IPPERWASH INQUIRY
CONSULTATION ON DRAFT PAPER: "THE ROLE OF THE NATURAL RESOURCES REGULATORY REGIME IN ABORIGINAL RIGHTS DISPUTES IN ONTARIO" by Jean Teillet

Tuesday, March 15, 2005
10:00 a.m. – 4:00 p.m.
Delta Chelsea Hotel
Carlyle Room
33 Gerrard Street West
Toronto

NOTES

The following notes reflect some of the discussion at the consultation. The opinions expressed at the consultation and reflected in these notes are those of the participants and not necessarily those of the Ipperwash Inquiry or the Inquiry Commissioner. The Commissioner will review the comments when he writes the Inquiry report and makes recommendations to help avoid violence in similar circumstances in the future. However, in making his findings of fact, the Commissioner will not consider the comments by participants to be evidence.

1. **Opening prayer:** Cathryn Mandoka

2. **Participants:** see Appendix A, attached

3. **Purpose of the Consultation:** see agenda in Appendix B, attached

4. **Introduction:** Peter Russell welcomed the participants and introduced Commissioner Sidney Linden.

   Commissioner Linden thanked the participants for attending, Jean Teillet for her work on the paper, and Peter Russell for chairing the session.

   Nye Thomas explained the focus of the research and policy part of the Inquiry and its aim of developing policy recommendations on preventing violence in similar circumstances to the Ipperwash incident.

5. **Overview of the Draft Paper:** Jean Teillet

   Jean thanked the Mississaugas of New Credit for sharing their land with us for this consultation.

   a) Haida Nation and Taku River Tlingit First Nation Cases

Jean was co-counsel on the *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 and assisted with the *Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 cases. These two cases represent a fundamental shift in the law that will dramatically affect the relationship between Aboriginal peoples and the natural resources regulatory regimes.

The *Haida* and *Taku River* Supreme Court of Canada decisions apply particularly in the area of natural resources development. The cases outline the constitutional obligation on the federal and provincial Crowns to consult with First Nations peoples about possible resource developments and if necessary, accommodate the concerns of First Nations peoples.

Government have taken the position that there is no duty to consult unless the Aboriginal or treaty rights have been proven in a court. These two decisions make it clear that the consultation process is an on-going duty and it applies to asserted rights, not just rights that have been proven in a court.

The *Haida* case involved the long-term logging of old growth cedar. Cedar is sacred to the Haida people, who regard it as a mother spirit. The province of British Columbia issued logging licenses over the years and when the licences were transferred to another logging company, the Haida people protested. British Colombia maintained that it had the authority to make a decision about the logging licenses and that it had no obligation to talk to or consult with the Haida. The Haida filed a land claim and sought a judicial review of the province's decision to transfer the licenses. The chambers judge found that the government had a moral, but no legal duty to negotiate with the Haida. The Court of Appeal overturned the decision and declared that both the government and the logging company have a duty to consult and accommodate the Haida. The government and the logging company appealed. The Supreme Court of Canada dismissed the government's appeal and upheld the logging company's appeal.

The Taku River Tlingit people describe the Taku River as their heart and blood. About 80-90 per cent of the Tlingit people live off the land and natural resources. In the *Taku River* case, a mining company sought permission to reopen an old mine. The company wanted to build a road alongside the Taku River that would cross the River about 17 times. The Taku people did not object to the reopening of the mine, but they wanted more extensive planning prior to the road construction, given that the road would likely encourage other types of development. There was an environmental assessment conducted and the First Nations peoples were consulted, but the government did not believe it had to act on the report results. The report was very critical of the road construction and concluded that the Tlingit economy would be dead within five years of its construction. Despite this, the Province approved the company's proposal. The Taku River Tlingit First Nation brought a petition to quash the decision. The chambers judge ordered a reconsideration because the Province had failed to meaningfully consider the Tlingit concerns. The Court of Appeal upheld the decision and found that the Province had failed to consult with and accommodate the

Tlingits. The Supreme Court of Canada reversed the Court of Appeal and found that the Province had fulfilled its duty to consult with the Tlingits and that there was no duty to reach agreement.

Governments and developers are trying to come to terms with the implications of these two cases. A very large number of projects, such as tar sands, oil and gas pipelines, fish farms, garbage dumps, mining, roads, hydro projects, etc. are at risk if there is no consultation and accommodation of Aboriginal rights. The government of British Columbia has estimated that this could impact on about 40,000 projects per year in that province alone.

