assumes all other related costs including transporting costs regardless of number of remands. This cost burden is high for NAPS that has limited and restrict travel budget.

### *2. Capital Requirements*

The lack of capital resources to develop proper infrastructure for NAPS policing could have justified calling for international monitoring for potential abuses of incarcerated individuals. Many of the holding cells and police stations were make shift premises that did not meet standards for holding offenders in custody. The liability and risks were high and still remains high.

The First Nation governments would take whatever measures were required to provide police stations that would be leased to NAPS. NAPS had no option to demand buildings according to certain standards. NAPS leased whatever was made available; there was no choice. It is only recently that the federal government has made efforts to provide capital. One of the means is to cover the costs of specially designed police buildings with cells that could be transported over the winter road. This

option has been available with NAPS for the last two years and which they have capitalized. The only problem is that not one RTM police station have been transported over the winter road because of the poor winter roads seasons. NAPS has these building delivered to road access communities or are in certain holding areas waiting a better winter roads transportation season. Capital requirements must be provided under normal supply methods as available to any police institution. We cannot afford any more Kashechewan tragedies.

It is ludicrous to think or believe that First Nations policing could be accomplished without the necessary capital infrastructure to support policing. Governments must provide the resources for major capital expenditures so that each community will have the police station and the required holding cells according to established Ontario policing standards. Anything less will be seen as supporting a second class policing system.

### *3. Drug Enforcement and Specialty Services*

First Nation communities have to contend with increase drug trafficking into their communities. The federal policy on First Nations policing does not provide the NAPS to train its officers in drug enforcement. NAPS cannot purchase the necessary tools or specialty equipment or services to mount any serious counter measures to rising drug problems. Aside from the increase of illicit drug trafficking, the constable and First Nations must contend with increase substance abuse and alcoholism.

The OPP is prepared to provide services in drug enforcement but NAPS will have to pay the associated costs from existing budgets that they do not have under the agreements. NAPS dose not have drug strategy as they do have the resources to deploy such strategy.

### *4. Stress, a Daily Challenge*

Generally, policing has been found to be high stress related occupation. Continued high stress conditions may cause officers to make wrong decisions that may lead to tragedy or an warranted crisis resulting in high costs or damaged relations in a remote location. First Nation policing was seem as an opportunity for individuals to provide policing for their own communities. It was seen as a way for cutting the over-all costs to program as there would be no necessity to bring in external people to provide policing. Most of the communities did recommend and hire their own people as police officers but the stress level from policing your own community began to rise to the point that most of the individuals who are from their own communities have terminated their policing careers or have joined other police institutions.

Sadly, the officers had to encounter family isolation and withdrawal because they had to enforce the laws whereby they would have had to

lock up and apprehend relatives. The officers were in a situation that forced them separation with relations. Furthermore they were treated and viewed with indifference from family. Policing your own community no longer became an opportunity sought after by the community members. Most officers hired and performing exceptionally well are from other community and regions.

NAPS do not have the resources to provide the technical counseling supports to their officers. OPP and other major police institutions have recognized treatment supports for officers encountering traumatic situations. Young officers who just came out of training have experienced where they had to cut down suicide victims from hanging. Many of these young officers were left to manage their situation and eventual left as they could not function any longer and many of these same individuals have social problems directly related to such traumatic incidents.

### *5. Coach Officers*

The present funding levels does not allow NAPS to hire coach officer supports for their newly recruits. Once the officer has completed their training, then they are deployed to their postings. The postings factor in the need to pair with experienced officers at every community. Due to constant shortages of constables, at times the newly trained constables will find themselves providing policing alone.

The Constables require mentoring support to enable the new recruits gain confidence and experience. The posting in isolation especially for a lone officer usher new and at times overwhelming challenges that can easily exasperate the officer. They are often cast into the midst of complex issues dealing with families and community issues that require pro-active measures in order to ease potential community flare-ups.

Without the resources for NAPS to hire coach officers then the police services stands to be compromised and potentially exposed to unnecessary risks and liability of the police service.

### *6. 24/7 Police Coverage*

NAPS is required to provide 24/7 police coverage at all communities. Although the police officers realize and are expected regular hours and shifts, the community feels that the officers are there to provide around the clock coverage. Prior to NAPS most of the communities may have had one band constable and now each community should have a two officer complement.

