

**IN THE MATTER OF THE  
IPPERWASH PUBLIC INQUIRY**

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**FINAL PART II SUBMISSIONS ON BEHALF OF  
ABORIGINAL LEGAL SERVICES OF TORONTO**

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## **INTRODUCTION**

1. Aboriginal Legal Services of Toronto (“ALST”) was granted Part II standing to address issues of policing and racism. To that end, ALST will focus its Part II submissions on only four areas that it believes are directly affected by issues of policing and racism:

- 1 Ipperwash and the Media;
- 2 OPP Services Board;
- 3 “Political Interference Protocol” ; and
- 4 From Ipperwash to Caledonia

2. Apart from the above noted issues, ALST is content that its Part I submissions adequately address the basis for its recommendations.

### **(1) IPPERWASH AND THE MEDIA**

#### *Recommendation*

25. *The Governments of Canada and Ontario provide funding to bring together schools of journalism, journalists, editors, academics, and the Aboriginal community to establish Best Practices for reporting on Aboriginal peoples, and Aboriginal issues.*

3. The Report of the Royal Commission on Aboriginal Peoples, quoted Charles Bury of the Canadian Associations of Journalists as follows:

The country's largest newspapers, TV, and radio news shows often contain misinformation, sweeping generalization, and galling stereotypes about Natives and Native affairs. Their stories are usually presented by journalists with little background knowledge or understanding of Aboriginals and their communities. The large media outlets include shamefully few Aboriginals either on their staff or among their freelance journalists. As well, very few so-called mainstream media consider Aboriginal affairs to be subject worthy of regular attention. The result is

that most Canadians have little knowledge of the country's Native peoples or of the issues that affect them.<sup>1</sup>

4. ALST commissioned John Miller, Professor of Journalism at Ryerson University, to review the media coverage of Ipperwash in 1995. Professor Miller's paper, entitled *Ipperwash and the Media: A critical analysis of how the story was covered* was provided to the Inquiry for consideration in its Part 2 work. ALST relies on the conclusions made in Professor Miller's paper and urges the Commissioner to make recommendations in this area.

5. To supplement the work that Professor Miller completed in relation to media coverage, ALST has summarized the evidence that arose during the Part 1 hearings that addresses issues with the media coverage. The following chart is a sample of the evidence provided over the course of the Inquiry regarding negative stereotypes of First Nations peoples perpetuated by the mainstream media. In addition, testimony of the deleterious impact of bias news coverage is included from a First Nations' perspective.

Citation	Statement/Incident
<p><i>Evidence of M. F. G. Simon</i>, September 27, 2004, p. 61, l. 20 – p. 62, l. 1.</p> <p>See also John Miller, "Ipperwash and the Media: A critical analysis of how the story was covered" (2005) prepared for the Royal Commission of Inquiry Into the Death of Anthony Dudley George at p. 9 and p.40 [<i>Ipperwash and the Media</i>].</p>	<p>Context: In response to a question by Brian Eyolfson, counsel for ALST, regarding media coverage.</p> <p>Q: Okay. And did you see any stereotypes about aboriginal peoples being perpetuated by such portrayals?</p> <p>A: Well the idea of masked warriors and the build up about warriors. I don't think any of us portrayed ourselves as warriors. We were the descendants of the people who came from there.</p>

<sup>1</sup> Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, vol. 3 (Ottawa: Ministry of Supply and Services, 1996) at p. 634.

<p><i>Evidence of Marlin Simon</i>, October 18, 2004, p. 21, l. 6 -14.</p> <p>See also <i>Ipperwash and the Media</i>, “Lead Source” chart at 49, “Sources” chart at 56 and “How many stories were written from the perspective of the First Nation people who were occupying the park?” at 57-59.</p>	<p>Context: Question by Karen Jones, legal counsel for the OPPA regarding the media’s coverage of the occupation.</p> <p>...But whenever we would, like, try and get our story out in the media, they would always twist it all around and wouldn't -- they weren't, I guess, telling our story.</p> <p>Q: Okay. And I didn't understand from your answer what effect the media coverage could have on whether or not you spoke with the OPP.</p> <p>A: The media coverage? Hmm hmm, they would pretty much get the general public fired up.</p>
<p><i>Evidence of T. Bresette</i>, March 1, 2005, p. 203, l. 23- p. 204, l. – 15.</p> <p>See also <i>Ipperwash and the Media</i>, “Frame Three: First Nation people in dispute among themselves” at p.31-32.</p>	<p>Context: In response to a question by Derry Millar, Commission Counsel regarding a news article in August of 1991.</p> <p>And I know there were, I guess, reporters that basically always want to sensationalise something, whatever's being said, because that sells paper. And that was -- my own personal observation has been since this thing entered the news media, the media kind of fuelled it and wanted to see a big fight out of it. And I guess that's one (1) of the things that they do cause is dissension. And I was told by a band member during a band meeting that, I watched you give an interview and everything you said was good. And they only take a little statement like that and write it down and say, That's what he said out of the whole interview. Forget the good stuff, just focus on the negative, stick it in a newspaper article. And I was told not to trust the media after that because they were fuelling distention [sp.] in the community as well as amongst people.</p>

<p><i>Evidence of G. Peters</i>, March 30, 2005, p. 142, l. 12 – 18.</p> <p>See also <i>Ipperwash and the Media</i>, regarding “parachute journalism” at p.11.</p>	<p>Context: In response to a question by Susan Vella, Commission Counsel regarding media coverage of the September 6, 1995 incident.</p> <p>Q: And how did you first learn about the fact of the confrontation?</p> <p>A: I think the first -- the first time I heard was that I got a call from a reporter asking me to comment on -- on the notion that the Premier had said, Get them 'F' ing Indians out of the Park. It was fairly early in the morning.</p>
<p><i>Evidence of G. Peters</i>, March 31, 2005, p. 57, l. 17 – p. 58, l. 21.</p> <p>See also <i>Ipperwash and the Media</i>, “Was the occupation described as legal or illegal at p. 41 - 43 and at p. 53.</p>	<p>Context: In response to a question by Brian Eyolfson, legal counsel for ALST, regarding the media coverage.</p> <p>Q: Okay. And did you have any concerns about any media coverage of the incidents at that time?</p> <p>A: We had a lot of concern with that. In fact -- in fact, we -- we had a couple of individuals tracking the media, trying to help us to -- to ascertain what the -- what the spin was that was being put on -- on information that was being presented to the media.</p> <p>And then subsequent to that we went and we met with the editorial board of the London Free Press as one (1) example of -- of our understanding because what we did was, we took documents to them and showed them the -- the changes in the process; and that it was -- it was our contention that -- that whenever an incident occurs, when -- when everything -- when anything occurs that's related to indigenous people, whoever from -- from the perspective of authority puts out a press release, they're going to be believed automatically.</p>

	<p>In this case, the police put out a document that said that they were fired upon; that became the -- that became the -- the standard format that the media used until -- until we were able to talk to the media -- members of them and to be able to -- to give our side of the story. And I don't think a lot of the media really, really changes gears until the Federal Government issues the document that there's a burial ground in the Park. I think at that stage a lot of media then started to backtrack and to be able to start -- to be able to ascertain whether or not the information that they had was -- was 100 percent correct.</p>
<p><i>Evidence of G. Peters</i>, March 31, 2005, p. 58, l. 22 – p. 59, l. 12.</p> <p>See also <i>Ipperwash and the Media</i>, at p. 39-41.</p>	<p>Q: Okay. And were there, in your view, were there any portrayals of First Nations people in the media that you found problematic at the time?</p> <p>A: There was always portrayals in the -- in the -- it was consistent -- it was consistent with the other incidents that had taken place, renegades, rebels, dissidents, breakaway groups, general – general terminology such as that that would say that – that people had -- that indigenous people, in general, have no legitimate claim to be doing anything beyond cooperating with provincial authorities.</p> <p>Q: And I take it from what you're saying this is something you've observed at other situations, not only Ipperwash?</p> <p>A: Yes. It -- it's -- the media's been fairly consistent in their approach.</p>
<p><i>Evidence of O. Mercredi</i>, April 1, 2005, p. 49, l. 14 p. 50 l. 17.</p> <p>See also <i>Ipperwash and the Media</i>, regarding “Common ways journalists “frame” stories at 25-28 and “Which general story “frames were used to tell this</p>	<p>Context: Comments regarding the media and educating the public about the <i>Indian Act</i>, in response to a question by Donald Worme, commission counsel, regarding the response and impact of the Ipperwash incident.</p>

story. Did these change after the shootings?" at p. 30-36.

A: Well, public opinion is -- is shaped by -- by the media to -- to a large extent in this country and the media have a very powerful influence in terms of what knowledge is given to the public. And our people have not been that effective in getting our message to the Canadian people.

Our voice is sometimes filtered by the reporters or by the media itself. And our -- our statements could also be misinterpreted or reinterpreted by -- by the editorial board of these papers in terms of their own perspective, right.

And that's why when I was the National Chief, as much as I was able to do this, I tried to have live interviews on television or in radio. Because through live interviews no one can misrepresent what you said. What you said is what you said, right. And what people heard is what you said.

So it's very important I think for -- for the people who are communicating what they call the news to be informed about our people; to be extremely informed about who we are as a people, what our goals are and -- and -- not to -- not to report on -- on their own perspective but to actually express what we're saying, right.

And that -- that is not an easy task, I gather, because obviously this is something maybe the school of journalism needs to look at besides -- besides the reporters themselves. But I think we need to work more on public education.

**(a) The Media's Role in Reporting and Contributing to the Post-Shooting Misconduct**

6. The most glaring omission in the mainstream media's coverage of the post-shooting events is the absence of the Stoney Pointers' voice. The people who were impacted most by the tragic events on the night of September 6, 1995, had little if any voice in the news coverage following the death of Dudley George, a Stoney Point community member<sup>2</sup>.

7. The media failed in performing the most basic journalism tasks required in coverage of conflict situations. The media coverage lacked proper historical context, balance of perspectives, factual accuracy and the ethical obligation to report the news responsibly and with appropriate sensitivity<sup>3</sup>.

**(i) Lack of Historical Context:**

8. It was not until Dudley George was shot and killed by an OPP officer that the media coverage began in earnest. However, this was not the beginning of the story, albeit a significant turning point marked by tragedy in the loss of a life but the story truly began in 1942 when the federal government, under the *War Measures Act* confiscated the lands of the Stony Point First Nation.

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<sup>2</sup> See *Ipperwash and the Media*, "Lead Source" chart at 49, "Sources" chart at p. 56 and "How many stories were written from the perspective of the First Nation people who were occupying the park?" at p. 57-59.

<sup>3</sup> "International Federation of Journalists" online: <<http://www.ifj.org/default>> and see also *Ipperwash and the Media*, "Conventions on reporting on conflict" at 23-25 and 58-59.

