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IPPERWASH DISCUSSION PAPER
ABORIGINAL – POLICE RELATIONS AND POLICING OCCUPATIONS

June 2006

IPPERWASH INQUIRY



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TO: Ipperwash Inquiry
Parties with Part Two Standing

FROM: Nye Thomas
Director, Policy and Research
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DATE: June 2006

RE: Discussion Paper on Policing Occupations and Police/Aboriginal Relations

1. INTRODUCTION

This is the second of three short discussion papers on major policy areas being considered in Part Two of the Ipperwash Inquiry. This paper considers the policing of Aboriginal occupations and protests and the relationship between Aboriginal peoples and the police. The Inquiry is also preparing discussion papers on government/police relations and Treaty and Aboriginal rights.

This discussion paper has two parts. The first part of the paper examines how police respond to Aboriginal protests and occupations. The second part focuses on the relationship between police and Aboriginal peoples, with particular attention to First Nations policing, building better relationships, and overcoming racism. The two parts are clearly connected.

The purpose of this paper is to provide parties with notice of the issues that Part Two is considering on this subject. The paper also sets out a series of questions that are likely to arise in our deliberations. **Parties are encouraged to consider some or all of these questions and the issues raised in the discussion papers in their written and oral submissions.** A list of questions is attached as Appendix A.

Neither the Commissioner, commission staff, nor the Inquiry's Research Advisory Committee have reached any conclusions on these issues. The Inquiry's policy staff and

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Research Advisory Committee have, however, provisionally identified a series of issues and questions that are likely to inform our analysis. The Commissioner will not be considering final recommendations on this or any other Part Two topic until the evidence is completed and all submissions have been received.

This discussion paper does not include references to the factual evidence or testimony heard at the Part One hearings. This paper will, however, discuss several policy topics or issues that have been discussed at the hearings. This is because many of the legal, policy and practical issues discussed at the hearings have been discussed in previous Inquiries, reports, and articles on this subject.

This discussion paper does not address every relevant issue on this subject. Moreover, the issues and questions discussed here are neither exhaustive nor fixed. They are, rather a summary of major issues and questions that we have identified so far. We encourage parties to discuss or recommend other issues or questions we have not identified.

The focus of this paper is on provincial policy and processes.

PART A POLICING ABORIGINAL PROTESTS AND OCCUPATIONS

2. WHY ARE THESE ISSUES IMPORTANT TO THE INQUIRY?

Police objectives, strategy, and techniques are obviously linked to the Inquiry's mandate to make recommendations to avoid violence in similar circumstances.

Recent events at Big Trout Lake and Caledonia confirm that Ontario continues to face Ipperwash-like protests and occupations. These incidents clearly demonstrate the relevance of the topics discussed in this paper.

The Inquiry's research and consultations suggest that Caledonia and Big Trout Lake are not aberrations. We have consistently heard that the "flashpoints" for Aboriginal protests and occupations remain. As a result, the Inquiry is assuming that assertions of rights by Aboriginal people, including forms of direct action such as public protest, occupations and blockades, will continue.

Most people have heard of high-profile Aboriginal occupations and protests, including Oka, Burnt Church, Gustafsen Lake, and Caledonia. Our research papers point out, however, how prevalent non-violent Aboriginal protests and solidarity protests have become.¹

¹ See Prof. John Burrows' background paper for the Inquiry, *Crown and Aboriginal Occupations of Land: A History & Comparison* and Prof. Don Clairmont/Inspector Jim Potts' background paper, *For The Nonce*:

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When considering these issues, the Inquiry has taken account of developments since 1995. It is clear to us that there have been considerable changes in the policing of Aboriginal occupations and protests and the relationship between Aboriginal peoples and the police in the last eleven years. This paper discusses some, but not all, of these developments. The discussion paper asks questions designed to assist us to evaluate these developments and propose constructive recommendations for the future. The Inquiry invites parties to consider Big Trout Lake, Caledonia and other recent incidents to suggest ways in which we can learn from them.

3. UNIQUENESS OF ABORIGINAL PROTESTS AND OCCUPATIONS

Aboriginal protests and occupations undoubtedly mirror many of the characteristics and dynamics of non-Aboriginal public order events. We have consistently heard, however, that the law and context of Aboriginal protests is so fundamentally different than non-Aboriginal protests and occupations that they require dedicated and unique police resources, strategies, and responses.

The *subject and legal context* of Aboriginal protest are different from labour or political disputes. The Inquiry's research papers point to the roots of Aboriginal protests, particularly those over land and resources, in treaty and Aboriginal rights. Asserting rights is a fundamental and defining characteristic of Aboriginal protests. Professor Borrows' paper traces the origins of occupations and blockades in Aboriginal cultures before contact with Europeans. The "flashpoints" he found for protests often were denial of Aboriginal rights by Canadian governments or courts.

There is a difficult *history* of relations between police and Aboriginal people, as the second part of this paper discusses. That history and experience may make it hard to establish trust when police and Aboriginal people meet in situations where Aboriginal people are asserting rights through direct action.

The *location* of Aboriginal protests and occupations tends to be different. Aboriginal protests typically occur in areas remote from Ontario's urban centres. That may or may not be the pattern in the future. Caledonia is an obvious exception. Frequently, protests and occupations take place off-reserve on "traditional lands" held by the Crown or non-Aboriginals. They may also occur on municipal land. Unlike other kinds of public order events, Northern Ontario is an area of significant – and perhaps growing – Aboriginal occupations and protests.²

The *participants* in Aboriginal occupations and protests tend to be different: First Nation's and Aboriginal peoples obviously have unique rights. Both the provincial and federal governments may be involved, as may municipalities, the media, non-Aboriginal

Policing and Aboriginal Occupations and Protests posted at
http://www.ipperwashinquiry.ca/policy_part/policing/crp.html

² See generally Clairmont/Potts at 45.