Most First Nations in Canada are small and do not have the capacity to handle the potentially huge numbers of requests from governments for consultation about projects. As well, many governments do not have the capacity to handle and coordinate the volume of potential consultations.

The duty to consult with Aboriginal peoples and accommodate Aboriginal rights sits on the government as a whole, but there is currently no central body in governments to ensure that these consultations and accommodation processes work and are coordinated amongst the various government departments and within government departments. For example, the fisheries branch of the Ontario Ministry of Natural Resources does not necessarily talk to the forestry branch and there is currently no capacity in the Ontario Native Affairs Secretariat to take on any of this coordination.

In the past, such as with the Saugeen fisheries disputes or the Temagami dispute, if Aboriginal people protest or object to government action, governments will negotiate, but they tend to do so on a sector by sector basis e.g. forestry issues, then fisheries issues, then mining, etc., rather than on a holistic basis with all relevant governments and government ministries involved.

In *Musqueam Indian Band* v. *British Columbia (Minister of Sustainable Resources Management) 2005 BCCA 128* and *Homalco Indian Band* v. *British Columbia (Minister of Agriculture, Food and Fisheries) 2005 BCSC 283*, the courts interpreted the *Haida* principles as a prerequisite to hearing the cases i.e. the government must consult the First Nations, try to negotiate an agreement and accommodate if necessary. The courts refused to allow the cases to go forward until the parties had attempted negotiations and resolution.

Haida and *Taku River* could have been set in northern Ontario, such as with the Temagami situation. All of the protests, disputes, blockades, cases, etc. around Aboriginal land rights are based on the same problem: First Nations peoples are dispossessed of the use and occupation of their land and resources by governments, developments, parks, settlements, etc. Aboriginal peoples are losing their way of life and it is a death by a thousand cuts. That being said, First Nations Peoples are still here and they retain their traditions and relationship to the land. There has been a resurgence of pride amongst First Nations peoples in the last 30 or 40 years and

education levels are improving. With the favourable court decisions, there is a growing expectation that Aboriginal rights will be respected. There will be more First Nations disputes, resistance and possible violence if governments do not move in a more timely way to resolve outstanding land disputes with First Nations peoples. The hope is that with the *Haida* and *Taku River* cases, governments will come to the table and work with First Nations peoples to resolve outstanding Aboriginal treaty and land rights disputes.

With *R. v. Powley* [2003] 2 S.C.R., there are existing Métis rights in many parts of Ontario, overlaid where there are treaties with First Nations Peoples. Potentially, there are Métis rights all across Ontario and particularly north of the French River.

b) Applicability, Varied Applicability or Total Non-Applicability of the Natural Resources Regulatory Regime to Aboriginal Peoples

The first question a government needs to ask itself is whether the natural resources regulatory regime applies to Aboriginal peoples in the same way as it is applied to everyone else. Will application of the law or regulations affect Aboriginal land rights? If yes, then how should the law apply fully, in a varied way or not at all to Aboriginal peoples and their interests? For example, a law changing the electoral boundaries would apply fully to Aboriginal peoples because it would not impact on First Nations rights, but a government would still have to give notice to the Aboriginal peoples in question of such a change. With any harvesting laws and regulations affecting Aboriginal peoples, governments would have to undertake full consultation and accommodation of the affected Aboriginal peoples.

c) Proposals for a New Institution with Responsibility for Haida and Taku River Types of Situations

Any proposed development in First Nations territory requires all the parties, i.e. provincial, federal and First Nations governments, at the table to consult, negotiate and accommodate First Nations interests, where appropriate.

British Columbia is discussing the idea of a new institution with responsibility for the *Haida* and *Taku River* principles. A new board or institution would be a central place where all the parties can set up processes for consultation and accommodation. It would be independent of governments and the courts and the people who make the decisions would have years of experience in the area. One possible model is a labour relations board. Labour relations boards make final decisions, they are independent of government and have representatives of both labour and management on them and generally have the respect of both labour and management.

For example, with the De Beers diamond mine development, there are four First Nations involved. If there were an institution such as this one in existence, then all parties could be formally involved. This institution would conduct all of the necessary research, and make a decision on a fully informed basis for a recommendation to the

responsible Minister. It is preferable that this institution have the authority to make binding decisions but if not and a Minister did not follow the recommendation, this could potentially be judicially reviewed. Any new institution must be properly resourced for experts to conduct environmental assessments, etc.