9. The news stories lacked sufficient historical context, rather than covering the story inclusive of the Indigenous people who had their lands confiscated by the mainstream government who reneged on promises to return such lands for over half a century, the media chose to cover it as a “splinter group” of the Kettle and Stony Point First Nation or “rebels” who had taken the law into their own hands. Thus, the media leapt into the story of the occupation and subsequent shooting lacking sufficient knowledge of the full circumstances<sup>4</sup>.

10. Without proper context the coverage left the audience only partially informed and led them to the inevitable conclusion that this was a story about a “splinter group of Indians” who showed blatant disregard for the rule of law.

11. Generally speaking, the mainstream media lacks the requisite knowledge to properly cover First Nations issues. This omission has the dangerous impact of reinforcing ignorance about First Nations peoples as commented on by Ovide Mercredi on April 1, 2005 and noted in the above chart<sup>5</sup>.

12. In order to properly cover First Nations issues, the media must be educated in the true history of First Nations peoples.

23 Because if they understood the historical  
 22 impact of the Indian Act, they would then understand some  
 23 of our sentiments as a people, they would better  
 24 understand our perspective, and they would then -- they  
 25 wouldn't be so critical about our strong arguments on it.

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<sup>4</sup> See also *Ipperwash and the Media*, “How was the background/context of the dispute described?” at p. 36-37.

<sup>5</sup> See also *Ipperwash and the Media*, regarding “Common ways journalists “frame” stories at p. 25-28 and “Which general story frames were used to tell this story. Did these change after the shootings?” at p. 30-36.

1                   They would understand why we are so  
 2 forceful about these issues, because if they experienced  
 3 the same thing, like any people who have experienced  
 4 trauma or -- or difficulties in their past, as the Jewish  
 5 people did, will make sure that that experience doesn't  
 6 re-occur, that it never re-occurs, right.  
 7                   And -- and they will take the steps to  
 8 make sure that people are aware about their feelings  
 9 about those incidents, and that the public becomes more  
 10 informed through -- through the education of -- of those  
 11 moments in their history.

*Evidence of Ovide Mercredi*, April 1, 2005 at p. at 53, l. 21 – p. 54, l. 11.

13.    An integral part of the media understanding the First Nations' perspective is to understand the First Nations' perspective on equality. Many of the opinion and editorial pieces appearing in the news called for a stop to what mainstream society deemed to be unwarranted differential treatment of First Nations peoples. However, equality from a First Nations perspective is something that was absent in the media coverage. Mr. Mercredi spoke about equality during his testimony:

24 Well, we want to be seen as equal, but  
 25 there's two (2) concepts of equality, right? One (1) is

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1 individual equality. We want individual equality. We  
 2 don't want to be discriminated against in terms of public  
 3 services and we certainly don't want to be, you know,  
 4 second-class citizens within the political legal system  
 5 of Canada.  
 6                   But there is a -- there is a second  
 7 equality and it's the equality of collectivities, the --  
 8 the equality of nations. Like, self-determination is a -  
 9 - is a -- is a collective right. Canadians have used  
 10 that to create their parliaments and their legislatures  
 11 and so on, but our people also have that right that has  
 12 been, to some extent, contained by the Indian Act.  
 13                   But -- but our aspirations are to -- are  
 14 to overcome the Indian Act and to give full expression to  
 15 that collective right of self-determination, see? So, in

16 that sense, when -- when people say to us we are  
 17 Canadians, well, what does that mean when -- when an  
 18 official of the Crown says that to you, or a police  
 19 officer says that to you, what does it mean?  
 20 It generally means, join us, assimilate  
 21 fully, that's what it generally means because it doesn't  
 22 mean equality in the sense of the collective rights of  
 23 our people, right?

*Evidence of Ovide Mercredi*, April 1, 2005 at p. 55, l. 24 - p. 56, l. 23.

**(ii) Imbalance of Perspective:**

14. The media's coverage of the events was highly favourable to the Ontario Provincial Police and the Harris government. Time and time again, the media accepted their statements as "official" assessments of the situation, without any substantiation or verification of the information<sup>6</sup>.

15. During his examination in chief by Susan Vella, Commission Counsel, Marlin Simon spoke about the media's bias coverage in favour of the OPP:

4 A: At this point, it was like, holy,  
 5 these guys are a bunch of assholes, I guess, because they  
 6 did that and then they -- we got pretty much portrayed as  
 7 being the bad guys in the newspaper.  
 8 Q: Did you think that was fair?  
 9 A: Was it fair? No, it was, like, what  
 10 the hell?  
 11 Q: Why didn't you think it was fair?  
 12 A: Just from the media -- media portrayal  
 13 of us being armed and firing on the police. And it was,  
 14 like, we didn't even -- we didn't have no guns around and  
 15 do anything. We never shot at them or nothing.

*Evidence of Marlin Simon*, September 30, 2004 at p. 73, l. 4-15.<sup>7</sup>

16. In stark contrast stands the perspective of the First Nations people. On the occasion that a First Nations person's perspective was included in a story, the statement

<sup>6</sup> See *Ipperwash and the Media*, at p. 53.

<sup>7</sup> See also *Ipperwash and the Media*, "To what extent did reporters take the OPP version of events as fact; to what extent did they indicate there was another, conflicting version of events" at p. 51 - 53.

was framed in a manner as to cast doubt on the legitimacy of their position. Usually, the comment would be subsequent to that of either the government or police “official” perspective, thus detracting from the First Nation position and lessening its merit.<sup>8</sup>

17. Furthermore, often times, the information was presented in a manner that was inconsistent with the individual’s intent.

16 Q: Okay. Who -- who was that when you  
 17 say, "yes, I do"?  
 18 A: **Lincoln Jackson.**  
 19 Q: Okay. And on September the 30th, you  
 20 told us that you and the occupiers, or one (1) of the --  
 21 that you and the occupiers would not speak to the OPP  
 22 after you were in the Park, because you didn't think you  
 23 were being represented right in the media.  
 24 A: **Yeah.**  
 25 Q: Do you recall that?

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1 A: **Yeah.**  
 2 Q: And can you help us understand what  
 3 media you're referring to?  
 4 A: **All of the media. Anybody that was,**  
 5 **like, I guess, seen in the media was pretty much targeted**  
 6 **for charges, or anything like that. But whenever we**  
 7 **would, like, try and get our story out in the media, they**  
 8 **would always twist it all around and wouldn't -- they**  
 9 **weren't, I guess, telling our story.**

*Evidence of Marlin Simon, October 18, 2004, at p. 20, l. 19 – p. 21, l. 9.*

18. In addition, for the most part, the voice of the Stoney Pointers, was absent in the news coverage. Rather than going directly to the source of the story, the mainstream media sought the opinion of outside First Nations representatives. Then Grand Chief Ovide Mercredi, of the Assembly of First Nations is quoted frequently in articles

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<sup>8</sup> See also *Ipperwash and the Media*, “How many stories said or suggested that the occupiers had guns?” at p. 38-39 and p.53.

subsequent to Dudley George's death as well as other elected band council representatives of local and regional territories.<sup>9</sup>

19. Granted, the First Nations officials could speak generally to the issues in relation to Ipperwash, however, they were not present on the night of Dudley George's death, nor would the impact of that fateful night be felt as personal as to those Stoney Point community members.

**(iii) Lack of Factual Accuracy:**

20. The media failed to verify information for factual accuracy. For the most part, the media accepted the information contained in OPP press releases as a correct assessment of the facts<sup>10</sup>. It was not until some time later that the media began to question the accuracy of such statements as noted by Gordon Peters on March 31, 2005, during his testimony, included in above chart.

**(iv) Lack of Sensitivity – Perpetuating Racist Connotations of First Nations People:**

21. ALST respectfully submits that the media portrayed the occupants in a manner that reinforced negative stereotypes and perpetuates racism against First Nations peoples.

22. The media made unsubstantiated links between the situation at Ipperwash to that of the Gustafsen Lake matter as well as past “confrontations” between First Nations and non-Indigenous governments and police agencies. The result, reinforcing negative stereotypes that “Indians” are violent savages, different and far less “civilized” than their

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<sup>9</sup> The Stoney Pointers were the bystanders of their own story as outside sources were quoted more frequently as lead sources *Ipperwash and the Media*, at p. 32 and 56.

<sup>10</sup> See *Ipperwash and the Media* at p. 51 to 53

non-Indigenous counterparts as *they* resort to violence to solve *their problems*. The “us (mainstream dominant society) versus “them” (Indians) mentality was constantly reinforced in the news coverage.<sup>11</sup>

**(v) The Media Failed Their Ethical Obligation to Report News in a Responsible Manner:**

23. The media’s coverage of the post-shooting events had the deleterious effect of increasing tensions not only between First Nations and mainstream society but amongst the First Nations community members.

24 Q: And at one point you stated to the  
25 effect that the news media began to fuel or cause

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76

1 dissension in the community?

2 A: Yes.

3 Q: And could you clarify what you meant  
4 by that?

5 A: Well, it's like they were trying to  
6 escalate a problem internally within our community to --  
7 to use a snippet of a discussion with myself during an  
8 interview and make it look like we were saying bad things  
9 about other people.

10 And -- and out of a whole conversation  
11 they basically take a -- a couple of sentences or they'll  
12 highlight something that they feel is a comment and that  
13 comment basically doesn't cover the -- the interview  
14 process in general. It takes it away to try to  
15 sensationalise a matter and create questions in people's  
16 minds and speculate on what was actually being discussed.

17 Q: Okay. And you feel that this led to  
18 dissension within your community, the Aboriginal  
19 community?

20 A: Yes. And in -- in a Band meeting it  
21 was pointed out to me that -- and all the people in  
22 attendance there to be careful of what they read in the  
23 media. And that's when it first came to light that, you  
24 know, and to the community that the media was somehow  
25 taking only snippets of a statement and putting it in the

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<sup>11</sup> See *Ipperwash and the Media*, at p.9 and p. 32 – 33 and “How many stories referred to other disputes like Oka or Gustafsen Lake?” at p. 37-38.

1 paper and not even dealing with -- with the questions  
 2 that they were asking.  
 3                   But I don't know whether it's the people  
 4 who write the story or the editor who -- and -- and I  
 5 guess my feeling was it was an attempt to try and  
 6 sensationalise or generate a -- a feeling that there was  
 7 something going to happen so the readers would continue  
 8 to follow their -- their paper.

*Evidence of Tom Bressette, March 3, 2005 at p. 75, l. 24 – p. 77, l. 8.*<sup>12</sup>

24. Marlin Simon, Stoney Point community member and occupier spoke to the matter of the media coverage straining already tenuous relations between First Nations and the mainstream public during his October 18, 2004 testimony before the Ipperwash Inquiry:

13                   A: The media coverage? Hmm hmm, they  
 14 would pretty much get the general public fired up. And  
 15 then the general public would be making complaints to the  
 16 OPP about stuff they seen or never seen or thought they  
 17 seen.  
 18                   And then the police would have to respond  
 19 and then they would always turn it into a big criminal,  
 20 like, criminal things, so that they could just charge the  
 21 people and sweep it under that rug.

