

**Ipperwash Inquiry Consultation and  
Panel Discussion about Aboriginal Burial and other Sacred Sites**

**Thursday, December 8, 2005**

**Agenda**

**Opening:** Alex Jacobs

**Welcome and Overview of the Day:** Katherine Hensel, Assistant Commission Counsel and Chair of the session, and Sidney Linden, Ipperwash Inquiry Commissioner

**Presentation of Draft Research Paper about Aboriginal Burial and other Sacred Sites:** Professor Darlene Johnston

**Overview Panel and Discussion:**

- Ron Williamson – chief archaeologist and managing partner of Archaeological Services Inc.;
- Chief Franklin Paibomsai - Chiefs of Ontario representative, and Chief of Whitefish River First Nation;
- John Westgate – Ontario Home Builders’ Association;
- Neil Ferris - Heritage Planner with the Ontario Ministry of Culture; and
- Chris Ferguson – a Director with the Ontario Ministry of Government Services

**Specific Examples Panel and Discussion:**

- David Donnelly – Counsel for the Huron-Wendat;
- Paul Jones - Band Councillor, Chippewas of Nawash Unceded First Nation;
- Mark Frawley - Director of the Niagara Escarpment Commission;
- Frances Sanderson - Executive Director of Nishnawbe Homes; and
- Fred Flood - Chief Administrative Officer of the Town of Midland

**Summary:** Wally McKay

**Closing:** Alex Jacobs

**Presentation by Professor Darlene Johnston of her Draft Research Paper about  
Aboriginal Burial and other Sacred Sites**

As Professor Darlene Johnston discusses in her paper for the Inquiry, an understanding of history, origin stories, and the unique connection that Aboriginal peoples have to the land and the burial sites of their ancestors is key to understanding why Aboriginal people are willing to take to the barricades in order to protect these sites. Professor Johnston explains the very different worldviews of Aboriginal peoples and European settlers.

Initially, Aboriginal peoples shared their traditions with Europeans, but European settlers demonstrated little respect for Aboriginal worldviews and traditions of sacredness. The power and ability of Aboriginal peoples to protect their archaeological, burial and other sacred sites was greatly impacted by the loss of their land to European settlers and the subsequent loss of control over their lives.

First Nations peoples have a continuing responsibility to care for their deceased ancestors, but the vast majority of land where burial and sacred sites are located is non-reserve land, largely beyond the control of First Nations.

The disturbance of First Nations' burial grounds is not new. For example, in the 1700s the colonial government issued a proclamation prohibiting the disturbance of Aboriginal burial sites located on the shores of Lake Ontario. Today, about 87% of land in Ontario is owned by the provincial government. The Ontario Ministry of Natural Resources is responsible for much of this land and resources. Aboriginal peoples have a stake in these lands at a very human level, since Aboriginal peoples today have responsibilities to protect these sites, the spirits of their ancestors and sacred places.

Both spiritual sites and burial sites need protection. The current legislative regimes in Ontario fail to protect sacred and burial sites. Only one piece of Ontario legislation, the *Marriage Act*, mentions sacred places. The *Cemeteries Act* deals with burial grounds, but it fails to meet the expectations of Aboriginal peoples in protecting their ancestral burial grounds. There are two types of burial grounds mentioned in the current *Cemeteries Act*, "unapproved" Aboriginal cemeteries and "irregular" burial grounds. These are unfortunate terms, because they imply that these burial grounds are somehow improper. With "irregular" burial grounds, the landowner has a great deal of discretion to do what he or she wants with the site, protect it, study it, and/or move it. If the Registrar declares a site to be a "cemetery" then there is more protection accorded to it.

If an Aboriginal burial site is uncovered and the Registrar of Cemeteries is involved, the average time for completion of a report and the declaration is about 500 business days. It takes an average of about 250 business days for stakeholders to negotiate a site disposition agreement. There are only 14 declared Aboriginal cemeteries in Ontario. If an Aboriginal burial is uncovered, the property owner must preserve and protect it pending a decision by the Registrar of Cemeteries. The *Cemeteries Act* includes offence provisions if these sites are disturbed, but very few people have been charged and successfully prosecuted.