6. Discussion:

a) Indian Claims Commissions

The current land claims process takes a very long time. However, this sometimes encourages growth in First Nations communities. People are trained as negotiators and the community decides what it wants out of the negotiations. The youth in the community develop a faith in the system and processes and a confidence that there will be employment for them in their community. Through this lengthy process, the community and its members gain expertise and build capacity so they are prepared to take over a multi-million dollar operation once the land claim is settled.http://www.indianclaims.ca/english/about/history.html#top

Some of the problems with the land claims process include:

- South of 60°, both the federal and provincial governments are involved in the claim negotiations, whereas north of this, the federal government has jurisdiction so negotiations are bilateral only and are often less complicated and time consuming;
- The mandates of the claims commissions are narrow;
- The commissions are not independent – the federal government is the funder and appoints the members. In Bill C-6, the proposed new claims process, the federal government still has the authority to appoint the members;
- The federal government is both the "defendant" and the "jury" in a claim;
- The commissions make recommendations only. The federal government has the ultimate decision-making authority. With Bill C-6, the federal government retains the final decision-making authority.

b) The Potential Impact of the Haida and Taku River Cases

How would a First Nation have access to an alternative process for land claims? There would need to be some triggering event. The Indian Claims Commission process is not available at first instance and First Nations cannot access it until after negotiations have stalled.

To commence the process, there would also have to be some government plan to undertake an activity that might impact on First Nations rights. There is some onus on the First Nation to show some foundation for a claim. For example, a letter to the government with some evidence to support the claim should be enough to trigger the *Haida* and *Taku River* negotiation requirements.

First Nations peoples will not accept the existing land claims regime or any new approach to land and resources management unless there is a fundamental restructuring that includes a First Nations approach to land and the plants and animals that live off the land. Until this happens, First Nations Peoples will not participate in any resource co-management systems set up by governments. However, it is difficult to change the attitudes of government officials when governments have all the jurisdiction and power and claim to own all of the natural resources in the province. Any new tribunal of decision-making body would have to be designed so that both First Nations Peoples and governments have respect for the members and the process.

The Report of the Royal Commission on Aboriginal Peoples included recommendations for an independent tribunal called the "Aboriginal Lands and Treaties Tribunal"(see Recommendations 2.4.29 to 2.4.41)

Has *Haida* and *Taku River* increased the duty of governments to consult with First Nations Peoples? Does the MNR or the federal Department of Fisheries and Oceans (DFO) have to engage in a new round of negotiations concerning development that affects First Nations rights? The duty to consult is an on-going duty. In *Haida*, the area in question had been logged for a long time. The loggers went on strike because the cut had tripled. Both the loggers and the logging company went to the Haida people for help and support and the company decided to reduce the cut by 50% as a result. The provincial government threatened to revoke the company's license because of this agreement with the Haida

Governments spent about a quarter of a billion dollars on managing the Oka dispute in 1990 and the issues that sparked the dispute remain largely unresolved today. There is a need for a completely different approach that is properly resourced and based on Aboriginal indigenous knowledge, sovereignty and the Two-Row Wampum.

One possibility is two systems of regulation and information, each on a parallel course, with their own way of doing things. These two approaches could be incorporated into a co- management system, but the First Nations system would need to be adequately resourced.

Any new approach must take into consideration the distinct peoples included in the term "Aboriginal," namely First Nations peoples, the Métis and Inuit. First Nations peoples will not accept a pan-Aboriginal approach to these issues.

It will take awhile for First Nations organizations to absorb, analyze and reach consensus on an approach to the principles outlined in *Haida* and *Taku River*. There is a need for a systemic and coordinated response to these cases, but it is a question of the capacity of Aboriginal organizations and individual First Nations. Meanwhile, individual First Nations continue to grapple with developments in their territory and third party interests.

c) Ontario Government Policy and Approach to First Nations Rights

A province can have good laws and policies concerning First Nations issues, but there is still often a disconnect between the laws and policies and the enforcement agencies and officers and what they do on a day-to-day basis with regards to Aboriginal rights.

Often during negotiations between a First Nation and provincial government officials concerning land and fishing rights, it is clear that the government officials have no clear sense of what First Nation is trying to do and what their concerns are. The government officials tend to spend a day or two in consultations with the First Nation, then return to Toronto for discussions with other government officials and when they return for further talks, the First Nation has to start all over again with the education process.

Another thing that tends to undermine talks between First Nations and the Ontario government on resource issues is the actions of the enforcement arm of the Ministry of Natural Resources (MNR). For example, Operation Rainbow was a sting operation by MNR that targeted Native hunters. MNR investigators did not determine if Aboriginal rights were involved, they just charged the First Nations Peoples they apprehended.

The MNR criminalizes First Nations peoples by targeting them and this undermines any resource management negotiations with the provincial government that may be taking place.