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third parties, and/or several police forces or other enforcement agencies. Occupations and protests may involve communities that are divided internally, even when the focus of protest is external. Or the protesting group may have a contingent of outside members or members who reject the police role in principle.

The potential *duration* of Aboriginal occupations and protests also distinguishes them from most public order events. Many Aboriginal protests span over days, if not weeks.

Finally, *the role of governments* in Aboriginal occupations and protests may be different than in most public order events. Aboriginal protests and occupations may actually require intervention by the federal and provincial governments. This is because Aboriginal protests and occupations very often raise public policy and legal issues beyond the scope and authority of police forces and public order policing. This issue is discussed in our first discussion paper on police/government relations.

Potts and Clairmont report that the unique character of Aboriginal occupations and protests has been recognized by police forces across Canada.³ For example, the OPP's "Framework for Police Preparedness for Aboriginal Critical Incidents" defines these incidents as:

[An] incident where the source of conflict may stem from assertions associated with Aboriginal or treaty rights, e.g., colour of right, a demonstration in support of a land claim, a blockade of a transportation route, an occupation of local government buildings, municipal premises, provincial/ federal premises or First Nation buildings.⁴

4. LIMITS AND POTENTIAL OF POLICING OCCUPATIONS AND PROTESTS

Clairmont and Potts found a widespread view among Canadian police that Aboriginal incident involve more issues and different principles than regular public order events. In most situations, the police cannot deal with the substance of Aboriginal grievances that lead to protests. The police role, rather, is to facilitate conflict negotiation in order to temporarily restore order, not to yield a solution to the underlying dispute.

This practical limitation on the police role can be frustrating for the police. There are obvious limits to what police can negotiate. On the one hand, the police are obviously not responsible for land claims, resource development policy, or the other substantive issues that may be the catalyst for an occupation or protest. On the other hand, the success of the police operation often depends on others, including the provincial and/or federal governments and/or the First Nations or Aboriginal community taking steps to

³ See generally Clairmont/Potts at 25-57.

⁴ The OPP's *Framework for Police Preparedness for Aboriginal Critical Incidents* is posted as Appendix E at http://www.ipperwashinquiry.ca/policy_part/meetings/OPP_forum.html

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address the issue in dispute. Inaction by these parties may complicate the policing of occupations and protests.

The police role in Aboriginal occupations and protests may be complicated by the conventional view of government/police relations that draws a bright line between policy and police operations. Aboriginal protests, occupations, and blockades are, of course, a crucial category of public order events that may inevitably raise public policy questions, particularly where a colour of right, treaty right, or other Aboriginal right is alleged.

As noted in our first discussion paper on government/police relations, the unique character of Aboriginal occupations and protests may justify a different approach to the way that the government interacts with the police. Professor Gordon Christie discusses some of these issues in his background paper for the Inquiry.⁵

5. POLICE OBJECTIVES

The Inquiry will likely begin its analysis of policing Aboriginal occupations and protests by identifying several core principles or objectives to use as reference points for its analysis and potential recommendations in this area.

Our first discussion paper identified several potential principles to guide our analysis and recommendations on police/government relations. Generally speaking, those principles emphasized the importance of accountability for police and government decision-making; professional, non-partisan policing; and respecting treaty and Aboriginal rights. Those principles may be equally appropriate here.

We have also provisionally identified several specific objectives to guide our analysis of the policing of occupations and protests. In our view, we tentatively propose that the police should strive to:

- Protect and restore public order;
- Minimize the risk of violence at occupations and protests;
- Facilitate the exercise of constitutionally protected rights; and,
- To facilitate the building of trusting relationships that will assist Aboriginal and non-Aboriginal policy-makers in order to constructively resolve the dispute at issue.

Question 1: Are these principles appropriate to guide the Inquiry's analysis and recommendations on policing occupations and protests? Or, should there be others and what should they be?

⁵ See Prof. Christie's background paper for the Inquiry, *Police-Government Relations In the Context of State-Aboriginal Relations*, posted at www.ipperwashinquiry.ca/policy_part/relations/crp.html.

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6. POLICE RESPONSE TO OCCUPATIONS AND PROTESTS

The Inquiry has undertaken extensive research and consultations on the evolving policing response to Aboriginal occupations and protests. It is clear to us that there have been considerable changes in police strategy, policies, organization and tactics since 1995. The sections below discuss some of the major developments and issues in this area and asks questions to assist the Inquiry evaluate these developments and propose constructive recommendations.

At the outset, it is important to note that developments in policing Aboriginal occupations and protests appear to be consistent with contemporaneous developments in the policing of public order events generally.⁶

a. Best Practices To Reduce The Risk of Violence

Don Clairmont and Jim Potts' research for the Inquiry represents an original and significant contribution to the analysis and understanding of how to reduce the risk of violence in Ipperwash-like situations. Over the course of their research, they interviewed more than 100 police, protesters, non-Aboriginal and First Nation government representatives, and others to identify best practices and strategies to reduce violence.

Clairmont and Potts recommend that the potential for violence is reduced if police (and others, for that matter) strive to build a web of mutual support or interdependence between police/protesters and promote trusting relationships that encourage and facilitate peaceful negotiations. At the same time, police should strive to effectively "institutionalize" conflict in order to reduce the risk of violence and contribute to a legacy of relationships of trust and mutual support between police and protesters.⁷

The Inquiry has heard overwhelming support for this approach. This was confirmed in our research papers, consultations, submissions from parties, and, indeed from most – if not all – witnesses commenting on this subject in Part One.