Parks Canada is doing some good work to protect Aboriginal burial and other sacred sites located in federal parks.

## Overview Panel and Discussion

Ron Williamson, an expert in Aboriginal archaeological sites and chief archaeologist and managing partner of Archaeological Services Inc., outlined four major concerns with the conservation of Aboriginal burial and other sacred sites in Ontario:

- 1) Opposition between sacred and not sacred: all peoples assign special meaning to the burial sites of their ancestors. Traditional knowledge is important in this area because there may not be readily available clues about the location of these sites.

It is difficult to define “sacredness” across cultures. The conflicting meanings and importance placed on sites can lead to conflict between Aboriginal and non-Aboriginal peoples.

- 2) There is a very large amount of archaeology undertaken in Ontario each year. In the last 5 years, there have been more than 5000 archaeological projects undertaken.
- 3) Existing provincial legislation that is supposed to protect burial and other sacred sites is a failure at protection. From about 1951-1991, about 8000 archaeological sites in Ontario were destroyed. Under the *Heritage Act*, only the Ministry of Culture can manage archaeological sites, and approve alterations to these sites. There is virtually no meaningful consultation with Aboriginal peoples about these sites. Of the hundreds of sites that are Aboriginal, almost none are protected. The Ministry of Culture has a duty to consult with Aboriginal peoples in a meaningful way about these sites, but the Ministry is not fulfilling this duty.
- 4) Millions of artifacts are stored inappropriately because the Ministry of Culture has failed to meet their legal and moral obligations in this regard. This Ministry lacks resources for this purpose so it is reluctant to curate and downloads this responsibility onto archaeological licensees. There is a need for consultation with Aboriginal peoples about the proper repositories for artifacts in Ontario. Four regional repositories may be appropriate.

The United States has legislation, *North American Graves Protection Repatriation Act* that could serve as a model for repatriation of Aboriginal artifacts in Ontario.

One positive development in the area of consultation with Aboriginal peoples about archeological and burial sites is the Founding First Nations Circle. The Founding First Nations Circle originated in the Ontario Realty Corporation’s development and consultation process for the Seaton lands in the Town of Pickering. For this development, the Ontario Realty Corporation consulted representatives from each of the First Nations whose ancestors occupied the Seaton region in the past, including the Huron/Wendat, Six Nations of the Grand River, and a number of Anishinabek First

Nations from the north shore of Lake Ontario. This consultation process resulted in the Founding First Nations Circle.

The Founding First Nations Circle helped secure a site disposition agreement with York Region concerning a Huron Wendat ossuary discovered in 2004 during the widening of Teston Road in the City of Vaughan. Through this agreement, the ossuary was preserved and the road redesigned to avoid any disturbance of the site. The Founding First Nations Circle is still in its infancy, but it may be a model for future consultations about Aboriginal archaeological and burial sites.

Chief Franklin Paibomsai, Chief of Whitefish River First Nation and Chiefs of Ontario representative spoke about Dreamer's Rock, a site that is as sacred to his people as Bethlehem is to Christians. Chief Paibomsai discussed the repatriation last year of the remains of 17 of his peoples' ancestors from the University of Michigan. These remains were removed in the 1930s by a professor. It was a challenge to convince the University that what this professor did was wrong and very hurtful to the community. The University wanted to conduct DNA scrapings and take photographs, which White Fish River First Nation opposed, but there are no rules governing such actions by universities.

Chief Paibomsai explained that his community might not heal from the violation caused by the removal of the remains of their ancestors. The burial ceremonies performed when these people were interred cannot be duplicated today. There is a sincere feeling of hurt and loss felt by the communities when part of one's culture is ripped out of the earth and studied.

Chief Paibomsai discussed problems with the *Cemeteries Act*, including:

- The obligation of Aboriginal peoples to protect their dead is an inherent right. The Act fails to respect this right. There is no funding available to First Nations to cover the time and expertise needed to ensure this right is respected by government and developers;
- Terms "unapproved" and "irregular" burials in the Act are offensive and should be changed;
- The Act distinguishes between "Full" and "Partial" burials but there is no direction in the Act as to what constitutes a "partial" burial;
- The Act does not mention "funerary" objects and their importance;
- The presumption that remains should not be disturbed or disturbed as little as possible should be in the Act;
- The Act should provide that the local municipality be involved in negotiations about land so zoning changes can be made or agreements for joint management of land facilitated;
- The connection between the *Cemeteries Act* and the *Heritage Act* is unclear. Human remains and graves are not archaeology; they are First Nations' cemeteries.