*Evidence of Marlin Simon, October 18, 2004, at p. 21, l.13-21.*<sup>13</sup>

25. In terms of “sweeping matters under the rug,” arguably, the media’s approach to covering the events of September 6, 1995 and the aftermath had a direct correlation with the government’s inaction to calling an inquiry. In the words of then Grand Chief Mercredi: “...public opinion is - - is shaped by - - by the media to - - to a large extent in

<sup>12</sup> See also *Ipperwash and the Media*, “Frame Three: First Nation people in dispute among themselves” at p. 31-32.

<sup>13</sup> See also *Ipperwash and the Media*, at p. 31-33.

this country and the media have a very powerful influence in terms of what knowledge is given to the public.”<sup>14</sup>

*Evidence of Ovide Mercredi*, April 1, 2005 at p. 49, l. 14-17.

26. ALST submits that the media holds a powerful position in Canadian society and that position has been used to reinforce stereotypes about First Nations peoples. ALST believes that with proper education, and established best practices-developed in partnership between the media and the Aboriginal community, improvements can be made. The media plays a large role in educating mainstream society. We have to ensure that the education they are providing is accurate. Without this accuracy, relationships between Aboriginal people and non-Aboriginal people will continue to be strained.

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<sup>14</sup> See also *Ipperwash and the Media*, “When did the call for an inquiry begin, and how was it pursued by the media?” at p. 42.

## **(2) OPP POLICE SERVICES BOARD**

### *Recommendation:*

11. *The Government of Ontario amend the Police Services Act, R.S.O. 1990, c.P.15 to create a police services board for the Ontario Provincial Police. The Ontario Provincial Police Services Board shall contain dedicated seats for Aboriginal representation. The number of dedicated Aboriginal seats on the Police Services Board and the appointment process will be established by the Province in consultation with the Aboriginal community.*

27. Aboriginal Legal Services of Toronto (“ALST”) respectfully submits that the *Police Services Act* should be amended to provide for an OPP civilian oversight body (“OPP Services Board”) akin to the municipal police services boards currently employed in Ontario. In addition, given the close relationship of the OPP to Aboriginal communities across Ontario, it is respectfully submitted that there be multiple permanent seats for Aboriginal people.

28. The OPP Services Board would provide two distinct benefits to the OPP that are currently absent from their governance. Firstly, the OPP Services Board would act as a buffer between the government and the police, providing an extra layer of security against any perceived intentional or inadvertent government interference with specific day to day police operations. Secondly, the OPP Services Board could hold the Commissioner accountable for his or her actions, adding a further level of accountability that is currently unavailable.

### **(a) Police Independence**

29. Before discussing the benefits of an OPP Services Board it is necessary to briefly discuss what form of police independence ALST advocates. In this regard ALST recognizes that any notion of police independence must be crafted in a manner that

recognizes, amongst other things, the two major concerns of police independence detailed in the Ipperwash Discussion Paper - Government/Police Relations:

To start, we are obviously concerned with ensuring the professionalism of policing and preventing partisan policing or inappropriate government influence. We are also obviously concerned about police becoming “a law unto themselves,” free from democratic input or control on appropriate issues<sup>15</sup>.

30. While recognizing that any rigid definition of police independence may not encapsulate every possible situation, ALST respectfully submits that a proper formulation of police independence recognizes that civilians, through their governments and through oversight bodies, have an important role to play in developing police policies and procedures. To that end it is necessary to provide civilian oversight bodies with the ability to effectively direct the head of the police and hold him or her accountable for any misconduct. ALST recognizes that this form of supervision is necessary to ensure that the police do not become “a law unto themselves”.

31. There are limits, however, to how far a civilian oversight body or the government should be able to direct the police. ALST respectfully submits that the police must remain entirely independent from outside influences when making operational decisions related to specific investigations or events.

32. This concept of police independence is not novel, rather, several commissions and Canadian courts have advocated for such an approach<sup>16</sup>.

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<sup>15</sup> Ipperwash Discussion Paper - Government/Police Relations at pg. 4

<sup>16</sup> R. v. Campbell and Shirose [1999] 1 S.C.R. 565; Commission of Inquiry Concerning Certain Activities of the RCMP Freedom and Security under the Law (Ottawa: Supply and Services, 1981); Commission Interim Report Following a Public Inquiry into Complaints that took place in connection with the demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver (Ottawa: Commission of Public Complaints, RCMP, 23 July 2001); Royal Commission on the Donald Marshall Jr.

**(b) Role of Police Services Board**

33. According to the Ontario Civilian Commission on Police Services (hereinafter the “Commission”), a Police Services Board is meant to act as the “the civilian overseer of the police on behalf of the community”. In the *Ontario Civilian Commission on Police Services, Report of an Inquiry*, (“Report”) the Commission summarized the functions and responsibilities of the Metropolitan Toronto Police Services Board as follows:

**The Police Services Board is responsible for providing civilian monitoring of the force and setting policies for its operation.** Because of this obligation to monitor and because police investigate allegations against their own members, expectations for scrutiny by Police Services Board, as representatives of the community are high. It is imperative that Police Services Boards understand their role and are held accountable to the public. Their function is a crucial one: **Boards exist to ensure that the policing services provided meet the community standards** (p.5).

The law is clear that the Board cannot usurp or replace the management role of the Chief of Police. However, the **Board clearly has overall responsibility for the operation of the force.** The Chief reports to the Board and must obey its lawful orders and directions. It is the view of this Inquiry panel that a **Police Services Board cannot fulfill its responsibilities for monitoring the policies it sets and the performance of the Chief unless it insists on having the necessary information.** (pp. 32-3)

We consider the reference by the task force to “discretion” in the Chief’s reporting to the Board to be inappropriate. It is important that Board policy state clearly the obligation of the Chief to report on cases which involve the integrity of the force or the public interest, and the obligation of the Board to be so informed. There should also be a requirement for a regular status reports on serious disciplinary matters.

However, we are concerned that putting policies in place that make the Board the passive recipient of information is not enough. Some mechanism is necessary to allow the Board to assure itself in a more proactive way that it is fulfilling its roles as **civilian monitor of policing services for the community**. (p. 36)

The Metropolitan Toronto Police Services Board should consider its options to fulfill its monitoring role more effectively. **The Board should have some mechanism for monitoring the implementation of its policies by the force and the capacity to investigate alleged problems which may come to light...** We direct that the Ontario Civilian Commission on Police Services be advised within six months of the decisions made by the Police Services Board on how it will improve its effectiveness in **overseeing implementation of its policies by the force**. (p. 37)

[emphasis added]

*The Ontario Civilian Commission on Police Services, Report of an Inquiry* dated August 1992 at pp.5, 32-33, and 36-37

34. As such, the Board's legislative mandate is to monitor the conduct of the members of the police force with a view to ensuring that the policies of the police force are being implemented. As recognized by the Commission, the Board does not operate in an informational vacuum concerning the conduct of members of the police force. Nor does the Board merely act as a passive recipient of information. Rather, the Board's mandate requires it to take "proactive" steps in "fulfilling its role as a civilian monitor of policing services for the community".

*The Ontario Civilian Commission on Police Services, Report of an Inquiry* dated August 1992 at pp.5, 32-33, and 36-37

35. Pursuant to the *Polices Services Act*, the Board takes a direct interest in any potential misconduct of individual officers to the extent that this conduct may reflect a systemic problem to be addressed by the Board through improvement in policies and

training for officers. The role of the Board, is among other things, to ensure that policing is conducted in a professional manner with sensitivity and respect for the communities that police officers serve. One of the major areas over which the Board is responsible involves considering and establishing policies for the appropriate use of force by police officers in any given circumstance.

36. ALST respectfully submits that the Commission's summary of the role of a police services board allows it to perform two essential tasks in monitoring the actions of the OPP – act as a buffer between the police and government and to hold the OPP Commissioner accountable for their acts and omissions.

### **(c) Benefits of Police Services Board**

#### **(i) OPP Services Board as Buffer**

16 Q: The author opines that on operational  
 17 matters the -- the -- the Minister basically must stand  
 18 back somewhat. The author goes on to say:  
 19 "This is not to say that the police  
 20 have no accountability with respect to  
 21 specific operational decisions. As  
 22 noted above, however, at page 13 the  
 23 Minister's accountability for  
 24 operational matters may be to require  
 25 information on what has or will be done

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97

1 rather than as in the policy area to  
 2 control or direct the actions of the  
 3 police.  
 4 Reporting relationships should also be  
 5 respected in order to avoid any  
 6 perception of political interference as  
 7 opposed to the Minister's right to be  
 8 fully informed on all matters under his  
 9 or her jurisdiction.  
 10 Accordingly, it would be advisable for  
 11 the Minister to direct his or her

12 requests for information to the  
 13 Commissioner."  
 14 Do you see that?  
 15 **A: Yes, I do.**  
 16 Q: Now, that notion of respecting the --  
 17 does -- do you get from that what I get from that, which  
 18 is it's important to respect the chain of communication?  
 19 **A: I do.**  
 20 Q: And the notion that if you buck that  
 21 chain of communication or override it, especially in the  
 22 operational area, it could well give rise to a perception  
 23 of political interference?  
 24 **A: Yes.**

*Evidence of Thomas O'Grady, August 25, 2005, p. 96 l. 16 – p. 97 l.24*

37. At the outset it is important to note that ALST does not advocate a position that entirely excludes the government from the operations of the OPP. ALST respectfully submits that the government of the day should be kept informed of the operational decisions of the OPP. This is particularly the case when dealing with Aboriginal occupations which will likely only be solved through negotiations with government officials. Allowing the government to directly communicate with the OPP when dealing with these delicate situations runs the risk of allowing government officials to intentionally or inadvertently direct OPP operational decisions. This runs contrary to the notion of police independence that ALST advocates – independence over operational decisions with the government playing a role in developing police policies. ALST respectfully submits that a buffer is required to ensure that police independence is maintained.

38. The perception of political interference is a danger that requires the attention of this Commission. Even where direct political interference with specific police operations is not proven it is entirely possible that the opinions and suggestions of the government may have an effect on the decisions of the police. Indeed, there was enough evidence



13 Minister, and -- and the Commissioner of the OPP, you did  
 14 state earlier in your evidence and also in your Will Say  
 15 that the Deputy Solicitor General's role in some ways, as  
 16 a buffer, is akin to a police services board.

17 Do you remember saying that?

18 **A: Yes.**

19 Q: And you also referred to the -- to --  
 20 and you'd agree you're somewhat familiar with the roles  
 21 of police services boards?

22 **A: Yes, I am.**

23 Q: You know that Section 31 of the  
 24 Police Services Act sets out the functions of a police  
 25 services board?

125

1 **A: Yes.**

2 Q: And, in particular, the notion that  
 3 there is a civilian oversight body representative of both  
 4 government and the community, acts as a buffer between  
 5 government on the one (1) hand and the Police Service on  
 6 the other. You know that?