Clairmont and Potts' recommendations to meet these objectives tend to fall into two related but distinct categories: 1) policing strategy or "style" and, 2) institutional policies and capacities.

Policing Strategy and Style During An Occupation or Protest

Clairmont and Potts' interviewees consistently recommended the importance of police adopting a dedicated strategy and "style" to reduce the risk of violence. They describe this strategy/style in different ways but on the whole they emphasize that police must:

⁶ See generally Willem de Lint's background paper for the Inquiry, *Public Order Policing in Canada: An Analysis of Operations at Recent High Stakes Events*, posted at http://www.ipperwashinquiry.ca/policy_part/policing/crp.html

⁷ Clairmont/Potts at 31.

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- Understand and respect the history, traditions, culture, and claims of Aboriginal protesters;
- Listen, communicate and negotiate honestly;
- Be patient and emphasize communications at every turn;
- Remain neutral as to the substance of the dispute;
- Build trusting relationships with protesters, First Nations communities and others involved in an occupation and protest;
- Commit to minimizing the use of force and to escalate only to prevent personal harm or serious property damage; and,
- Maintain public order.

Institutional Policies, Resources and Capacity Building

Clairmont and Potts also identify a number of institutional policies, resources and capacities that contribute to improving the web of mutual support/interdependencies, “institutionalize” occupations and protests, and thereby reduce the potential for violence. These policies, resources, and capacities include:

- Internal policies addressing police responses to occupations and protests;
- Protocols between police and other police services, First Nation governments or organizations; and/or other agencies involved in occupations and protests;
- Effective internal police training and supports for Aboriginal conflict resolution and peacekeeping; and,
- Support for alternative dispute resolution within First Nations communities.

The Clairmont/Potts “best practices” are an important starting point for the Inquiry. The Inquiry is also considering the role of governments and the need for accountability as potential “best practices” to reduce the risk of violence. These are discussed below.

b. Ontario Provincial Police

The OPP’s “Framework for Police Preparedness for Aboriginal Critical Incidents” sets out a broad policy framework for policing a wide range of Aboriginal critical incidents. The Framework appears to be one element of a comprehensive strategy to improve the OPP’s policing of Aboriginal occupations and protests. Other notable components include the Commissioner’s Select Liaison Committee, Aboriginal Relations Teams (ART), improved training, and improved intelligence and public order procedures.

The Framework stresses that incident commanders must learn the background to the dispute; establish communications with all parties; show respect for all parties; and build trusting relationships with members of the community, First Nations police officers and other agencies. The Framework further states that negotiations will be used at every opportunity; that demonstrators and other members of the public will be treated with

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dignity and respect; that the OPP, whenever possible, will respect core cultural values; and that the OPP will respond to conflict with minimal use of force.

The Framework is clearly an important development in the policing of Aboriginal occupations and protests. It appears consistent with the “best practices” discussed above. It also represents an important policy statement of the organization’s public commitment to minimize the use of force and promote peaceful conflict resolution.

The OPP reports that its approach to occupations and protests and the Framework may evolve in light of the OPP’s experience at Caledonia. It should be noted, however, that the Framework is relatively new and is intended to address a wide-range of Aboriginal critical incidents, not just large (and largely unprecedented) incidents like Caledonia.

The Inquiry will likely need to consider questions about the Framework’s implementation, effectiveness, sustainability, and accountability. For example, how will the OPP evaluate the Framework’s effectiveness? How will the OPP ensure this approach is embedded across the organization? No less importantly, an incident like Caledonia raises questions about whether this approach can be sustained in the face of opposition from at least some non-Aboriginal third parties and potentially inconsistent court decisions. The success of this approach in these circumstances may depend on government support.

Question 2: Is the OPP’s Framework an appropriate approach to policing Aboriginal protests and occupations? What other policies, or resources, are needed to support this approach?

Question 3: How can the OPP evaluate and support the Framework within the OPP?

Question 4: How can or should the provincial government support the Framework?

c. RCMP – First Nations Protocols

Clairmont and Potts conclude that protocols can be valuable when policing occupations and protests. Among other things, protocols help to create an atmosphere of communication, understanding, trust and collaboration that help “institutionalizing contention” through communication and formal procedures.

The RCMP has signed several protocols with First Nations.

In 2004 the RCMP and Assembly of First Nations (AFN) signed the *Public Safety Cooperation Protocol Between the Assembly of First Nations and Royal Canadian Mounted Police*. The protocol states that in the event of a serious occupation or protest or threat thereof, the AFN and RCMP agree to strike a special group drawn from lists

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advanced by both parties that will meet with local officials and explore peaceful resolutions. The protocol also contemplates awareness training and other related collaborative programs.⁸

The RCMP in British Columbia has also entered into a protocol with the federal Department of Fisheries and Oceans (DFO), and the BC Aboriginal Fisheries Commission, representing the interests of Native fishers. The protocol can be activated by any of the signing parties and sets in train a process for discussion and resolution of disputes.⁹

To our knowledge, the OPP has not signed equivalent protocols in Ontario.

Question 5: Should the OPP (or other Ontario police forces) develop public safety protocols with First Nations on a provincial or local basis similar to the RCMP protocols?

d. First Nations Police Services and Intra-First Nations Protests

The second part of this paper considers the general issue of whether First Nations police forces can improve the relationship between Aboriginal peoples and the police. This section considers the potential for First Nations police services to reduce the risk of violence in Ipperwash-like situations.