With regards to artifacts found in gravesites, archaeologists are not the “owners.” Museums in Ontario maintain that they have no money to conduct inventories of human remains they have in collections. Chief Paibomsai contrasted this with the National Museum in the United States that took only two months to put together its inventory of human remains. In the U.S., unlike Ontario, there is legislation (*North American Graves Protection Repatriation Act*), governing the return of artifacts from federal institutions to First Nations.

Chief Paibomsai emphasized that we are dealing with basic human decency here; we have to improve the laws and protect Aboriginal burials sites. No dead person should be dug up and moved over the objections of his or her descendents.

Neil Ferris, an archaeologist with the Ontario Ministry of Culture discussed the *Heritage Act* and the ways in which the regulation of archaeology overlaps with the protection of Aboriginal burial and other sacred sites. Mr. Ferris explained that the *Heritage Act* and the regulation of archaeologists and their activities have greatly improved over the past couple of decades. Today, archaeological studies are routine on many development projects in Ontario. Mr. Ferris reported that in 2004, over 1400 archaeological projects were undertaken in the province by licensed archaeologists, and over 800 archaeological sites were reported. Over 300 of these sites were subject to some form of excavation by archaeologists to document the human history of these places, largely to allow development to proceed. Mr. Ferris acknowledged the range of concerns brought to the Ministry’s attention about what archaeology is and should be. According to Mr. Ferris, the Ministry is coming, belatedly, to the view that archaeological sites are not just the responsibility of archaeologists and the development proponents, but all Ontarians have a direct interest in these sites and their history. To this end, the Ministry tries to solicit as many views as possible.

Mr. Ferris explained that burial places are subject to the Ontario *Cemeteries Act*. While archaeologists sometimes uncover burial sites during their work, they are explicitly not part of the *Cemeteries Act* process. Archaeologists are not allowed to research burial sites unless the descendents of those interred have consented to the research.

Mr. Ferris stated that there is a gap between sacredness and archaeology. There are many dimensions of sacredness, such as vision quests or sites containing traditional medicines that exist without physical items. Such sites would not be considered archaeological sites under the *Heritage Act*. Once any physical items are removed, any sacred dimension is beyond the *Heritage Act*. According to Mr. Ferris, there is a need to reconcile the sacred dimensions of places with the archaeological heritage.

The Ontario Home Builders’ Association represents thousands of companies in the residential construction business. John Westgate, whose company is a member of the Association, spoke at the Inquiry’s December 8 consultation. He explained that the Association’s members are looking for clarity, fairness and equity in the archaeological, burial and other sacred sites processes. Developers do not intend to desecrate these sites. They want to be part of the solution, not the problem. The provincial government must

take a lead role in designing a process that balances the desire to protect and preserve archaeological and cultural heritage with the rights of landowners to develop their property. Mr. Westgate stated that archaeological master plans to identify potential archaeological sites are very important tools for the development industry, as well as for the protection of these sensitive sites. He suggested that if archaeological or burial sites are discovered on privately owned land and there is a desire to preserve the sites, then the private landowner should be compensated for the loss of the land.

Chris Ferguson is a Director with the Ontario Ministry of Government Services, Marketplace Standards and Service. His department is responsible for the *Cemeteries Act*. The Registrar of Cemeteries reports to Mr. Ferguson. Mr. Ferguson said that the other areas his department is responsible for do not come close to the deep spiritual and historical significance of Aboriginal burial sites.

Mr. Ferguson explained that there has been some progress in enforcing the *Cemeteries Act*. For example, charges were laid in connection with the Dorchester Aboriginal burial site. However, it is not easy to catch those who desecrate burial sites.

Mr. Ferguson said he appreciated the need to make the *Cemeteries Act* process faster, but this has to be balanced with the need for a full and complete consultation about a site with all the necessary parties.

According to Mr. Ferguson, referrals to arbitration under the *Cemeteries Act* are not “successes.” Arbitration should be a last resort. It is always preferable that interested parties reach an agreement about a site.