At every community, the demands on officers are high that cannot be met during regular working hours. At most times, there is one officer on duty

but if alcohol or drugs are involved then the other officer must be called in to assist in the domestic disturbances. NAPS has to pay over-time costs that are not included adequately with the over-all annual budget allocations. The police service experiences higher officer burn-out, increase requests for stress and medical leave. The existing officer availability does not meet the demands and often communities have to do with police services or adequate coverage. Although, the pay is now comparable to OPP, officers have left the organization because it is not worth the demands placed upon them.

### *7. NAPS Auxiliary Police Program*

A number of years ago NAPS introduced an auxiliary police program to respond to high demands on police time and resources. This program could be very instrumental in assisting First Nations constables address community related issues and concerns that really do not require police intervention. Currently, there are thirteen (13) auxiliary police positions with NAPS. All these positions are funded from monies within existing budgets and provided then with used equipment. Presently, the auxiliary program is included under negotiations with Ontario and Canada. Being on the agenda does not mean the negotiations will be successful in securing on-going funding for the program. The auxiliary program would not only be instrumental in providing non-direct policing support to officers but it could be turned in constable development program.

## Potential for Confrontations, Road Blockades, Protests in NAN Territory

Confrontations, road blockades and protests will happen in northern Ontario. These direct actions by First Nations will happen not only sporadically but will be staged in sequence for maximum effect and results. For the past decade, First Nation leadership had been predicting that it is only a matter of time before First Nations will replace leadership who are more keen and supportive on dialogue, with groups who will undermine peaceful undertakings and resort to direct action. Unfortunately, direct action has proven to produce more results rather than dialogue with governments. Many First Nations interest feel that the leadership for all its good intent have been manipulated by governments through layers of bureaucracy, policies and regulations to prolong and exasperate the communities. While these manipulations are proceeding at snail pace, the communities and their people continue to wallow in abject poverty. We now have come to the crossroads where the chicken has return for some serious roosting.

These confrontations and direct interventions will continue to happen as leadership and individuals from communities take more aggressive approaches to protect their traditional territories. The protection of territories is to preserve the natural resources for their benefit but to ensure that they meet their custodial

responsibilities for future generations. The First Nations will take whatever action is required to protect their interests in their lands. The traditional territories were never relinquished, ceded or sold through treaties or other forms of transactions. In some cases the Chiefs and Councils become secondary players when blockades or protests are mounted because the protestors realize that the authorities of the Chiefs and Councils are relegated to within the boundaries specified by the Indian Act. The traditional land occupiers then take it upon themselves to resort to such direct action. The traditional land occupants do maintain positive relations with the councils but now governments, industry and police will need to deal with another group aside from the Chief and Council in trying to resolve the confrontation.

In some cases, the First Nation leadership will assume the direct action because their people, including the traditional land occupants, who believe that such intrusions into their lands will not only have impact on them but other traditional land occupants. The involvement of First Nations leadership in the direct action can be viewed to be more ideal situation as the interests involved in resolving the confrontation will need to deal with the Chief and Council otherwise the central figures without Chief and Council become a moving target.

First Nations interests will resort to direct action if the governments continue to use unnecessary bureaucratic tactics that continue to frustrate First Nations efforts to participate in real and meaningful manner with the development. The processes engaged by governments such as Timber Class assessments and Forest Management Planning exercise that have marginalized efforts for First Nations on their issues and concerns must not continue. There must be realistic changes to these processes that will address the concern of the First Nations but more directly to the traditional land occupants.

These processes cannot be developed in isolation of the impacted interests from the First Nations. The usual process of requesting feedback on the developed or proposed process will no longer be acceptable. Such mechanism does not meet the test of consultation as viewed and understood by First Nations. These processes must be negotiated with First Nations, and then monitored or at the best jointly managed between Ontario government and First Nation governments that are directly impacted by such plans.

The presumptions by governments that First Nations relinquished or ceded all their lands with the treaties need to be re-examined. NAN had called for re-negotiation of James Bay Treaty #9 in 1977 as part of their Declaration of Nishnawbe-Aski Nation. The presumption of governments, especially Ontario that all lands except Crown lands which reserve lands are considered have been ceded is a total misconception, untruth of mega proportions. First Nations could not dispossess themselves of their traditional territories that have been handed down from generations to generations prior to arrival of settlers. Occupation of traditional territories was a recognized land tenure system practiced by First

Nations in northern Ontario and elsewhere in Canada. The First Nations are poised to challenge both federal and provincial governments on the presumption that all lands have been ceded.