With the “Lands for Life” policy discussions, the provincial government and environmental groups worked together to develop the Forest Accord, but with little consultation with First Nations peoples in the affected area. Nishnawbe Aski Nation was involved in the Lands for Life process, but withdrew because they said the government was not taking their position seriously.

Will the *Haida* and *Taku River* decisions improve the relationship between First Nations and governments and ensure First Nations have a real say in resource development issues that affect them? Currently there is nothing in the Ontario government policy and approach to resources and land development issues that takes into consideration the principles laid down in these cases. For example, the Ministry of the Environment is looking at source water protection without involving First Nations as extensively as these cases would imply. There needs to be a fundamental change in both the policy approach and the attitudinal approach in government before these cases will have any effect on relations between First Nations and governments.

Police services are often frustrated when they are called upon to police an Aboriginal occupation because the police are there to enforce the law and hopefully resolve a dispute in a conciliatory way. However, the police have no authority to deal with the root causes of many of these occupations. This is the governments’ responsibility. The police want to see a respectful process that recognizes Aboriginal rights so that the police and Aboriginal peoples are not repeatedly put into conflict situations.

The provincial governments are saying they have no responsibility because First Nations Peoples are a federal responsibility and the federal government is saying it delegated much of this responsibility to the provinces but there is no money to accompany this delegation. First Nations end up fighting with both levels of governments.

There is a history in Ontario of close relations between the MNR and sports hunting and fishing groups, such as the Ontario Federation of Anglers and Hunters. The Harris government embraced this relationship. However, the principles underlying this relationship run deep in non-Aboriginal society. Non-Aboriginal society emphasizes universal access to resources, no special rights for any particular group, and the importance of conservation. It is very difficult to explain Aboriginal rights and different treatment of Aboriginal peoples in light of these engrained principles. And it is very difficult for Aboriginal peoples to work through mainstream politicians and the political system to assert their rights because of the backlash from non-Aboriginal communities. Many Aboriginal peoples use the court process because it is often the only place where there is a chance of success.

"Conservation" is someone's idea of ethics and values, but it does not include First Nations values and beliefs. First Nations values and beliefs must be included in any regulatory regime. A mutual definition of "conservation" may help avoid disputes over Aboriginal rights in the future. – see Stephen S. Crawford and Bruce Morito *"Comment: Toward a definition of conservation principles for fisheries management"* Can. J. Fish. Aquat. Sci. 54: 2720-2723 (1997)

People who work in government enforcing laws and regulations that impact Aboriginal peoples have to be aware of the First Nations' worldview. Awareness and sensitivity may improve relations between Aboriginal and non-Aboriginal peoples.

In 1979, interim enforcement guidelines were drafted for all MNR directors and resources were to be available to train Aboriginal MNR officers. Training was planned for conservation officers concerning Aboriginal rights. None of the guidelines were ever enforced. MNR staff on the ground saw them as something they had to continue to oppose.

d) Cross-Cultural Training for Police and MNR Enforcement Officers

Some Aboriginal organizations deliver cross-cultural training programs for police and MNR officers. The impetus for such training is usually something negative such as a confrontation or dispute. Such training cannot be within the sole discretion of the civil service and police bureaucracies. On the other hand, such training cannot be forced on people. We need to recognize that changing attitudes and perceptions takes a long time and cross-cultural training must be viewed as long-term and on going.

Cross-cultural training for government officials and MNR personnel is discouraging because it is often a one-time event, whereas these officials and personnel change quite frequently. Such training must be on going. However, even if training is on going, it often has no effect if it is not backed up by laws and mandatory policy and protocols that MNR enforcement officers much follow. The scope of discretion of these enforcement officers must be narrowed considerably.

There are some studies that demonstrate that after cross-cultural training, conservation officers have more negative attitudes about First Nations peoples then before the training.

Some Aboriginal organizations have suggested that First Nations peoples and the local conservation officers should try to talk to one another and get to know each other on a personal level. A cooperative, collaborative approach and learning about each other helps to change misinformed and attitudes.

e) Other Provincial Governments' Approach to Aboriginal Rights

In B.C., the NDP government enacted the *Environment Act* that includes a requirement to involve First Nations Peoples in the area in any development proposals. Funding was available to First Nations to hire their own scientists and other specialists. Without access to such funding, any consultation process with First Nations is a sham. This Act was repealed by the new government. Now, there is no funding available to First Nations and any consultation and involvement of First Nations in proposed development projects is at the discretion of the Minister. In *Haida* and *Taku River*, the Supreme Court of Canada essentially mandated what was legislated in the B.C. *Environment Act.*

In early 2005, the British Columbia government contacted First Nations organizations to begin discussions about the *Haida* and *Taku River* cases and how to incorporate the principles into a new policy approach.