7 **A: Yes.**

8 Q: And I take it you also know that the  
 9 Police Services Board, while statutorily being prohibited  
 10 from giving orders to members of a municipal police  
 11 service are statutorily mandated to give orders to the  
 12 Chief of Police?

13 **A: Correct.**

14 Q: And you know --

15 **A: With -- with an exception to that  
 16 rule.**

17 Q: That's right. I was about to get  
 18 there. And you know that statutorily, the Police  
 19 Services Board is prohibited, statutorily, by law from  
 20 interfering or giving orders or directions in matters of  
 21 operation to the Chief of Police?

22 **A: That's correct.**

23 Q: And -- and was that the exception you  
 24 wanted to raise?

25 **A: That was the exception.**

*Evidence of Thomas O'Grady, August 25, 2005, p. 124 l. 10 – p. 125 l.25*

41. Relying on the Deputy Solicitor General as a buffer between the police and government officials runs the same risks as described by Professor Roach in the *Small* case. As such, ALST respectfully submits that a proper buffer between the police and

government officials would be an OPP Services Board. This model of OPP accountability would include providing the OPP Services Board with the same statutory powers and prohibitions as the municipal police services boards established by the *Police Services Act*.

42. As the Commissioner is no doubt aware, section 31 of the *Police Services Act* details the responsibilities of the municipal police services boards. Subsection 31(1)(e) enables the boards to direct the chief of police and monitor his or her performance. While the *Police Services Act* allows the board to direct or order the chief of police, it does recognize the independence of police. To that end, subsection 31(3) explicitly prohibits a board from directing the chief of police with respect to specific operational decisions or with respect to the day-to-day operations of the police force.

43. The purpose of the limitation imposed by subsection 31(3) was meant to preserve the common law independence of police officers in regards to specific cases. This is evidenced in several ways. It does not, however, limit the ability of the police services board to act as an informational conduit between the government and the police, nor does it limit the board's ability to create police policies and procedures.

44. In Canada, the general proposition regarding the independence of a local police force in respect of specific cases is undoubted<sup>18</sup>. As is apparent from the following, this independence is limited to specific criminal investigations, and does not curtail oversight obligations:

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<sup>18</sup> See generally *R. v. Campbell*, [1999] 1 S.C.R. 565, at pp. 588-589

- Legislation in every province except Newfoundland provides for the creation of civilian police boards and thus, in Canada, there exists a general rule of local civilian accountability for police services<sup>19</sup>.
- Police accountability is thus structured to ensure that police do not become “a law unto themselves”. As stated by the McDonald Commission, the overriding principle of public accountability is as follows:

We take it as axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives ... The government must fulfill its democratic mandate by ensuring in the final analysis it is the government that is in control of the police, and accountable for it.

The McDonald Commission expressed the view that the independence/supervision dichotomy regarding police services could be properly maintained with government maintaining control of police forces but “not normally [becoming ] involved in the decisions to be made by members of [the R.C.M.P.], including the Commissioner himself, with respect to investigation, arrest and prosecution in individual cases”<sup>20</sup>.

- Commissions of Inquiry and leading commentators outside Canada have concluded that the “independence” of a police force is limited to individual cases. The English Royal Commission on Police recommended that independence of police forces be maintained for investigating suspected offences, making arrests and deciding whether to lay a charge. However, the Commission also recommended that immunity from external influence was not appropriate for “matters which vitally concern the public interest”<sup>21</sup>.
- As professor Stenning has pointed out, “the application of [the] doctrine of independence expounded by Lord Denning in the *Blackburn* case, to municipal police in Canada is doubtful...” The English *Police Act* in force at the time of the *Blackburn* decision did not provide for general management authority for civilian police bodies, contrary to the legislation in Ontario regarding police services boards (see s. 31(b)(c)(e)). Moreover, the English *Police Act* contained no provision requiring the chief constable to “obey lawful orders” of the civilian authority, whereas s. 41(2) of the *PSA* provides the Board with such authority in respect of a municipal Chief of Police<sup>22</sup>.
- Courts in Ontario and B.C. have recognized the jurisdiction of a civilian governing police body to make orders necessary for the maintenance of their statutory functions even where those orders conflict with the actions of a police force; see *Toronto (Metropolitan)*

<sup>19</sup> See Ceyssens, “Legal Aspects of Policing” (Earlscourt Press: Saltspring Island: Looseleaf – Release 13 December 2001) at p. 1-3.

<sup>20</sup> *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, (Minister of Supply and Services: Ottawa: 1981) (“McDonald Commission”), at pp. 1005-1006, 1014

<sup>21</sup> Royal Commission on the Police (1962), (Her Majesty’s Stationary Office: London), at paras. 68, 87-93; see also Marshall, “Police and Government” (Methuen & Co. Ltd.: London: 1965), pp. 119-120

<sup>22</sup> Stenning, “Police Commissions and Boards in Canada”, (Centre of Criminology, University of Toronto: Toronto: 1981), at pp. III.26 to III.28

*Police Force v. Bromell*, [2000] O.J. No. 1674 – the Court affirmed the role of the Board to pass a by-law to control fundraising (“True Blue”) by police officers; *Police Services Union v. Port Moody Police Board* (1991), 78 D.L.R. (4<sup>th</sup>) 79 (B.C.C.A.) – a majority of the Court held that a departmental order “to prevent abuse” of police officers participating in private solicitation campaigns fell within the Board’s powers to administer municipal police forces (see pp. 95-96).

45. The inclusion of the words “day-to-day” and “specific operational decisions” in subsections 31(3) and 31(4) was meant only to preserve the common law independence of police officers in regards to specific cases. This distinction is not meant to eviscerate the supervisory duty of a police services board in matters of vital public importance.

46. In light of the above, it would be entirely appropriate for an OPP Services Board to supervise the OPP in the performance of their duties and to direct or order the Commissioner of the OPP to perform actions deemed necessary by the Board.

47. An OPP Services Board would supervise the OPP and act as a buffer between the government and the police. An OPP Services Board could act as an information conduit allowing information to pass between the government and the OPP without any intentional or unintentional commentary being passed on with the information. This would allow the government to be properly informed of police policy as well as provide a means for the government, through a civilian oversight body, to be informed of specific incidents or investigations that are important to the public.

#### **(ii) Commissioner Accountability**

48. As an arm of the Provincial Government the Auditor General routinely reviews the efficacy of the OPP’s operations as a part of the government. This is one mechanism of accountability. In addition to the Auditor General’s reviews, the OPP Commissioner

may be called upon by the Standing Committee on Public Accounts to make submissions on various issues, including information contained in the Auditor General's report. The Standing Committee on Public Accounts does not regularly call upon the OPP Commissioner to make submissions; the evidence provided by Commissioner Boniface was that she was called to make submissions in 2001 with respect to an Auditor General's Report published in 1998. She was next summoned to the Standing Committee on Public Accounts in 2005. With respect, ALST submits that these two current forms of accountability are not sufficient.

49. An OPP Services Board would provide an added level of accountability on the OPP Commissioner that is currently absent from the legislative scheme. The current legislative scheme provides the Board with four mechanisms of accountability over a police chief. The first mechanism is that the municipal police services board has the ability to direct and order a police chief (subject to the exception detailed above). The second form of accountability is that the Board may dismiss or request the resignation of a police chief that has been found guilty of an unlawful act or misconduct. The third form of accountability is that the Board has the power to appoint the chief of police and they have the power to refuse to renew the contract of the appointed chief of police. Lastly, police services boards meet on a regular basis and a chief of police is required to attend those meetings. The added benefit of these meetings is that part of the meeting is made public, thereby allowing concerned citizens to question the board members, including the chief of police. These four mechanisms of supervision are not present in the current system of OPP accountability.

**(d) Aboriginal Seat on the OPP Services Board**

50. ALST respectfully submits that any incarnation of the OPP Services Board must include permanent seats for Aboriginal people. It is well recognized that the OPP play a dominate role in the policing of Aboriginal people. This is particularly true in municipalities where the local council has contracted with the OPP for police services. This special relationship was acknowledged by the current Commissioner, Gwen Boniface:

16 Q: And -- and isn't it true, in fact,  
 17 that because of the remote areas the OPP polices relative  
 18 to other services, what ends up happening is that the  
 19 communities you police are very often more First Nations  
 20 communities than any other policing service? You end up  
 21 having that responsibility more than any other non-  
 22 Aboriginal police service; isn't that true?  
 23 A: **You mean in the province?**  
 24 Q: That's right.  
 25 A: **Yes.**

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216

1 Q: Although Kenora Police could probably  
 2 compete with you but...  
 3 A: **The -- I'm just trying to sever out**  
 4 **the First Nation Police Services so --**  
 5 Q: Right.  
 6 A: **Right. Probably in the province we**  
 7 **do the most.**  
 8 Q: And so -- and -- and it's simply an  
 9 example of why community oriented policing is so  
 10 important. Now, what I wanted to ask you is you've given  
 11 us examples of how you've attempted to address and  
 12 remedy, and are remedying, the disproportionate  
 13 representation of First Nations people in policing,  
 14 correct?  
 15 A: **Tried to.**

*Evidence of Commissioner Gwen Boniface, June 15, 2006, p 215 l.16- p. 216 l.15*

51. Not only is the OPP the primary source of Aboriginal policing, but it is well recognized, as noted in the Commission's Research paper *Aboriginal Peoples and the Criminal Justice System*, that Aboriginal people are both over-policed<sup>23</sup> and under-policed<sup>24</sup>.

52. Professor Roach explains that systemic discrimination against Aboriginal people may require a variation of the four models of police government relations:

Finally, it is possible that none of the four models outlined above may be optimal for Aboriginal people and that alternative models should be developed. For example, police independence may be resisted in part because of the well documented history of systemic discrimination against Aboriginal people in the criminal justice system and the often tense relations that have existed between Aboriginal people and the police. In addition, the democratic model of policing may have to be adjusted to accommodate Aboriginal people who are under-represented in Canada's democratic institutions. Such adjustments may include the encouragement of Aboriginal policing where possible and the introduction of police boards that may include Aboriginal representation. Finally, the case for a governmental model of policing may be stronger in relation to Aboriginal people who can argue that policing implicates the duty of the Canadian state to respect Aboriginal rights including treaty rights and fiduciary duties. When these rights are not respected by the state including the police, then the relationship between Aboriginal peoples and the Canadian state may suffer by resting on force as opposed to consent and reconciliation<sup>25</sup>.