At the same time, many First Nations position themselves to develop the natural resources so that they can create opportunities and wealth for their people. The First Nations believe and accept the reality that the poverty conditions will not change unless real long term economic opportunities are undertaken. The First Nations need to be the developers or major partners in any development that happens within their territories.

The present approach whereby the industry interests agree to benefit agreements with impacted First Nations will no longer be the alternative. First Nation will demand greater returns especially in areas of non-renewable resources. Once non-renewable resource is exploited or taken then it is gone forever. Musselwhite Mine, formerly owned by Placerdome Canada operating north of Pickle Lake has successfully negotiated benefit agreements with four First Nations impacted by the mining development. Now, two of these First Nations have declared moratorium any further mining exploration in their traditional territories. One of the First Nations is now demanding an independent review of the benefits agreement. Benefit agreements do not impact real change in the quality of life of the people.

### *a. Peaceful Direct Action Undertakings*

One of the comforting aspects of the road blockades and protests that have been mounted in the north is the nature of the direct action. The people involved in all four case studies mounted the road blockades as a peaceful protest. The commitment of the people undertaking peaceful demonstration is confirmed by the fact that the four case studies confirm that not one demonstrator or protestor was ever charged by the police. In most of the blockades, the OPP and NAPS affirm that the protestors lived up to their commitment that their action was a peaceful effort.

The protest launched In Kitchenuhmakkoosib Inninuwug (KI) (Big Trout Lake) was under the peaceful protest banner. No charges were laid in that undertaking. The actions of OPP on the winter roads leaving the community created unnecessary tension that have damaged relations between the community and OPP. KI went to demonstrate integrity and commitment befitting and honouring their grandfathers and grandmothers.

The blockade launched by Asubpeeschoseewangong First Nation (Grassy Narrows) had instituted internal security measures to ensure the integrity of their “peaceful” nature of the blockade. This measure included ensuring no unnecessary form of intimidation or insults would be used. They had their own

people conduct a search of vehicles of external supports to ensure safety. One supporter had brought his rifle and when confronted by the protestors as to his reason for bringing a firearm he stated that he wanted to go hunting while in the area. The supporter was instructed by the security to leave and to go do his hunting elsewhere. The annoying aspect was created by OPP who did not recognize or believe the sincere efforts of the Asubpeeschoseewangong protestors to provide their own security. The undermining efforts by OPP created distrust with the protestors.

The proposed peaceful nature of the protests places huge undertaking and responsibility on the part of the protestors and organizers. The external support groups have and will continue to be attracted to such protests and some of them will have their own agendas that are not in keeping with the protest. In the case of KI protest, the Chief and Council were committed to a peaceful protest and made sure that the people understood this undertaking by repeatedly being announced over the radio that the protest will not tolerate "***manahgekawin***" from their people. ***Manahgekawin*** is a Cree word that describes every type of aggressive behaviour, from war, to riots, to fighting, to lying and stealing, and gossiping – essentially, disruption or antisocial behaviour of any kind. In all direct action undertakings the protestors have demonstrated commitment to the peaceful nature of such action.

If provocation should happen at the site then defense is a recourse that is open to the protestors. The protestors will not allow any form of physical abuse therefore defensive actions will be taken if warranted.

### *b. Third Party Application for Judicial Remedy*

Whenever, First Nations stage direct action the proponents inconvenienced by the direct action have the legal recourse by applying to the court for an injunction to remove the protestors. Certain proponents have and will continue to use court injunctions as a means to remedy their situation. In most application for court injunctions the court does not review or take into account of the First Nations reasons for taking such actions. The judge will base his/her decision on the license or ownership of the undertaking.

The judges have not factored whether the First nations have legitimate claims that the area of undertaking has been done without their consent let alone if adequate consultation has been completed to satisfy the Supreme Court of Canada rulings. Once the court injunction has been served then the police is required to remove the protestors and failure to comply may lead to arrest and charges been laid.

When the police are compelled to remove the protestors then the line is drawn where the police are now deemed to be supporting the proponents and no longer seen as keeping the peace at the site. The relations will be seriously damaged

that often lead to some form of tragedy. The court injunction does not resolve the problem but create further distrust and anger. It is during these times, that the protestors will take new tactics, trenched positions will be dug deeper and protestors resolve has now been challenged. Tensions will escalate.