Clairmont and Potts discuss the potential and limitations of First Nations police services in policing protests and occupations. They note "...the capacity of the First Nations police services to effectively deal or even partner with the OPP in responding to the challenge of occupations and protests is very limited." For example, First Nations police may not receive specialized training to deal occupations and protests.

Clairmont and Potts further state that there may be problems when serious occupations and protests occur off reserve. The OPP has greater capacity to "police" these incidents but may not have ready access to or awareness of key local people. Clairmont and Potts argue that collaboration between police services could be advanced through more protocols. (The OPP has existing protocols with some First Nations services.) They also note that virtually everyone interviewed supported the development of an integrated conflict negotiation/peacekeeping team to solidify the informal relations that have developed between the OPP and First Nations services.¹⁰

Finally, Clairmont and Potts note that many, if not most, Aboriginal occupations and protests occur within First Nations communities themselves. As a result, they recommend that resources be allocated to increase the capacity for alternative dispute

⁸ The AFN protocol is at http://www.rcmp-grc.gc.ca/ccaps/psc-protocol_e.htm.

⁹ Clairmont/Potts at 82.

¹⁰ Clairmont/Potts at 37.

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resolution with First Nation communities to both prevent occupations and protests and reduce their potential for violence if and when they occur.¹¹

Question 6: Should the OPP and First Nations police services develop protocols to promote cooperation and clarity when policing occupations and protests?

Question 7: Should the OPP and First Nations police services develop an integrated conflict negotiation/peacekeeping team?

Question 8: How can the capacity of First Nations police services and governments to peacefully resolve intra-band disputes be increased?

e. Municipal Police Services

Municipal police services may also be called upon to respond to Aboriginal rights incidents. For example, there are many towns and small cities (Kenora and Thunder Bay, for example) with significant Aboriginal populations. These services may not be familiar with Aboriginal issues or may not have dedicated policies to address Aboriginal occupations and protests. Clairmont and Potts recommend greater planning, integration and support between the OPP and other police services in the province.¹³

Question 9: How can the OPP best support municipal or other police services to police Aboriginal occupations and protests effectively?

f. Other Government Agencies

Aboriginal occupations and protests often involve many government agencies, including, but not limited to, the Ministries of Natural Resources, Transportation, Attorney General and others. Municipalities may also be involved.

Clairmont and Potts report that many police officers identified a need to communicate what they describe as the “less-partisan nature of the police role” to these agencies. They also report that police officers contended that agency officials sometimes pressure them to take action rather than wait out the occupation or protest.¹⁴ The Inquiry has further heard that police services sometimes play an important moderating and liaison role with other agencies. They note that the RCMP now has an inspector-level liaison with the federal Department of Fisheries and Oceans and First Nations in BC’s lower mainland.

¹¹ *Ibid* at 85.

¹³ *Ibid* at 37.

¹⁴ *Ibid* at 64.

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This officer is a conduit between the parties, provides support and advice for DFO enforcement activities, and consults with First Nations in BC.¹⁵

Question 10: Should the OPP and related agencies develop protocols to promote cooperation and clarity when policing occupations and protests?

g. Restoring Relationships

The period after an incident also may give participants and police time and opportunity to restore relationships. The OPP's Framework, for example, directs the OPP to hold a session where police and parties in conflict can establish a plan that addresses the damage done during the dispute or crisis. The OPP also undertakes to maintain a continued OPP presence that can respond to community questions or concerns relating to the role of local OPP members or emergency management services performed during the incident.

It may also be equally important to restore relationships and trust with the affected non-Aboriginal community as well. Community meetings may be appropriate for the non-Aboriginal community as well.

Question 11: How can police restore and/or establish good relations with First Nations/Aboriginal communities and the non-Aboriginal communities restore after an occupation or protest?

h. Debriefing

Prompt, objective and thorough review of incidents is a valuable tool for police to examine their experience systematically and learn from it. Clairmont and Potts report that:

Much effective police practice regarding peacemaking in [occupations and protests] can undoubtedly be formally transmitted through training but much is also an art that is learned through debriefing and sharing experiences with others similarly engaged. In the fieldwork we uncovered excellent individual practitioners but saw little evidence of any systematic organizational building upon their efforts.¹⁶

Question 12: How should police services review and analyze the policing of occupations and protests? Should First Nations or Aboriginal people participate in this activity? If so, how?

¹⁵ *Ibid* at 81.

¹⁶ *Ibid* at 63.

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7. CONSTITUTIONAL RIGHTS AND THE USE OF INJUNCTIONS

Professor Pue's research paper for the Inquiry, "Trespass and Expressive Rights," discusses the law and policy of trespass, expressive rights and injunctions.¹⁷ Prof. Pue warns against simple generalizations on these issues, particularly when protests are on public land and/or when Aboriginal rights are asserted. Professor Pue concludes that the management rights of public authorities are constrained by constitutional law. He notes that time, place and use restrictions on public property:

must be sensitive to the countervailing public policy which seeks to protect core freedoms. Though few complications arise with respect to ordinary users of public property, constitutional considerations come into play as the use at issue moves from "ordinary" to expressive or from the realm of individual rights to aboriginal entitlement. Though each is relevant to the important balancing tasks that arise, none of ancillary police powers, the law of trespass, or the law of injunctions provides an easy "end-run" around the need for state authorities to respect both common law liberties and constitutionally protected rights.¹⁸

The Inquiry has heard somewhat contradictory views on the propriety and strategy of using injunctions at Aboriginal occupations and protests. Some argue that injunctions are appropriate because they confirm the police's legal authority to take more assertive steps against protesters. Others argue that injunctions reduce police operational flexibility and should, therefore, be sought and enforced with great caution.