53. ALST respectfully submits that permanent seats for Aboriginal people on an OPP Services Board are necessary to combat the systemic discrimination faced by Aboriginal people. In addition, permanent seats for Aboriginal people are necessary in the context of developing police policies and procedures with respect to the policing of Aboriginal rights. Currently, Aboriginal people are under represented in our democratic institutions. As such, their ability to have a voice in policing policies is virtually non-existent. To that

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<sup>23</sup> *Aboriginal Peoples and the Criminal Justice System*, at p. 31 – “Over-policing refers to the practice of the police of focussing their attention inordinately in one particular geographic area(or neighbourhood) or on members of one particular racial or ethnic group”

<sup>24</sup> *Ibid.*, at p. 39 - “The term under-policing refers to situations where the police choose not to act even where there is evidence that crimes have been committed. Aboriginal people in Canada are not only over-represented as offenders, but also as victims of crime as well.”

<sup>25</sup> Roach, K. *Four Models of Police-Government Relationships*, at pg. 35

end, it is necessary to have Aboriginal people placed in a position where they have direct access and influence over the drafting of police policies. In turn, this would ensure that police policies, as they relate to Aboriginal people, would respect Aboriginal rights and the Crown's fiduciary duty owed to Aboriginal people.

54. ALST respectfully submits that advisory committees, such as the Commissioners' Select Liason Council on Aboriginal Affairs, serve an important role in police organizations. They are not, however, an alternative to having Aboriginal people sit on police service boards. Committees such as the Commissioners' Select Liaison Council merely advise. They do not have the statutory authority to direct the police or police policy and they do not govern the operations of the service. In addition, such committees often do not have set terms, and they lack established criteria for member selection. There is no monitoring in relation to whether the members are consulting with their communities, or reporting back to the community on the policing matters that they are "advising" on. As such, ALST respectfully submits that an advisory committee should not supplant the need for Aboriginal people to sit as members of the board.

**(e) Province Wide Board**

55. The OPP, in paragraph 185 of their Part II Submissions, states that they are not philosophically opposed to being governed by a police services board; however, they query how a province wide board would interact with contract OPP detachments. ALST respectfully submits that these concerns can be easily accommodated.

56. With respect to contract OPP detachments, ALST respectfully submits that those OPP detachments currently under contract with municipalities would not be subject to the

OPP Services Board. Detachment Commanders of contract OPP detachments already have a reporting relationship to local municipal police services board and are subject to the direction and control of the local municipal police services board. As such, there is adequate supervision of contract OPP detachments.

57. While there is no current Canadian model of a province wide or national level police services board, such a board was established in Northern Ireland. The Northern Ireland Police Services Board (“NIPSB”) is an example of a national level police services board that was established to govern a single large police force – the Police Services of Northern Ireland.

58. The NIPSB works in conjunction with District Policing Partnerships (DPPs) that represent each policing district. DPPs are made up of members of the local community and are either members of the public (Independent Members), or councillors (Political Members) who represent the district on their local council. The DPPs are meant to provide views to the district commander on any matter concerning policing in the district; monitor the performance of the police in carrying out the local policing plan; obtain the views of the public about matters concerning the policing of the district; obtain the co-operation of the public with the police in preventing crime; and to act as a general forum for discussion and consultation on matters affecting the policing of the district<sup>26</sup>.

59. DPPs have many important responsibilities. For example, they give voice to community views on policing, identify, discuss and prioritize local concerns and establish policing priorities. DPPs also contribute to the formulation of local policing plans and

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<sup>26</sup> [http://www.nipolicingboard.org.uk/Our\\_role/what\\_does\\_policeboard\\_do.htm](http://www.nipolicingboard.org.uk/Our_role/what_does_policeboard_do.htm)

together with local PSNI District Commanders they will make a positive and significant difference to policing with the community right across Northern Ireland <sup>27</sup>.

60. The Northern Ireland experience is just one example that the Commissioner could draw upon in creating a province wide police services board model. Currently there is already a patchwork of OPP detachments that fall under the supervision of municipal police services board and those that do not. ALST respectfully submits that the OPP Services Board model will provide a level of accountability for those OPP officers that are not currently under the supervision of any civilian oversight board.

**(f) Transparent Political Interference with Police**

61. The Canadian Civil Liberties Union (CCLU) advocates for a greater government role in not only police policy but police operations. The CCLU recognizes that the politicalization of the police is a dangerous problem and seeks to address that problem through the adoption of various safeguards. These safeguards include government directives to the police being made in writing and self-generated audits performed by an external agency. CCLU further suggests that the government should direct the police with respect to dealing with Aboriginal occupiers.

62. ASLT respectfully disagrees with the position advocated by the CCLU. CCLU's model provides for a retroactive form of accountability. While internal audits are a useful tool, they do not provide security in ensuring that tragic events, such as those that occurred at the Ipperwash Provincial Park, are avoided. They may ensure that errors and

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<sup>27</sup> Ibid

misconduct are discovered, but the safeguards advocated by the CCLU are not preventative in nature.

63. The provincial government should be informed of the policy and operational matters of the OPP. The government should not, however, try to influence or direct the operational matters of the police. Whether directives are made in written form or not, the problem is still the same - partisan policing. To allow the provincial government to directly order the OPP on operation matters could lead to a situation where the OPP would be directed to act based on party platforms and polices as opposed to the rule of law. This is a greater concern in Aboriginal cases where governments and the public are not informed of Aboriginal rights and their place in the rule of law. Aboriginal people will not benefit from any regime of policing that holds their rights hostage to the imperatives of majoritarian politics.

**(g) Conclusion**

64. Almost every province in Canada relies on local police services boards as a mechanism to hold municipal police services accountable. They act as a mechanism of accountability for police actions and also ensure that there is some civilian and government oversight in the formulation of police policies and procedures. In that regard ALST respectfully submits that the OPP's current models of accountability are outdated and behind the times. As such, ALST submits that the Commissioner recommend that the provincial government amend the *Police Services Act* to provide for a police services board that would govern those OPP officers not currently under the jurisdiction of a municipal police services board.

### **(3) POLITICAL INTERFERENCE PROTOCOL**

*Mr Gerry Phillips (Scarborough-Agincourt): My question is to the Premier. Premier, I believe you are in a serious conflict-of-interest situation and you must remove yourself from that conflict of interest. I refer to the Ipperwash Provincial Park issue. On the one hand, there is considerable evidence that you were deeply and personally involved in the events surrounding the shooting death. Yesterday, evidence was made public that you -- I'm quoting -- "[desire] removal within 24 hours." On the other hand, it is you who controls whether or not there is a public inquiry into the events. So you have a serious conflict of interest. You are personally deeply involved in it, but it is you who controls whether there is a public inquiry that will look into your actions.*

*Will you agree, Premier, to remove yourself from this conflict by referring the matter to the Chief Justice of Ontario so he can make a recommendation on whether or not there should be a public inquiry?*

Hansard debates, June 26, 2001

*Recommendation:*

7. *The Government of Ontario shall develop a "Political Interference Protocol" that establishes a mandatory procedure that shall be invoked when allegations of political interference with police are made.*

65. In the previous section ALST made submissions concerning the need for a police services board for the OPP to, among other things, act as a buffer against political interference with police operations. ALST acknowledges that this structural proposal could never constitute a complete antidote to the risk of political interference; even with a well functioning police services board, the risk of political interference can never be completely eliminated.

66. ALST proposes a Political Interference Protocol or "PIP" to address those rare cases where credible allegations of political interference with police emerge. PIP would encompass a formal, statutorily prescribed investigative and reporting process that would automatically and promptly be invoked where any such credible allegations of political interference are made.

**(a) Why Do We Need PIP?**

67. ALST submits that there are several compelling reasons that justify the creation of PIP. First, as Mr. Gerry Phillips (then the member for Scarborough-Agincourt) observed in the passage cited above, any government that faces a credible allegation of political interference with police is in a fundamental conflict of interest. By the very nature of the allegation, the government of the day will almost inevitably be the target of the allegations while at the same time controlling the existing *ad hoc* mechanisms for investigating the allegation. This reality not only leaves the government of the day in an invidious position, it is also corrosive of public confidence in politics and politicians.

68. Second, there is nothing more destructive of a society's faith in its democratic institutions than unresolved allegations that the state's paramilitary organs (i.e. the police) have been utilized to advance a partisan political agenda. The stakes are simply too high for such allegations not to be thoroughly and transparently investigated and resolved through a statutorily mandated process. The basis for PIP is not that such allegations are always true: it is that when an allegation of political interference is made, and not properly answered, the damage to public confidence in our democratic institutions is done.

69. Third, ALST submits that accountability through the electoral process has shown itself to be incapable of addressing allegations of political interference. In this case, credible allegations of political interference against Premier Harris were made in May 1996, concerning his personal involvement in the policing response to the Ipperwash occupation. Premier Harris and other senior members of his government were repeatedly

questioned in the Provincial Parliament concerning this allegation up to the Provincial general election in June 1999. It was only after the election that Premier Harris acknowledged that he attended the “dining room meeting”. The active concealment of Premier Harris’ personal involvement until after the 1999 election effectively deprived the people of Ontario of any meaningful opportunity to hold anyone accountable. There is simply nothing presently in place to prevent any future government from similarly avoiding the judgment of Ontario voters with respect to allegations of political interference.

70. Finally, and most importantly, the evidence at this Inquiry along with current events suggests that Aboriginal occupations and protests are likely to become part of Ontario’s and Canada’s political landscape for the foreseeable future, as the disputes that give rise to these events remain unresolved. The evidence at this Inquiry and current events also strongly suggest that Aboriginal protests and occupations will be accompanied by heated reactions from the non-Aboriginal communities, and corresponding demands for a decisive government response. It is in this context, and the broader context of the relationship between the police and Aboriginal people, where the risk of political interference with police is most acute<sup>28</sup>. It is essential, given the unique vulnerability of Aboriginal people to politically motivated policing, that political interference be both deterred, and properly addressed when it occurs.

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<sup>28</sup> The relationship between police and Aboriginal people has historically been fraught with examples of the police being employed as an instrument of politics; see J. Rudin, “Aboriginal Peoples and the Criminal Justice System”: [www.ipperwashinquiry.ca/policy-part/research/pdf/rudin.pdf](http://www.ipperwashinquiry.ca/policy-part/research/pdf/rudin.pdf) at p.35-39

**(b) Potential Models for PIP**

71. ALST acknowledges that, fortunately, credible allegations of political interference with police will be rare. Such allegations may only emerge once or twice in the life of a government. For this reason, there may be some reluctance to implement a formal process to address such allegations.

72. ALST submits that any such concern is addressed by the fact that there already exist well-functioning processes and structures that could be adapted to PIP<sup>29</sup>. The *Members' Integrity Act*, 1994, S.O. 1994, Ch.38, imposes legal/ethical obligations on members of the Ontario Legislative Assembly, as well as a complete code for investigating and reporting on misconduct by members. The *Act* creates the office of the Integrity Commissioner, who is an officer of the Assembly with security of tenure<sup>30</sup>. It provides for an avenue for members, on reasonable and probable grounds, have a formal written allegation of misconduct laid before the Assembly<sup>31</sup>, and referred (by resolution of the Assembly) to the Commissioner for an opinion. Upon such referral, the Commissioner enjoys “the powers of a commission under Parts I and II of the *Public Inquiries Act*, in which case those Parts apply to the inquiry as if it were an inquiry under that Act...”<sup>32</sup>

73. The *Act* also creates a process for the Commissioner’s opinion on the conduct of a member, including a recommendation as to penalty, to be reported to the Speaker, the

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<sup>29</sup> ALST unsuccessfully sought funding from the Commission to fully research potential models for implementing PIP.