In Alberta and Saskatchewan, there is recognition of the permanence of First Nations peoples and their importance to these provinces. The different relationships are primarily based on the treaty relationship. There are framework agreements that define how much outstanding land the First Nations are entitled to. In Alberta, there are the Natural Resources Transfer Agreements that are negotiated on a one on one basis. Lands are selected and the federal, provincial and First Nations governments work together to obtain possession of the land in question, even if there are third party occupants. In these processes, First Nations peoples are at the table and fully engaged. The Ontario approach is almost draconian in comparison. The marked difference in how the Western provinces treat First Nations peoples and their rights is a potential flashpoint for First Nations peoples in Ontario.

One of the differences between the western provinces and Ontario is the *St. Catherines Milling & Lumber Co*. v. *The Queen* (1888), 14 App. Cas. 46 (J.C.P.C.) (you can refer to this web site for a summary of this case http://www.canadalegal.com/gosite.asp?s=1003).

Unlike Ontario, in Alberta, the Natural Resources Harvesting Agreement allows "Indians" to hunt and fish on unoccupied Crown lands. The Agreement does not formerly apply to Métis, but Alberta allows Métis to harvest for food on these lands as well.

7. Written Submission about the Draft Paper

Kevin Simon presented a submission on behalf of himself and Marcia Simon entitled "A Reaction to the Paper: The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario."

Appendix A – List of Participants

Peter Russell – Chair of the consultation and member, Ipperwash Inquiry Research Advisory Committee

Jean Teillet – author of the paper

Parties with Standing

Aazhoodena and George Family Group: Kevin Simon, Cathryn Mandoka

Aboriginal Legal Services of Toronto: Brian Eyolfson

Chiefs of Ontario: Kathleen Lickers

Chippewas of Nawash: Paul Jones, David McLaren

Kettle and Stony Point: Jonathan George

Mennonite Central Committee Ontario – Don Procter

Ontario Provincial Police: Andrea Tuck - Jackson, Brad Blair

Residents of Aazhoodena: Martin Kewageshig, Glenn Morris George, Stewart Bradley George

Union of Ontario Indians: Allan Dokis

Invited Experts

Darlene Johnston – member of the Ipperwash Inquiry Research Advisory Committee

David T. McNab – professor of history at York University and author of a number of books and articles, including "Blockades & Resistance: Studies in Actions of Peace and the Temagami Blockades of 1988-1989" and "Circles of Time: Aboriginal Land Rights and Resistance in Ontario."

Ipperwash Inquiry

Sidney Linden – Commissioner
Debbie Strauss - Manager of Operations
Noelle Spotton - Policy Counsel
Erin Stoik – Junior Legal Analyst
Jeffrey Stutz – Senior Policy Advisor

Nye Thomas – Director, Policy and Research

Appendix B – Agenda

9:15 a.m. – Light breakfast

10:00 to 10:15 – Opening prayer and Introductions

10:15 to 10:30– Welcome, overview and purpose of the consultation by Chair, Peter Russell (member of the Ipperwash Inquiry Research Advisory Committee)

10:30 to 10:45 – Welcome and brief presentation by Ipperwash Inquiry Commissioner, Sidney Linden; brief overview of the Part Two process by Nye Thomas, Director of Policy and Research for the Inquiry

10:45 to 11:00 – Overview of the paper by Jean Teillet

11:00 to 11:15 – Presentation by the Province of Ontario (Tentative)

11:15 to 11:30 – Break

11:30 to 12:30– Discussion

We hope to learn from the participants' respective experiences and perspectives. Specific issues we would like to discuss include:

- What is current provincial policy?
    - Role of Ontario Ministry of Natural Resources (MNR) and Ontario Native Affairs Secretariat (ONAS)
    - Provincial response to recent Supreme Court decisions (*Taku River* and *Haida Nation*)
- Relationship between policy-setting and enforcement agencies
- How to avoid violence?
    - Role for Aboriginal people in regulatory regimes
    - Who should be at negotiating table?
    - What principles should inform the process?
    - Successful practices, processes, or examples?
    - Where do we go from here?

12:30 p.m. to 1:30– Lunch break

1:30 to 2:30- Continuation of discussion

2:30 to 2:45– Break

2:45 to 3:30– Continuation of discussion

3:30 – Summary and closing prayer