Question 13: How can and should police services and governments balance constitutional rights with public order in Aboriginal occupations and protests? When are injunctions for occupations and protests appropriate?

8. THE ROLE OF GOVERNMENT

As noted above, the role of governments in Aboriginal occupations and protests is addressed, in part, in our first discussion paper on police/government relations.

Irrespective of our analysis of the distinction between policy and operations, it appears that governments have significant powers to shape the environment surrounding the police response to an occupations and protests. For example, if an occupation occurs on Crown land, governments determine whether and how to seek an injunction. Decisions on this issue may affect the police response or increase/decrease the risk of violence in the totality of the circumstances.

¹⁷ Professor Wesley Pue's research paper for the Inquiry, *Trespass and Expressive Rights*, is posted at http://www.ipperwashinquiry.ca/policy_part/policing/crp.html

¹⁸ *Ibid* at 68-69.

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More generally, the sustainability of a particular approach to an Aboriginal occupation and protest may at times also depend on the government's willingness to at least commit to negotiations on the substantive issues in dispute. Governments may, however, be concerned about "queue-jumping" and the precedents that may be established for future or current negotiations across the province.

Finally, we have already noted the potential importance of what is sometimes called "alignment" of government and police objectives in occupations and protests.

In these circumstances, it may be helpful for the provincial government to develop its own policies or protocols for government ministries or agencies that are consistent with the OPP's Framework or best practices to reduce the risk of violence. Public policies and protocols of this sort are, of course, important accountability mechanisms.

Question 14: How can governments support the peaceful resolution of occupations and protests during an event? Should governments adopt a policy on the use of injunctions?

9. ACCOUNTABILITY

The Inquiry's discussion paper on police/government relations stresses the general importance of accountability and transparency of police and government decision-making. We emphasised there that police should probably be as accountable for the policing of Aboriginal occupations and protests as for other kinds of police work. We argued that accountability and transparency undeniably limit or restrict the power of the police to act unilaterally. Yet they also give police more legitimacy when coercive force is justified.

In this paper, we ask questions about more specific accountability mechanisms.

Accountability *within* a police service ("internal accountability") depends on procedures for keeping detailed records of incident. It may require systematic review of what was done soon after an incident and the analysis and dissemination of findings. The OPP's Framework requires the OPP to consider who needs to be involved in an operational review, when to conduct the review and where. Internal accountability could include compliance with organizational policies and procedures, compliance with the law, and meeting applicable professional standards.

Accountability to the public ("external accountability") depends on reporting to government and the public. As noted in our first discussion paper, police are subject to several external accountability mechanisms.

The Inquiry may want to consider whether new policies, processes or structures are needed to improve the OPP's internal or external accountability for Aboriginal

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occupations and protests. As noted above, public policies and protocols are important internal and external accountability mechanisms. The Inquiry must, however, again be cognizant of the many different accountability mechanisms that already exist. The section below discusses a few potential accountability mechanisms.

a. Police Complaints

Mr. Justice Patrick LeSage recently recommended a new police complaints system for Ontario.¹⁹ In his report, Justice LeSage stated that the oversight of First Nations police forces and policing is complex and includes factors such as First Nations autonomy and the particular constitution of the police service in question.

In April, 2006, the Ontario government introduced Bill 103 2006, “An Act to establish an Independent Police Review Director and create a new public complaints process by amending the Police Services Act.”²⁰ The Bill is based on the LeSage recommendations. The Bill does not specifically mention Aboriginal peoples.

The *RCMP Act* requires the Commissioner to respond publicly to the reports of the Commission for Complaints against the RCMP.

b. Special Investigations

In Manitoba, the RCMP adopted a provincial protocol with three First Nations organizations addressing situations where a First Nations person has died while under or during arrest or while in custody of the RCMP, not necessarily in a situation of asserting Aboriginal rights.²¹ The purpose of “Norway House” protocol is “to establish trusting and reciprocal relationships amongst the Parties to see potential conflict averted, to prevent personal harm and to enhance public safety.”

c. Public Reports

Public reports are a common tool to improve accountability and transparency. Disruptive, large-scale occupations and protests like Caledonia generate significant public interest and discussion about policing philosophy and tactics. In these circumstances, it may be appropriate to identify means by which the OPP can explain and answer appropriate questions about its decisions and activities to its responsible Minister, the legislature, or the public at large.

d. Consultations

¹⁹ April 22, 2005 report titled “The Report on the Police Complaints System in Ontario”.

²⁰ http://www.ontla.on.ca/documents/Bills/38_Parliament/session2/b103_e.htm

²¹ The Manitoba protocol is at http://www.rcmp-grc.gc.ca/mb/webpages/public_safety_protocol_e.htm

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The OPP's Select Liaison Committee is an example of an ongoing, expert consultation forum. We have heard that it provides important advice and support to OPP management and operational commanders. The OPP could also have a formal consultation forum or relationship with a political organization like the Chiefs of Ontario, similar to the RCMP protocol with the AFN. The latter would arguably be more broadly-based, politically representative and transparent than the Select Liaison Committee. The two committees need not be contradictory if their mandates were developed thoughtfully. It may also be appropriate to have an equivalent (or joint) committee with non-Aboriginal community members.

Question 15: How can or should internal and/or external accountability for the policing of occupations and protests be improved?