<sup>30</sup> *Members' Integrity Act*, 1994, S.O. 1994, Ch.38, s.23

<sup>31</sup> *Ibid*, s.30(1)-(4)

<sup>32</sup> *Ibid*, s.31(2)(a)

party leaders, and the concerned members<sup>33</sup>, and then laid before the Assembly<sup>34</sup>. The *Act* imposes a duty on the Assembly to consider and respond to the Commissioner's report within 30 days after the day the report is laid before it<sup>35</sup>. Significantly, the *Act* specifically empowers the Commissioner to promptly screen out meritless or vexatious allegations at an early stage of the proceedings.

74. ALST respectfully submits that there is no reason that this process could not be adapted to accommodate allegations of political interference with police. This existing statutory regime deals with conduct that is directly analogous to political interference: legal/ethical misconduct by elected officials that necessarily involves a conflict of interest. The existing regime also creates the necessary independence, transparency, and investigative powers to satisfy the function of PIP. The screening function contained in the *Act* represents a complete answer to any concerns that PIP could be used as a vehicle for a partisan "smear campaign". The Annual Reports of the Integrity Commissioner<sup>36</sup> strongly suggest that the statutory regime functions properly without undue cost or delay.

75. Alternatively, the Provincial Auditor General under the *Auditor General Act*<sup>37</sup> could satisfy PIP's functions. The Provincial Auditor enjoys the necessary degree of prestige and independence, as well as the panoply of investigative powers, to credibly address allegations of political interference. Section 17 of the Act permits the Auditor General to perform "special assignments" at the request of (amongst other bodies), the Assembly, a Legislative Committee, or a Minister of the Crown. Such "special

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<sup>33</sup> *Ibid*, s.31(3)(a) and (b)

<sup>34</sup> *Ibid*, s.31(3)(c)

<sup>35</sup> *Ibid*, s.34(2)

<sup>36</sup> Available at [www.oico.on.ca](http://www.oico.on.ca)

<sup>37</sup> R.S.O. 1990, Ch. A.35

assignments” could reasonably encompass the investigation of allegations of political interference.

76. ALST submits that, regardless of whether PIP is implemented through an existing or dedicated statutory regime, the Solicitor General is imposed with special obligations in circumstances in which credible allegations of political interference emerge. The Solicitor General, in its role as a buffer against political interference with police, is required on occasion to assume the duties of a “law officer of the Crown”, and “to act independently of direction, control, or undue influence of other members of the government (including cabinet)”<sup>38</sup>. Accordingly, there would be a special duty on the Solicitor General to invoke PIP. At the conclusion of his article with respect to the APEC inquiry, Professor Stenning comes close to recommending something analogous to what is being proposed by ALST to address allegations of political interference:

“The Commissioner of the RCMP should disregard any instruction from the Solicitor General or any other government official that the Commissioner believes is an unlawful order. The Commissioner should publicly report any such unlawful order to the Solicitor General or, if the order comes from the Solicitor General, to the Prime Minister. The Solicitor General and the Prime Minister should similarly be required to report any such unlawful order to Parliament.”<sup>39</sup>

### **(c) The Benefits of PIP**

77. ALST submits that PIP would create a number of salutary benefits to the operation of our democratic institutions. First, a mandated and timely invocation of PIP would ensure that all relevant evidence (both documentary and testimonial) would be

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<sup>38</sup> P.C. Stenning, “Someone to Watch over Me: Government Supervision of the RCMP”, in W.W. Pue (ed.) *Pepper in Our Eyes: the APEC Affair* (UBC Press, Vancouver: 2000) at p.115

<sup>39</sup> *Ibid*, at p.115-116

preserved. The unfortunate questions that remain concerning the survival of Inspector Fox's files would never have arisen under PIP:

MR. JULIAN FALCONER: October 20 -- I'm  
 22 sorry, September 30th, 1998, Tab 9 of Hansard. And then  
 23 Tab 10 is October 20th, 1998, Tab 10 of Hansard.

24

25 CONTINUED BY MR. JULIAN FALCONER:

1 Q: Now this is the issue that's raised  
 2 by Mr. Phillips:

3 "My question is to the Solicitor  
 4 General. It has to do with key  
 5 Ipperwash files that are missing from  
 6 your office. As you know, a key  
 7 participant in the Ipperwash affair was  
 8 Mr. Ron Fox,  
 9 OPP officer on secondment to your  
 10 office. He was at the September 6th  
 11 Interministerial meeting where the  
 12 Premier's Executive Assistant said  
 13 she'd been talking to the Premier the  
 14 previous night.

15 'Out of the Park only,' were her  
 16 instructions to the group. Mr. Fox  
 17 then made a phone call to the police  
 18 command post at twelve (12) minutes  
 19 after 11:00 that morning.

20 The evening Dudley George was shot and  
 21 a police officer convicted of criminal  
 22 negligence causing death.

23 On April 19th, 1996, seven (7) months  
 24 later, Ron Fox was transferred. We now  
 25 know, based on sworn testimony from  
 1 your Deputy, that all of Mr. Fox's  
 2 electronic files were destroyed shortly  
 3 after he left. Knowing how crucial Mr.  
 4 Fox's files would be to an inquiry, how  
 5 could it possibly happen that his files  
 6 were destroyed shortly after he was  
 7 transferred?"

8 Mr. Runciman answers.

9 "I know that the Privacy Commissioner  
 10 reviewed this matter with respect to  
 11 how files are kept and found nothing  
 12 wrong with respect to the issue of  
 13 missing files. The Deputy has  
 14 explained that as best as we can and  
 15 asked for a review of the systems that  
 16 are utilized in terms of retention of  
 17 files.

18 Beyond that, Superintendent Fox, whom I  
 19 know quite well, has an outstanding  
 20 record of service in the policing  
 21 community of this Province, I would not

22 want anyone to suggest otherwise."  
 23 And then Mr. Phillips adds, second line,  
 24 quote:

25 "I have nothing but respect for Mr.  
 1 Fox." Close quotes.

2 Now can you assist me on this, sir? Is it  
 3 a satisfactory state of affairs that during your  
 4 Government and, in particular, in the time period in the  
 5 year that followed the shooting death of Dudley George,  
 6 that the man's files, the man who was in the small  
 7 boardroom with you, his electronic files would end up  
 8 destroyed.

9 Is that a satisfactory state of affairs?

10 **A: I -- I don't know what was destroyed**  
 11 **or what wasn't. It would not be satisfactory to me if**  
 12 **there was anything that would be relevant to any ongoing**  
 13 **investigation was destroyed.**

14 Q: The next day is October 20th, 1998.  
 15 The next day this is dealt with in Hansard and it's at  
 16 your Tab 10.

17 **A: Okay.**

18 Q: "MR. PHILLIPS: I will give you one  
 19 specific --"

20 And this is the second paragraph, sir. So  
 21 if you look at Gerry Phillips, top of the page.

22 "I will give you one specific which we  
 23 found out about only a few weeks ago.  
 24 The key person, who is the liaison  
 25 between your Interministerial group and  
 1 the police command post, left the  
 2 Ministry on April 19th, 1996.  
 3 As soon as he left his files were  
 4 erased and thirty (30) days later, the  
 5 backup files were erased. Key  
 6 documents required for inquiry into  
 7 Ipperwash are being systematically  
 8 erased.

9 PREMIER: Will you at least agree to  
 10 this, that you will send all your  
 11 Cabinet Ministers and your Ministries  
 12 that are affected by Ipperwash an  
 13 instruction that all Ipperwash files  
 14 that have not been destroyed be  
 15 retained for the conceivable future."

16 And you answer:

17 "Yes."

18 So it's fair to say that, at minimum, this  
 19 was a very unfortunate development that Mr. Fox's  
 20 electronic files were destroyed in their entirety,  
 21 agreed?

22 **A: I don't know. I don't know if**  
 23 **anything was destroyed that wasn't duplicated anywhere**  
 24 **else. I don't know whether there were hard copies. I --**  
 25 **I don't know that, I wasn't privy to any of that.**

1 And I -- and I, to this day, I don't know  
 2 if -- if something was destroyed that -- that was  
 3 relevant that -- that was done over Mr. Fox's objections

4 or that was done inappropriately; that would be -- that  
5 would be a concern. But I don't know that.

6 Q: Now, what I'm going to suggest to you  
7 though, sir, is that -- and I want to be fair to you in  
8 the Hansards there's a reference at one (1) point by Mr.  
9 Runciman that some of Mr. Fox's records were kept in a  
10 paper form, some of them.

11 So none of this stuff is ever black and  
12 white. But having said that, it is obviously a source of  
13 concern to you that files would be destroyed in this way,  
14 correct?

15 A: If it was a file and the only record  
16 and copy of a file and it was relevant and pertinent and  
17 information that we or others would want, it -- it  
18 shouldn't be destroyed but I -- I don't know what was  
19 destroyed, under whose orders and what was there.  
20 Whether there were other copies. I -- I -- I haven't  
21 been privy to any of that.

*Evidence of Michael Harris, February 20, 2006, p. 253 l.21 – p.258 l. 21*

78. Second, a continuously functioning PIP could very well forestall expensive and time-consuming Commissions of Inquiry that often result from the initial mishandling of allegations of political interference. Third, PIP would also have important benefits for the members accused of political interference. PIP would present a prompt and fulsome opportunity to “clear the air”, and emerge from the shadow cast by potentially unfounded allegations. Premier Harris appeared to lend a cautious endorsement to such a process during his cross-examination by ALST:

23 Q: Let me take another approach. And --  
24 and it's this, sir.

25 If instead of being required to make the  
1 personal call you would have to make about a public  
2 inquiry, if instead there was a protocol wherein which  
3 when serious allegations of political interference are  
4 made against the Government, some form of protocol kicks  
5 in.

6 So that, for example, the Attorney General  
7 or, frankly the Solicitor General, would have a method or  
8 mechanism to ensure a proper investigation of the facts,  
9 conservation of records and files and, ultimately, a  
10 process whereby which a third party, not connected to  
11 your Government, would make the decision on whether an  
12 inquiry was appropriate.

13 Don't you think that would put you in a  
14 better position in terms of the awkward role you found  
15 yourself in as reflected in the questions of you on June  
16 26th, 2001?

17 **A: That's possible. I hadn't really**  
18 **reflected on it.**

19 Q: Fair enough.

20 **A: But I will if you'd like me to.**

21 Q: And -- and I appreciate that. And --  
22 and the reason I ask that, sir, is because obviously this  
23 Commission has a dual mandate. Facts and systemic  
24 issues, you know that? Yes?