Mr. Ferguson had not heard before that the term “unapproved” was offensive to First Nations people. He said he would take this concern back to his department for consideration.

Mr. Ferguson outlined the public consultation process concerning the proposed amendments to the *Cemeteries Act* and regulations.

### **Comments from the Floor**

- First Nations do not support a provincial, pan-Aboriginal approach to burial and other sacred sites. The treaties were signed with the Crown. The relationship is with the federal government. The federal government “owns” less than 1% of the land in Ontario, but since we are all treaty people and First Nations have a relationship with the federal Crown because of the treaties, then the federal government has a continuing obligation to protect Aboriginal burials and other sacred sites. There is an obligation on the federal government to help preserve these sites and to help First Nations people gain access to these sites. The absence of the federal government in this area could be a breach of treaty obligations.
- In the municipal context, it may be possible to look to other parts of the *Heritage Act*, such as parts 4 and 5, to identify and protect sacred sites as cultural heritage.

- The *Environmental Assessment Act* does not include much about consultation and there is no mention of keeping Aboriginal sacred sites confidential.
- For non-physical sites, municipal heritage feature master plans could help to map traditional and sacred sites with the input of local First Nations and other communities. Municipalities play an important role here and can be inventive in protecting these places.
- It costs money to ensure all the right First Nations are at the table and involved in determining what to do with Aboriginal burial sites. The Ministry of Culture and the Cemeteries Branch have the will to protect these sites but not the resources or the staff.
- Under the current system, there must be physical evidence of the existence of a burial site. There is no capacity to accommodate other methods, such as seers, oral history and traditional knowledge. This is a problem for Aboriginal burial sites and practices because it forces the disturbance of burial sites, which is often traumatic for the community and contrary to the spiritual beliefs and practices of the people involved.
- The *Cemeteries Act* embodies a Christian understanding of burials, which is problematic when applied to Aboriginal burial sites.
- When a Huron Wendat burial site was accidentally uncovered in Midland, there was a debate about whether to analyze the remains through carbon dating. The First Nations peoples involved did not want this to happen, and the Town of Midland agreed. There was a wealth of First Nations oral history about the site that the Town relied on to make decisions, rather than a scientific analysis of the remains.
- While oral histories should be strong evidence, in some cases First Nations people want scientific testing done on remains because the results could be compelling evidence in land claims cases. This was the case with the Moatfield ossuary.

### **Specific Examples Panel and Discussion:**

David Donnelly, a lawyer representing the Huron-Wendat people, discussed *R. v. Ontario Realty Corporation Ont. Ct Justice*, May 2004 (the Milroy prosecution). This was a prosecution of the Ontario Realty Corporation (ORC) pursuant to the *Environmental Assessment Act* (EAA). In 2002, the ORC sold a 170-acre parcel of land to the Catholic Church. The land includes the remnants of a 500-year-old Aboriginal village. The Church planned to use the land to build a cemetery. There was no consultation with Aboriginal peoples during the environmental assessment process, contrary to the EEA, and the court convicted the ORC and fined it \$7,500. There is now an eight-acre easement that protects the village site.

Mr. Donnelly explained that the Milroy site is not an isolated incident. There are many other Aboriginal heritage and burial sites in Ontario that could give rise to controversy. He explained that the laws protecting these sites in Ontario are inadequate and there is no enforcement of what protection does exist. There needs to be stronger laws and adequate enforcement, including a “swat team” similar to what exists for water protection.

Paul Jones is a band councilor and a member of the Chippewas of Nawash Unceded First Nation. He discussed Nochemowenaing (Hunter's Point), a sacred place to his people. He explained the need for negotiation between the government, the landowner and the First Nation to purchase the site and protect it from additional development. In the past, the First Nation could not protect the land for various reasons but it is now committed to protecting the site one way or another. There are tree, scaffold and land burials on the site. The ancestors of the Chippewas of Nawash are there. It is a deeply spiritual place that is know by many First Nations people as a place of healing. There is more to land than money. The spirituality of the land is key for First Nations people.