### *c. Lawsuits*

The usual first course of action contemplated by the proponents who are impacted by the direct action is to threaten protestors with lawsuits. There have been lawsuits, lawsuits that have not resolved any issues pertaining to the direct action. The proponents may still be accessing resources as agreed from the dismantling process of the blockade. Yet, certain proponents have continued to pursue legal remedy for recovery costs incurred as a direct result of the blockade or protest. First Nations have taken the position that they will defend their people and First Nation at all costs. In the end, it is inevitable that the cost will just mount to unrealistic levels and the results will not satisfy any party. In an adversarial environment there are losers and even winners tend to be losers.

Unfortunately, First Nations record of winning at court cases is not encouraging and they do not believe that courts are the places where they will get legal remedy from the claims. The legal system is based upon a settler judicial framework that does not reflect the reality of First Nations perspective. Why do First Nations have land claims when they owned the country? Isn't it suppose to be the other way around? There is something very wrong with the picture.

The compensation claimed by the lawsuits is unrealistic and intimidating. Most First Nations and the individuals cited with the lawsuits will not be able to comply. If measures were to be exhausted then in all likelihood the individuals would end up being incarcerated. Many of the lawsuits citing compensation levels are hard to phantom sound reasoning behind the figures other than to intimidate. These suits are nothing more the means of undertaking legal terrorism against the First Nations.

### *d. NAPS Capacity to Respond to Confrontation*

There will be confrontations, road blockades and protests and NAPS will be the lead police service to respond to these critical incidents. At this present time, all direct action incidents will happen outside the reserve boundaries unless developer proponents have infringed upon the reserve territories of the First Nations. The OPP has the lead response to incidents happening outside the reserves. The protocol between OPP and NAPS outline first response to incidents will be handled by the police service closest to the location. In this case NAPS will certainly be the first line of response until the OPP take over the incident.

At this time, NAPS does not have the financial and human resources to deal with any major incidents. Any incidents requiring crowd control or prolonged occupation will deplete available funds earmarked for policing First Nations communities. The officers are not trained to respond to such incidents. The marshalling of officers from other communities will only exasperate the acute policing shortages already plaguing the communities.

### *e. NAPS Unique Policing Opportunities*

If direct action incidents should occur and NAPS had to respond, NAPS is in best position to facilitate, maintain stability and understanding between the parties because of the following;

1. NAPS is in a position to draw upon resources that other policing agencies like OPP do not have access to. One key element placing NAPS in better position as the appropriate police service for direct incidents in NAN territory is the fact that the Chiefs as a whole have an obligation to support their own police service. It is in the interest of NAN leadership to support NAPS to design, develop and deploy unique approaches dealing with such incidents.

For example, during the blockade at Aroland First Nation, NAPS officers provided front line policing at the blockade. The community members respected their police officers and the officers understood the community members' situation. The officers maintained integrity as officers and gained respect from the community.

2. NAPS should have the resources to hire Aboriginal communication and liaison specialist who would have the knowledge and expertise in negotiations forums and practices. These individuals could be deployed as part of front-line operations where these individuals can provide professional advise to protestors how to pursue real and meaningful negotiations on Aboriginal issues with public and private sector interest. This would be a pro-active measure by NAPS which will assist in restoring calm and confidence from the protestors.

3, NAPS should have resources to train their officers in negotiations. Negotiations will become the key factor that will de-escalate tensions. NAPS will be in a position to encourage the participants and proponents to enter into negotiations. These negotiations skills will be utilized by NAPS officers to facilitate the protestors to undertake negotiations as a means of resolving the direct action. The officers should be in a position to recommend strategies to protestors so that calm and peace is maintained at all times.

NAPS cannot operate in isolation as police. The police need communities to complement the need of communities for their police service. NAPS must develop concrete partnerships with various sectors of the First Nation society. NAPS should be in a position to draw key sectors to respond to situations that may arise at the occupations. First Nations have tremendous human resources that impact the social, economic and spiritual community sectors. Advanced development of partnerships with these sectors will prove invaluable during such times.