25 **A: Sorry.**

1 Q: This Commission has a dual mandate --

2 **A: Yes.**

3 Q: -- to look at facts and systemic  
4 issues. You know that?

5 **A: Yes.**

6 Q: And if the Commissioner were of the  
7 view at the end of the day and of course there are many  
8 parties that will make many different submissions.

9 If the Commissioner were of the view that  
10 governments would benefit from a protocol, express  
11 guidelines, this is what you do when serious allegations  
12 of political interference are made against -- personally  
13 against heads of state, this is what you do especially  
14 political interference with the police, I take it you'd  
15 have no objection to that?

16 **A: I'd have no objection to the**  
17 **Commissioner making recommendations?**

18 Q: That's right, of the protocol.

19 **A: Well, I certainly won't object to any**  
20 **-- the Commissioner making recommendations. I think I'll**  
21 **wait until I see them though to -- to give you my opinion**  
22 **as to whether --**

23 Q: All right, I'm trying -- let me --

24 **A: -- I might agree with them or not.**

25 Q: -- put some meat on the bones. Fair  
1 enough and that's what I'm asking. You see, you were the  
2 sitting Premier. It was you that was the target of the  
3 allegations, fair?

4 **A: Yes.**

5 Q: All right. So running by you is  
6 probably appropriate. So what I'm asking you is, let me  
7 give you an example.

8 The Solicitor General, we've heard  
9 evidence about his role in terms of civilian oversight of  
10 police. All right?

11 **A: Yes.**

12 Q: And the Solicitor General's role  
13 includes the notion of, in essence, being the top  
14 civilian oversight individual over the OPP, you  
15 understand that?

16 **A: Yes.**

17 Q: Now the Solicitor General has what is  
18 argued to be a buffer through the Deputy Attorney General  
19 between him and the police. You know that too?

20 **A: Yes.**  
 21 Q: But you also know, do you, that the  
 22 Solicitor General's role includes, at times, being a  
 23 buffer between other Cabinet members and the police. Did  
 24 you know that?  
 25 **A: Could be.**  
 1 Q: And would you agree with me if that  
 2 Crown officer on serious allegations of political  
 3 interference by the Government with the police, if the  
 4 Crown officer was able to make decisions or take steps  
 5 independent of being part of Cabinet, that might assist  
 6 to create a perception of distance from the allegations,  
 7 would you agree?  
 8 **A: It's hard to disagree with something**  
 9 **that might deal with perceptions.**  
 10 Q: Fair enough. And would you also  
 11 agree with me that in those circumstances the Solicitor  
 12 General who might enjoy that distance or the Attorney  
 13 General who might enjoy that distance, it might be open  
 14 to them to request an investigation by an independent  
 15 third party.  
 16 Would you agree?  
 17 **A: It might be.**  
 18 Q: Are you familiar with the functions  
 19 of the Auditor General of Ontario?  
 20 **A: Generally, yes.**  
 21 Q: And you know that for example, I mean  
 22 going Federally for a moment, we've looked at both pieces  
 23 of legislation. There's some similarities, mostly  
 24 similarities.  
 25 The Auditor General of Canada was actually  
 1 the one and would you forgive the colloquial but who blew  
 2 the whistle on the Gomery issue, on the -- on the  
 3 advertising scandal?  
 4 You know that?  
 5 **A: You -- you've told me and I know he**  
 6 **was involved, yes.**  
 7 Q: She.  
 8 **A: She, okay.**  
 9 Q: Ms. Fraser.  
 10 **A: The office was involved.**  
 11 Q: Right. And so it's an example. An  
 12 Auditor General reports independently to Parliament in --  
 13 in the country, that is federally, and an Auditor General  
 14 of Ontario is capable of reporting independently to the  
 15 House in the province.  
 16 Do you understand that?  
 17 **A: Yes.**  
 18 Q: And so the theory would be that if an  
 19 Auditor General who has powers to seize records, who has  
 20 powers to conduct investigations were brought into this  
 21 kind of situation, things such as the Fox records might  
 22 be preserved, yes?  
 23 **A: I -- I -- yes, but I would hope that**  
 24 **the Fox records were preserved, any that were relevant to**  
 25 **this. I don't have any evidence they weren't.**

*Evidence of Michael Harris, February 20, 2006, p. 264 l.23 – p.269 l. 25*

79. Finally, and most importantly, PIP would contribute immeasurably to the restoration of public confidence in democratic institutions in cases where that confidence has been most seriously eroded. PIP would be particularly significant for the restoration of confidence in the rule of law amongst Aboriginal people, especially in the context of occupations and protests over disputed land.

#### **4) FROM IPPERWASH TO CALEDONIA**

80. The mandate of Part 2 of the Inquiry is to make recommendations directed to the avoidance of violence in similar circumstances. ALST submits that the current land dispute in Caledonia is such a “similar circumstance”. A review of the similarities and differences between the circumstances surrounding Ipperwash Provincial Park in 1995 and at Caledonia in 2006 indicate that some progress has been made, however ALST submits that more work lies ahead.

##### **(a) Failure to Address the Land Disputes**

81. The following chart sets out some of the similarities between the history of the land disputes at Ipperwash and at Caledonia.

<b>SIMILARITIES</b>	<b>IPPERWASH</b>	<b>CALEDONIA</b>
First Nation people were original land owners	1763 British Royal Proclamation protected the land as “Indian land”	1784 British Crown grants Six Nations 385,000 hectares “Haldimand Grant”
Questionable Surrenders	1827 Huron Tract Treaty 1928 Beach Front at Stony Point, 1942 <i>War Measures Act</i> invoked	1841 surrender
Government Sells Land	1932 Federal Government sells land to Ontario Government-Ipperwash Provincial Park	1848 Federal Government sells land to private citizen, land eventually sold to Henco Industries Ltd. in 1992
Notice Given	1937 Park authorities were notified by Chief and Council that a sacred burial ground existed on the land	1995 Six Nations of the Grand River sue the federal and provincial governments over the land

Warnings Given	1972 Minister of Indian Affairs Jean Chretien, urged the government to act on the land claims before the First Nation people ran “out of patience”	October 2005 Chief David General warns Henco Industries against developing Douglas Creek Estates on Six Nation land.
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82. The main similarity between Ipperwash and Caledonia is the complete failure and lack of attempts, on behalf of the Federal and Provincial governments, to resolve the long-standing land claim issues in question.

83. The Commission has rightfully acknowledged in its Discussion Paper on Treaty and Aboriginal Rights that “It appears that the absence of timely, fair and effective procedures that can be reasonably counted upon to address disputes will likely lead to more occupations and protests in the future”. Given this reality ALST respectfully submits that the Commission’s report should recommend that the resolution of Aboriginal land disputes must be made a priority for all levels of government.

84. The Commission has identified several core principles to use as reference points for its analysis and recommendations in relation to resolving Treaty and Aboriginal Rights. ALST submits that the guiding principles identified by the Commission are appropriate, however, ALST also believes that in addition to “acknowledging and respecting treaty and Aboriginal rights” there should be an acknowledgment that Aboriginal rights are inherent rights. ALST refers the Commission to paragraphs 43-53 of ALST’s Final Submissions on Part 1 of the Inquiry for further discussion of this point.

85. The Commission has heard from several sources that the existing land claim process is flawed and simply does not work. Recommendations are needed to correct systemic problems within the current land claim system. Professor Michael Coyle has identified, and the Commission has tentatively adopted, six criteria to use in the designing of a system that would be more effective. ALST accepts, as appropriate, the six criteria as set out in Professor Coyle's paper. However, ALST is concerned that the criteria only identifies the protection of the general public interest, without also identifying the protection of Aboriginal rights. ALST submits that the perception of fairness will never be achieved in the Aboriginal community without this latter recognition. The identification of protecting the general public interest without concurrently identifying the protection of Aboriginal rights, may lead to the perception that the interests of the general public are paramount to Aboriginal rights.

86. ALST submits that the general public has a negative perception of Aboriginal people and Aboriginal rights. The Report of the Royal Commission on Aboriginal People (RCAP) noted that:

More recent events have brought about a hardening of attitudes towards Aboriginal issues in many parts of the country. This is especially true in rural areas, the northern parts of some provinces and urban areas that border some of the larger southern reserves. This growing hostility can be traced in large part to recent negative publicity over land claims, Aboriginal hunting and fishing rights, and issues of taxation ...<sup>40</sup>

87. Negative perceptions against Aboriginal people are fuelled by the lack of understanding and awareness of Aboriginal people, history and issues. ALST supports the recommendations being made at improving education in Ontario. RCAP

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<sup>40</sup> Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol. 2 (Ottawa: Ministry of Supply and Services, 1996) at p. 614.

recommended that public education on Aboriginal issues should be based on three principles:

- (a) Building public awareness and understanding should become an integral and continuing part of every endeavor and every initiative in which Aboriginal people, their organizations and governments are involved and in which non-Aboriginal governments and stakeholders have a part;
- (b) Public education should involve both the sharing of information and a process of interaction, leading in time to a shared sense of advocacy and of public support; and
- (c) Non-Aboriginal organizations and corporations should establish internal mechanisms to make themselves aware of the distinctive needs of Aboriginal people whom they serve or employ and to ensure that they respond to those needs.

“Report of the Royal Commission on Aboriginal Peoples: Renewal : A Twenty–Year Commitment, vol. 5 (Ottawa: Ministry of Supply and Services, 1996) at 94.

88. ALST urges the Commissioner to consider and adopt the above noted principles.

**(b) Reactions to First Nations Asserting Their Rights**

89. The following chart sets out the reactions and sentiments expressed once First Nations asserted their rights in relation to their land. The common theme is that, to many, the interests of others are paramount to the rights of the First Nations.