Mark Frawley, Director of the Niagara Escarpment Commission (NEC), explained the origins of the NEC, the Niagara Escarpment Plan and the area the Plan protects, and how development is controlled in this area. Nochemowenaing, or Hunter's Point, is located in the Niagara Escarpment. The owner of the Hunter's Point land applied to the NEC for a development permit. The Chippewas of Nawash participated in the NEC hearing about the development permit application and presented their own report about the archaeological resources and burial sites at Hunter's Point. This report differed significantly from that of the government's. The NEC deferred its decision and wrote to the federal and provincial governments and requested that they resume negotiations with the landowner and the First Nation regarding Hunter's Point. Both governments refused and referred the matter back to the NEC to make a decision. The NEC reconvened the hearing and heard from the landowner, the municipality and three people representing the Chippewas of Nawash Unceded First Nation, including an Elder, who described traveling to Hunter's point in his youth, where ceremonies were performed and objects were buried. The NEC denied the development permit application. This decision is under appeal.

Francis Sanderson, the Executive Director of Nishnawbe Homes, discussed the Tabor Hill site in Scarborough, which is an Aboriginal peoples cemetery containing the remains of over 500 Iroquoian people and how through education, the site was protected and respected. Many people in the local community had no knowledge of Tabor Hill and the extensive Aboriginal burial sites it contains. Through education and media attention, the local community was involved in developing the site protection plan. There was a large, well-attended ceremony to recognize and celebrate the site. As part of this, Scarborough City Council organized a First Nations Day celebration and after five years running, over 5000 people came to listen and learn about Aboriginal history and culture.

Ms. Sanderson explained her involvement with the development of the best practice document setting out the step-by-step procedures to be used by authorities when Aboriginal remains are uncovered. The committee that wrote the best practice document included the police, various provincial government ministries, the Coroner, Aboriginal organizations and others. While the best practice document is a work in progress, it has helped to clarify the process and who should be consulted when Aboriginal remains are uncovered.

As explained by Fred Flood, Chief Administrative Officer of the Town of Midland,

in 2003 the town accidentally uncovered an ossuary during work to enlarge the recreation centre. Upon discovery of the human remains, the town ceased work immediately and contacted the coroner, the police, the Registrar of Cemeteries, and the closest First Nation. The town followed the direction of an Elder who provided guidance and training to those involved. The town hired security guards to protect the site and archaeologists to assess the site. The town paid to have the remains removed and stored until the site could be stabilized. The Registrar of Cemeteries declared the site an Aboriginal peoples cemetery. Throughout this process, the town worked closely with a number of First Nations, including the Huron Wendat whose ancestors are buried at the site. Finally, in the fall of 2003, the town supported the First Nations in the reburial ceremony. In consultation with the First Nations, the town has landscaped the area and erected a commemorative stone that reads “A Huron Wendat Ossuary – Communal resting place of several hundred Wendat children and adults who died as a result of social upheaval and epidemics new to the land (Circa 1600s).”

### **Comments from the Floor**

- Archaeological assessments prior to development are a better way to preserve and protect archaeological and burial sites, rather than commencing development and trying to deal with sites if and when they are uncovered.
- When owners and land developers are not supportive of preserving Aboriginal heritage or burial sites, there needs to be a law to deal with this situation rather than allowing a land owner to remove artifacts or burials to make way for development.
- Another concern is the narrow interpretation of Aboriginal burial sites in the *Cemeteries Act* and that physical proof is required for burial sites. The Registrar of Cemeteries wants to see the bones before classifying a site as an Aboriginal cemetery or burial ground.
- The possibility of compensating private landowners for property containing Aboriginal heritage or burial sites is offensive to some. The province has not offered any compensation for owners whose lands are affected by the Greenbelt legislation. These sites are protected because of community standards and values. Why should it be different for Aboriginal heritage or burials sites?
- The state of all of Ontario’s old cemeteries is a concern. There needs to be a jury of cemeteries, not just a registrar to decide what happens to some of these cemeteries. There needs to be strong legislation to protect all burial grounds in Ontario and a fund to ensure these sites are maintained and preserved. Under the *Heritage Act*, municipalities have the power to designate cemeteries as heritage sites. Municipalities should be urged to take this action across Ontario. First Nations should be able to designate their burial sites both on and off reserves.