# Part VI

# RECOMMENDATIONS

1. It is recommended that Ontario and Canada provide financial resources for NAPS to further develop into a fully function police service. The present financial base that is negotiated on continual interim phases restrict and stifle growth and development. NAPS must have adequate resources to respond to policing needs of the communities including not only front-line services but other policing services such as drug enforcement, and special investigation capability.

2. It is recommended that Canada renew its Aboriginal policing policy to support progressive development of Aboriginal police services to fully functioning police service units. The present policing policy as outlined has or is lagging behind Aboriginal policing growth and development.

3. It is recommended that Ontario take measures to provide the resources for NAPS to further its capacity policing development as a fully functioning police service. These measures may include exceptional resources arrangements independently or with OPP. These arrangements must be viewed and recognized as investments wherein such development will advance unique capabilities that NAPS may provide in the event of direct action undertakings.

4. It is recommended that Canada and Ontario provide the required capital resources for NAPS to have the required up-to-date capital infrastructure at all sites. NAPS should have the capital infrastructure parallel to what is available to RCMP and OPP. Ontario and Canada must approach financing for NAPS under a new fiscal transfer mechanism that will be consistent and dependable.

5. It is recommended that NAPS develop internal operational policing capacity to not only to adequately respond to confrontations, road blockades, and protests but implement unique systems of managing and resolving future direct action undertakings without collateral damage. The recommendation recognizes that additional financial resources will need to be secured and designated strictly for this capability. In light of increased direct action undertakings by First Nation not only in northern Ontario but throughout Ontario and elsewhere, NAPS would be in a position to deploy such expertise responding to such incidents.

6. It is recommended that NAPS be provided with financial and human resources to engage full time additional positions for communications and public liaison specialty functions. These individuals would be fully trained, and have the expertise to design negotiation formats and processes. These individuals would be engaged as front-line functionaries assisting the protestors with negotiation processes and in turn will restore confidence and calm at occupations. This will be key pro-active policing measure.

7. It is recommended that NAPS be have the resources to employ coach officers on full-time basis. The newly recruits who find themselves as the only police officer because of time-off, medical leave and other policing demands expose new officers to potential personal safety risks and crisis.

8. It is recommended that NAPS be provided with resources to implement a full Auxiliary Policing Program that will not only provide non-direct policing for NAPS officers but that the program can be designed to promote constable development at ground level.

9. It is recommended that NAPS be provided with resources to design, develop and implement program to support officers that have encountered traumatic situations. NAPS should have access expertise to provide professional counseling and supports at its disposal.

10. It is recommended that NAPS be recognized as a legitimate police service under appropriate legislative base as with other police services. NAPS present status as a police program is a disservice and at best viewed as secondary policing institution. Under this recommendation, the following must include;

- territorial designation,
- police appointment powers,
- powers and responsibilities of board,
- powers and responsibilities of Citizens Review Board ( policing accountability),
- contracting police services,

11. It is recommended that Ontario commission an undertaking to fully explore, design and recognize the traditional peace-keeping practices of First Nations. Once designed, peace-keeping should not be considered as an option at First Nations but a cornerstone for providing public security and protection for all.

12. It is recommended for Ontario to begin discussions and negotiations with NIshanwbe-Aski Nation on the spirit and intent of Treaty # 9. Ontario is a signatory to Treaty # 9 and its adhesion. The discussions should include the traditional or customary land tenure systems of First Nations and how such systems will be recognized by Ontario.

13. It is recommended for Ontario to undertake negotiations with First Nations to determine and implement real and meaningful resources sharing opportunities with First Nations in Nishnawbe-Aski Nation territory. Revenue sharing opportunities that will have real and meaningful impact on the present quality and standard of lives for First Nations must be developed and pursued.

14. It is recommended that Ontario review existing legislation, policies and regulations on land management affecting First Nations and to amend ensuring consistency with the Supreme Court of Canada consultation parameters. The present regimes and actions of Ontario undermine the Aboriginal land and resources interests. Specifically, the Mining Act, Ontario's Mineral Strategy, Ontario's best Practices Manual, Ontario's Forest Management Process, Terms and Condition #77 (now referred to T&C #34), Ontario's Timber Class Environmental Assessment and others.

15. It is recommended that Ontario and First Nations jointly design and implement Aboriginal and Treaty Rights Impact Assessment process. The assessment process should review all potential issues affecting Aboriginal, public and private sector interests. The design and implementation process must involve the impacted First Nations.