PART B: ABORIGINAL AND POLICE RELATIONS

The first part of this discussion paper discussed policing Aboriginal occupations and protests. This part discusses the relationship between Aboriginal peoples and the police generally. More specifically, the paper discusses three related areas that are relevant to the Inquiry's mandate to reduce the potential for violence:

- First Nations policing;
- Building better relationships between police forces and Aboriginal peoples; and
- Racism in policing.

Not surprisingly, these topics have also been the subject of many previous inquiries, studies, reports, and articles in the past, including the Donald Marshall Inquiry (Nova Scotia, 1989), the Aboriginal Justice Inquiry (Winnipeg, 1991); Bridging the Cultural Divide (Ottawa, 1996); the Commission on First Nations and Métis Peoples & Justice Reform (Regina, 2004); and the Stonechild Inquiry (Regina, 2004). The analysis and recommendations in these reports have been remarkably consistent.

There have also been a large number of new programs, initiatives, and institutions designed to address these issues. For example, police forces have implemented many programs and initiatives to improve Aboriginal/police relations.

What is the Inquiry's role and value in these circumstances? We may not want to simply repeat the work (or recommendations) of previous inquiries and reports. A more constructive approach would be to acknowledge the progress of recent initiatives yet also consider questions about their implementation, effectiveness, sustainability, and accountability.

Readers should note that this section focuses on Aboriginal peoples and police forces. There are, of course, many enforcement agencies in Ontario that have relations with Aboriginal peoples, most notably the Ontario Ministry of Natural Resources (MNR). The

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relationship between Aboriginal peoples and MNR is addressed primarily in our Treaty and Aboriginal Rights background papers.

10. BACKGROUND

Previous inquiries and reports noted above often emphasize the history of mistrust between Aboriginal and police. At the risk of oversimplification, the history between police and Aboriginal peoples has been characterized by:

- The legacy of colonialism;
- The role of the police in attempts to assimilate Aboriginal people;
- Government reliance on the police to resolve Aboriginal rights disputes;
- Over-representation of Aboriginal people in the criminal justice system;
- Under and over-policing of Aboriginal peoples; and,
- Racism.

The Inquiry has also heard criticisms of policing by Aboriginal peoples and their leadership about unequal or racist policing. This point was made to us in many of our research papers; at our April 22, 2005 Youth and Elder Forum on Aboriginal/Police Relations; at several of our consultations; in many projects submitted to the Inquiry; by several speakers at the Chiefs of Ontario forum; and at the recent Law Enforcement and Aboriginal Diversity conference in Toronto.²²

11. FIRST NATION POLICE FORCES IN ONTARIO

There are currently eight stand-alone First Nation police forces in Ontario. Together, these forces police 106 First Nations communities and almost 70,000 people. First Nations police forces grew substantially between 1995 and 2005.

The Inquiry has consistently heard from researchers, parties, witnesses, and participants in our consultations that First Nations police forces can help improve the relationship between Aboriginal peoples and the police. We have also repeatedly heard of the great

²² See generally the following background papers for the Inquiry: *Aboriginal Peoples and the Criminal Justice System* by Jonathan Rudin; *Crown and Aboriginal Occupations of Land: A History & Comparison* by John Borrows; *The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario* by Jean Teillet. See also the summaries of several of our consultations and special forums, including the Inquiry's April 22, 2005 Youth and Elder Forum about Aboriginal/Police Relations. This summary is posted at http://www.ipperwashinquiry.ca/policy_part/policing/cs.html. See also the following party submissions to the Inquiry: *Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted Their Rights and Claims and Dealt with the Backlash*, by the Chippewas of Nawash Unceded First Nation; *Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario* and *Anishinabek First Nations Relations with Police and Enforcement Agencies* by the Union of Ontario Indians. These issues were also raised by several commentators at the Chiefs of Ontario session at the Inquiry in March, 2006 and at the Law Enforcement Aboriginal Diversity Network (LEAD) conference in Toronto, April 20-May 3, 2006

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potential for First Nations police forces to reduce the potential for violence in Ipperwash-like situations.

Parties may recall that First Nations' policing was discussed at both the OPP's January 2006 Part Two forum and at the Chiefs of Ontario Special Assembly with the Inquiry in March 2006. Participants at both forums discussed the many challenges facing First Nations police forces. These challenges are very similar to those discussed in previous inquiry reports and studies, including:

- Limited mandates and jurisdiction;
- Inadequate funding;
- Lack of resources to develop a community policing or peacekeeping approach to policing services;
- Difficulty in meeting First Nations' community expectations;
- Problems with the recruitment and retention of police officers; and
- "Project" status rather than established programs governed by legislation

Advocates for First Nations police often complain of "second-class" funding and legal status. They further argue that First Nations forces are "set up to fail" because they lack funding and have limited mandates. They say that First Nations forces should be funded and supported as "replacements" – not "enhancements" – to mainstream police forces in their jurisdictions. Clairmont and Potts report that all senior OPP officers interviewed during their research recommended that First Nations' police services SAs should be seen as replacements, not enhancements, and should be funded accordingly.²³

The OPP presented many initiatives at its January forum designed to support First Nations policing, most notably the Nishnawbe-Aski Police Service (NAPS) Investigative Support Unit and the Integrated Support Services Unit (ISSU). Participants at the forum and the Inquiry's own research note the generally very good relations between the OPP and First Nations police services in Ontario.

Previous reports and studies on First Nations policing have generally called for clarification of jurisdictional and legal issues, stable and equivalent funding, and better support from mainstream police forces.

Question 16: Should First Nations police be organized and funded as replacements or enhancements to OPP services in First Nations communities?

Question 17: How can the federal government, provincial government, or OPP improve policing by First Nations police forces? Should the federal and/or provincial government enact framework legislation to recognize and support First Nation police forces?