<b>SIMILARITIES</b>	<b>IPPERWASH</b>	<b>CALEDONIA</b>
Peaceful Protests Commence	1993 Stony Point people occupy Camp Ipperwash, and in September 1995 move into Ipperwash Provincial Park	February 2006 small group of Six Nation members move onto the lands in question
Remedies to Remove Protestors are Sought	Government of Ontario takes steps to seek an injunction <i>Notice of Trespass</i>	Henco Industries seeks and obtains an injunction ordering protestors off the site

	<i>Exhibit P-880</i>	
Messages Sent	<p>September 6, 1995: He wants them out in a day or two.</p> <p><i>Deb Hutton to Ron Fox (and others) – Jai IMC Notes P-536 (Inq. Doc. 1012579)</i></p> <p>Sept 6, 1995: Okay Premier is quite adamant that this is not an issue of native rights and then his words ah I mean we've tried to pacify and pander to these people for too long. Its now time for swift affirmative action.</p> <p><i>Ron Fox quoting Premier Harris to John Carson and Chris Coles, P-444(a) Tab 37 (Sept.6 at 2:00pm) p. 274.</i></p> <p>I want the fucking Indians out of the park.</p> <p><i>Evidence of C. Harnick, November 28, 2005, p.10, l. 3-4</i></p> <p>But I think it was - - was former Minister Wildman who'd say we - - we - - from the NDP Government, we don't negotiate across a barrier. And that's very consistent with - - with our philosophy as well.</p>	<p>March 3, 2006: Justice Marshall issues an order requiring the occupiers to clear the site by March 10, 2006.</p> <p>March 17, 2006: Justice Marshall finds protestors in criminal contempt.</p> <p>May 29, 2006: Justice Marshall summons parties, OPP, AG Ontario, AG Canada to court to explain why the order has not been complied with.</p> <p>August 8, 2006: Justice Marshall Issues an order that the matter of contempt is referred to the Attorney General for carriage, and that "In the Courts view, after much deliberation, there should be no further</p>

	<p>We - - we - - we're not going to - - there's no quid pro quo, we're not going to negotiate any issues that may come forward. If the occupation ends we're happy to sit down and discuss and negotiate all kinds of issues.</p> <p><i>Evidence of M. Harris, February 14, 2006, p. 120, l. 14-22.</i></p>	<p>negotiations till the blockades are lifted and the occupation is ended”.</p>
<p>Non-Aboriginal Community Responds</p>	<p>September 6, 1995: Staff Sergeant Wright meets with angry cottagers.</p> <p><i>Evidence of M. Wright, March 21, 2006, p. 229, l. 20 – p. 230 l. 3</i></p>	<p>April 4, 2006: Rally of 500 people gather in Caledonia to demand an end to the occupation.</p>
<p>Local Politicians Respond</p>	<p>August 14, 1995: Marcel Beaubien writes to Charles Harnick “we need to see a clear stand on what Provincial ownership of land means and the laws of the Province will be upheld. This needs to be made very clear without delay.”</p> <p><i>Letter from Marcel Beaubien to Charles Harnick, Exhibit P418</i></p>	<p>April 25, 2006: Haldimand County Mayor Marie Trainer makes comment to CBC Newsworld that residents of the town were being hurt economically by the protest and they don't have money coming in automatically every month. She later stated to the media that “they needed to know what the Caledonia people thought.”</p>

90. ALST states that the above noted chart illuminates the fact that non-Aboriginal perceptions towards Aboriginal people asserting rights remains the same. It is clear that non-Aboriginal people want matters to be resolved swiftly so as to not disrupt their lives

further. The resolutions demanded however, are not in relation to resolving the underlying land claim issues. They are about removing the First Nation people from the land that they claim. There is little appreciation or understanding of the rights claimed by the Aboriginal people. What has remained constant is the notion that the non-Aboriginal community's rights, as they interpret them to be, must be enforced over and above the inherent rights of Aboriginal people.

**(c) The Rule of Law**

91. The notion that the rule of law must be upheld is another sentiment that was expressed at Ipperwash and has been expressed by Justice Marshall in relation to the Caledonia matter.

<b>IPPERWASH</b>	<b>CALEDONIA</b>
<p>September 6, 1995: MPP Marcel Beaubien states to the Sarnia Observer that “we will uphold the law, no matter who is involved.”</p> <p><i>Sarnia Observer article, “Queen’s Park to take hard line against park occupiers: Beaubien”, Exhibit P962.</i></p> <p>Bosanquet Mayor Fred Thomas “The laws of Canada and Ontario must be enforced equally for all Canadians.” “This reign of terror must stop.”</p> <p><i>Sarnia Observer article, “Queen’s Park to take hard line against park occupiers: Beaubien”, Exhibit P962.</i></p>	<p>The fact that Douglas Creek property is still occupied by protestors and remains under blockade in spite of a court order and after many months, with no appeal taken to the order, is strong evidence for many that the rule of law is not functioning in Caledonia.”</p> <p><i>Henco Industries Ltd. V. Haudenosaunee Six Nations Confederacy Council, [2006] O.J. No. 3285, at para. 28 (T.D.) (Q.L.).</i></p>

92. Justice Marshall in his order dated August 8, 2006 states that the rule of law applies to everyone. Justice Marshall poses the following question:

But what of the native people? They too are entitled to equal access to the Rule of Law. What of the alleged injustice to them. This is our land they say. We have seized it and we will hold it-what does the law say and do for them.<sup>41</sup>

93. The clear answer is that the rule of law is a legal fiction for First Nation people and has been used as an instrument of oppression against Aboriginal people. Professor John Borrows examined the role of the rule of law in Canada and noted that:

Aboriginal peoples have by and large been illegally and illegitimately forced to diminish their claims to lands and government because of the arbitrary actions of non-Aboriginal governments. This is an issue of justice that directly implicates the rule of law.<sup>42</sup>

94. ALST submits that relying on the rule of law to force Aboriginal people off lands that they claim belong to them is a great hypocrisy. If one wishes to espouse the principles of the rule of law, one must be willing to apply the principles to all communities, and not just to one community at the cost of another.

**(d) Unjust Enrichment**

95. The law of unjust enrichment is well established within the Euro-western justice system and may be summarized as follows: An enrichment of the defendant with a

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<sup>41</sup> *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 3285, at para. 30 (T.D.) (Q.L.).

<sup>42</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002).

corresponding deprivation of the plaintiff for which there is no juristic reason to justify such benefit.<sup>43</sup>

96. The conferral of a benefit and the existence of a corresponding deprivation may also occur in circumstances whereby an ineffective transaction has taken place or *as the result of the defendant acting in breach of a duty owed to the plaintiff*.<sup>44</sup>

97. Applying the above test to the “questionable surrenders” of Stony Point and Six Nations lands is arguably a breach of the Crown’s fiduciary duty owed to First Nations which results in the unjust enrichment of both the Crown and non-Aboriginal Canadians.

98. The *sui generis* relationship between the Crown and First Nations is distinguished from that of the Crown’s relationship to Canadian citizens. The Crown-Aboriginal relationship requires the Crown to act with the utmost good faith or *uberrima fides*, in the best interests of the First Nations peoples. The Crown must not allow self-interest or third party interest to interfere with the obligations owed to First Nations peoples.<sup>45</sup>

99. Despite the rule against conflict of interest born out of the Crown-Aboriginal fiduciary relationship, unjust enrichment has occurred to benefit all but the First Nations.

Professor Borrows notes that:

Many people are being unjustly enriched through the failure of the rule of law for Aboriginal peoples, and will not easily give up their accouterments and power.<sup>46</sup>

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<sup>43</sup> *Garland v. Consumers’ Gas Co.* [2004] S.C.J. No. 21; 2004 SCC 25.

<sup>44</sup> P.S. Maddaugh and J.D. McCamus, *The Law of Restitution*, (Looseleaf Edit.), (Aurora, On: Canada Law Book, 2004), at pp. 3-16 to 3-18.

<sup>45</sup> See *R. v. Guerin*, [1985] 1 C.N.L.R. 120 and Borrows, John and Leonard Rotman, *Aboriginal Legal Issues*, 2nd ed.(Canada: Lexis Nexis Group, 2003).

<sup>46</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002).

100. Despite the complexity of challenges related to remedying the unjust enrichment, First Nations ought not to be denied justice any longer. As Professor Borrows states:

A house built upon a foundation of sand is unstable, no matter how beautiful it may look and how many people may rely upon it. It would be better to lift the house and place it on a firmer foundation, even if this would create some real challenges for people in the house. Ultimately this would benefit all within the house by prolonging the life of the structure and creating benefits for its inhabitants for generations beyond what would be possible if it collapsed because of its unsupported weight. Canada is built on a foundation of sand, as long as the rule of law is not consistently applied to Aboriginal peoples. This country must be placed on a firmer legal foundation by extending the full benefits of legal ordering to its original inhabitants.<sup>47</sup>

101. ALST submits that in order to ensure that violence does not recur in similar situations, the process to resolve outstanding Aboriginal land claims issues must be built on a “firm foundation.” Such a “foundation” would afford appropriate benefit and protection for Aboriginal peoples’, and individual and collective rights in relation to the land.

**(e) OPP Response**

<b>SIMILARITIES</b>	<b>IPPERWASH</b>	<b>CALEDONIA</b>
OPP Move In -claiming “escalation of activity” and risk to public safety	September 6, 1995 approximately 10:45 p.m.	April 20, 2006 4:30 am

<sup>47</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002).

102. As noted in ALST's Reply submissions the OPP presented a number of justifications for calling out the CMU at Ipperwash Provincial Park in 1995. These justifications, in ALST's submissions, represent pretext policing, and do not represent the real reasons for why the OPP marched on the protestors, in the dark of the night, on September 6, 1995. With respect to Caledonia, the public has yet to be informed as to the reasons for the OPP's decision to raid the reclamation site at 4:30 am on April 20, 2006. Without this information, a comparison is not possible in this area.

103. What can be compared is the aftermath of the raids. Both events resulted in an increased show of support for the occupations by other First Nation communities. The OPP's action to forcefully remove the Aboriginal people from their land, led to increased tensions locally, provincially and nationally between Aboriginal and non-Aboriginal people. The OPP decision to move in (rather than wait for a negotiated end to the occupation), turned a fragile situation into a volatile one.

104. ALST submits that fragile situations, such as that experienced at Ipperwash and more recently at Caledonia, call upon the OPP to be peacekeepers and not a police "force". OPP officers and the general public need to be educated on what "peacekeeping" is in these contexts. ALST respectfully submits that any recommendations directed to the OPP in relation to training, must include training on "peacekeeping". Such training should be in partnership with the Aboriginal community. ALST further submits that this training is needed far more than OPP training that has police officers going to sweats and learning about sacred medicines. ALST agrees that training on spirituality is important, however, it is not the answer to resolving Aboriginal "occupations".

**(f) Government Responses - The Main Difference**

105. No chart is needed to point out that the current government's response to Caledonia has been different to the former government's response at Ipperwash. The current government has indicated that its goal at Caledonia is to settle the dispute in a peaceful manner. To this end, representatives from Six Nations and the provincial and federal governments have signed an agreement to discuss the land dispute. The provincial government has purchased the disputed land from Henco Industries and is holding the land in trust pending the outcome of the negotiations. ALST submits that negotiations of this nature, to be successful, must necessarily commence with the understanding that they are taking place on a nation-to-nation basis.

**(g) Moving Forward**

106. After reflecting on the events leading up to and following the occupations of Ipperwash and Caledonia what becomes apparent is that little has changed in eleven years.

107. We see that no steps have been taken to correct the faulty land claims process. The societal and governmental indifference continues in relation to Aboriginal peoples and their rights. And rather than adopting a proactive approach to resolve the outstanding Aboriginal land claims issues the government only reacts when faced with a crisis.

108. ALST respectfully submits that the only way to avoid the circumstances in which occupations occur is to address the underlying issue – recognition of Aboriginal peoples’ inherent right to the land.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**September 8, 2006**

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**Julian N. Falconer**

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**Kimberly Murray**

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**Julian Roy**

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**Brian Eyolfson**

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**Sunil Mathai**

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**Mandy Eason**