²³ Clairmont/Potts at 35.

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12. RELATIONSHIPS BETWEEN ABORIGINAL PEOPLES AND POLICE

Like many topics in this paper, building better relationships between Aboriginal peoples and the police has been the subject of many reports and studies in the last 20 years.

The Inquiry's literature review and the survey conducted by Professor John Hylton discuss these reports in some detail. Professor Hylton summarizes the "best practices" and recommendations identified in the literature review and the survey as follows:

- Police leadership must support and model strong diversity policies;
- Police recruitment screening must be designed to eliminate racist candidates with racist views;
- A proactive Aboriginal recruitment strategy must be maintained over time with a goal of police service membership mirroring the community make-up;
- Employment and family assist care programs, as well as other programs for Aboriginal police members, must be provided in order to support full participation in an historically hostile system;
- Increased emphasis must be placed on cross-cultural training for recruits and experienced police service members, using Aboriginal police officers in an experiential environment (not through academics, advocates or other Aboriginal leaders).²⁴

As noted above, it is clear that police forces have implemented many programs and initiatives to improve Aboriginal/police relations. The OPP, for example, presented many such initiatives at its Inquiry forum and during OPP Commissioner Gwen Boniface's testimony at the Inquiry. These include:

- The Commissioners' Select Liaison Council on Aboriginal Affairs;
- The OPP Youth Summer Camp;
- The Police Ethnic and Cultural Exchange (PEACE);
- OPP Bound;
- Native Awareness Training;
- Aboriginal Liaison – Operations;
- Aboriginal Relations Team;
- Regional Aboriginal Strategy Committees;
- Aboriginal Officers Leadership Forum; and

²⁴ John Hylton, *Canadian Innovations in the Provision of Policing Services to Aboriginal Peoples*, at p.6. See also Human Sector Resources' background paper for the Inquiry, *Challenge, Choice and Change: A Report on Evidence-Based Practice in the Provision of Policing Services to Aboriginal Peoples*. Both papers are posted at http://www.ipperwashinquiry.ca/policy_part/policing/crp.html.

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- Traditional Aboriginal Drum.²⁵

The Inquiry also notes the leadership and commitment of the OPP, the RCMP, the Canadian Association of Chiefs of Police and others to organize and support the Law Enforcement Aboriginal and Diversity Network (“LEAD”).²⁶ LEAD is a relatively new, national organization whose goals include collecting and distributing best practices in policing of Aboriginal and diverse communities.

It is clear that these initiatives, like the Framework for Aboriginal Critical Incidents discussed earlier, are works in progress. In these circumstances, the Inquiry may want to acknowledge the progress of these initiatives yet also consider questions about their implementation, effectiveness, sustainability, and accountability.

The Inquiry may also consider the role and responsibilities of the provincial government in this area. It can be argued that OPP’s position as the provincial police force means that the provincial government has a responsibility to ensure the OPP is successful. As a result, it may be appropriate to ask if and how the Policing Standards Division of the Policing Services Division of the Ministry of Community Safety and Correctional Services specifically, or the provincial government generally, can support police organizations and Aboriginal communities to improve Aboriginal/police relations.

Question 18: Have the OPP’s initiatives improved relations between Aboriginal peoples and the OPP? What else is needed for the OPP – or any other policing organization – to improve relations?

Question 19: How can Aboriginal peoples be involved in the design, implementation, and evaluation of initiatives to improve relations?

Question 20: How can the provincial government support the OPP and other police forces in their efforts to improve relations with Aboriginal peoples?

13. RACISM AND POLICING

The Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform Commission (2004) summed up the long-standing consensus of many Canadian inquiries and reports when it stated, “racism is a major obstacle to healthy relations between the First Nations and...police organizations.”²⁷

²⁵ These and other initiatives are described in detail in the OPP’s report, “Aboriginal Initiatives – Building Respectful Relations” available on the Inquiry’s web site. The Inquiry has asked the OPP a number of follow up questions to the forum. We will circulate the OPP’s response when it is available.

²⁶ <http://www.lead-alda.ca/index.php>

²⁷ *Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform Commission* at .5-6.

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The need to combat racism in policing has been acknowledged by police services across the country. Notable developments include the Canadian Association of Chiefs of Police (CACP) 2003 resolution promoting Bias-Free Policing,²⁸ and the OPP's cultural awareness training, recruitment, and relationship-building initiatives, among others. Finally, the recent LEAD conference was largely dedicated to discussing racial profiling, recruitment and retention of Aboriginal officers, culturally competent policing, etc.

Once again, most observers would acknowledge that more work is needed. Indeed, many Inquiry parties and participants in our consultations consistently reported and were critical of what they believe to be racist or anti-Aboriginal policing.

As noted above, the Inquiry's role and recommendations in these circumstances could be to analyze and recommend policies and programs that advance the work already undertaken by police forces and in previous inquiries and reports.

The OHRC's report on "Policy and Guidelines on Racism and Racial Discrimination" provides some guidance on how organizations can identify and combat racism.²⁹ The report identifies the steps organizations can take to prevent and respond to racism and racial discrimination. These steps include:

- A comprehensive anti-racism and racial discrimination statement and policy;
- Proactive, ongoing monitoring;
- Implementation strategies; and
- Evaluation.³⁰

This report also discusses the collection and use of numerical data. The report states: "appropriate data collection is necessary for effectively monitoring discrimination, identifying and removing systemic barriers, ameliorating historic disadvantage and promoting substantive equality."³¹

The OHRC's emphasis on data collection is interesting given the current debate in Ontario on "racial profiling." Recently, the debate played out in Ontario over the publication of a data collection study of racial profiling by the Kingston Police Department in 2005.

Kingston Chief of Police William Closs explained the project as follows:

This project grew out of our genuine interest in addressing the issue of racial profiling in policing; our conscious decision to take action that would result in

28 The full text of the CACP resolution is available at <http://www.cacp.ca/english/>.

29 Available at: <http://www.ohrc.on.ca/english/publications/racism-and-racial-discrimination-policy.pdf#search='The%20Ontario%20Human%20Rights%20Commission%20%28OHRC%29%20in%20its%20Policy%20and%20Guidelines%20on%20Racism%20and%20Racial%20Discrimination>

30 *Ibid* at 48.

31 *Ibid* at 44.

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more positive contacts with citizens; and the need to respond appropriately to, rather than dismissing, citizens' perceptions and anecdotal stories. This was an honest effort to move beyond denial and to cause change, rather than just maintaining the status quo. While people refer to this issue in different ways and with different labels, essentially we wanted to allow an objective, academic researcher the opportunity to test whether police treat people equally as they exercise police discretion and initiate contacts with citizens.³²

Chief Closs was troubled by the absence of sound operational research on this subject. He also believed that data collection process was potentially a proactive monitoring and oversight tool for the police to ensure bias-free policing. He further noted that data collection served an important educative role within the police force. Finally, Chief Closs wrote that there was a lack of provincial leadership on the issue of bias-free policing.

Question 21: Are the conventional or historic strategies to combat racism in policing sufficient? Or is more needed?

Question 22: How can or should Aboriginal peoples be involved in the design, implementation, and evaluation of initiatives to reduce racism?

Question 23: Does the provincial government have a responsibility to promote bias-free policing? If so, what can or should the provincial government do to support the OPP and other police forces in their efforts to reduce racism?

Question 24: Should the OPP undertake a data collection project similar to the Kingston project?

Readers should note that many parties have identified early and on-going education as a key to reducing racism in Ontario. The Inquiry will consider public education in its discussion paper on Treaty and Aboriginal Rights.

14. CONCLUSION

As noted above, the purpose of this paper is to provide parties with notice of the issues that Part Two is considering. **Parties are encouraged to consider some or all of these questions and the issues raised in the discussion papers in their written and oral submissions.**

Please contact me with any questions or comments.

Police-Aboriginal Peoples Discussion Paper -- June 2006.doc

³² William Closs, Kingston Police Data Collection Project: A Preliminary Report, May 17, 2005, at 1.

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APPENDIX A

QUESTIONS ON POLICING OCCUPATIONS AND POLICE ABORIGINAL/ RELATIONS

- Question 1: Are these principles appropriate to guide the Inquiry's analysis and recommendations on policing occupations and protests? Or, should there be others and what should they be?*
- Question 2: Is the OPP's Framework an appropriate approach to policing Aboriginal protests and occupations? What other policies, or resources, are needed to support this approach?*
- Question 3: How can the OPP evaluate and support the Framework within the OPP?*
- Question 4: How can or should the provincial government support the Framework?*
- Question 5: Should the OPP (or other Ontario police forces) develop public safety protocols with First Nations on a provincial or local basis similar to the RCMP protocols?*
- Question 6: Should the OPP and First Nations police services develop protocols to promote cooperation and clarity when policing occupations and protests?*
- Question 7: Should the OPP and First Nations services develop an integrated conflict negotiation/peacekeeping team?*
- Question 8: How can the capacity of First Nations police services and governments to peacefully resolve intra-band disputes be increased?*
- Question 9: How can the OPP best support municipal or other police services to police Aboriginal occupations and protests effectively?*
- Question 10: Should the OPP and related agencies develop protocols to promote cooperation and clarity when policing occupations and protests?*
- Question 11: How can police restore and/or establish good relations with First Nations/Aboriginal communities and the non-Aboriginal communities restore after an occupation or protest?*

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- Question 12: How should police services review and analyze the policing of occupations and protests? Should First Nations or Aboriginal people participate in this activity? If so, how?*
- Question 13: How can and should police services and governments balance constitutional rights with public order in Aboriginal occupations and protests? When are injunctions for occupations and protests appropriate?*
- Question 14: How can governments support the peaceful resolution of occupations and protests during an event? Should governments adopt a policy on the use of injunctions?*
- Question 15: How can or should internal and/or external accountability for the policing of occupations and protests be improved?*
- Question 16: Should First Nations police be organized and funded as replacements or enhancements to OPP services in First Nations communities?*
- Question 17: How can the federal government, provincial government, or OPP improve policing by First Nations police forces? Should the federal and/or provincial government enact framework legislation to recognize and support First Nation police forces?*
- Question 18: Have the OPP's initiatives improved relations between Aboriginal peoples and the OPP? What else is needed for the OPP – or any other policing organization – to improve relations?*
- Question 19: How can Aboriginal peoples be involved in the design, implementation, and evaluation of initiatives to improve relations?*
- Question 20: How can the provincial government support the OPP and other police forces in their efforts to improve relations with Aboriginal peoples?*
- Question 21: Are the conventional or historic strategies to combat racism in policing sufficient? Or is more needed?*
- Question 22: How can or should Aboriginal peoples be involved in the design, implementation, and evaluation of initiatives to reduce racism?*
- Question 23: Does the provincial government have a responsibility to promote bias-free policing? If so, what can or should the provincial government do to support the OPP and other police forces in their efforts to reduce racism?*
- Question 24: Should the OPP undertake a data collection project similar to the Kingston project?*