

***Upholding Indigenous Land Rights in Ontario:
Amnesty International's Urgent Call for Action
on Implementation of Key Recommendations
from the Ipperwash Inquiry***



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SUMMARY OF AMNESTY INTERNATIONAL RECOMMENDATIONS

In the following brief, Amnesty International Canada is recommending to the Minister of Aboriginal Affairs that the Government of Ontario take immediate action to:

- Implement the critical recommendations from Volume 2 of the *Report of the Ipperwash Inquiry* pertaining to land and resource rights, especially recommendations 1-17, 29-31, 40, 45, 47-48, and 50.
- Develop a specific timetable for establishing an independent treaty commission to impartially assist the governments of Ontario, Canada, and First Nations to effectively and in a timely manner resolve disputes over land and treaty rights.
- Collaborate with Indigenous peoples to establish laws, regulations and policies to ensure that the Crown's duty of consultation and accommodation is upheld.
- Give the Ministry of Aboriginal Affairs the lead responsibility for ensuring that all laws, regulations and policies are brought into line with the Crown's duty of consultation and accommodation.
- Ensure that, pending the substantial legal reform referred to above, clear instruction is provided to all relevant government ministries on upholding the rights of Indigenous peoples, including their right to consultation, accommodation and consent.
- Develop co-management and resource-sharing initiatives with Indigenous peoples and undertake independent evaluations of one or more of such existing initiatives with the co-operation and participation of Indigenous peoples' organizations.
- Undertake an independent evaluation – with the participation of Indigenous representatives in the design, oversight and analysis of the evaluation – of the OPP Framework for Police Preparedness for Aboriginal Critical Incidents and its implementation to determine how well the new direction signalled by this Framework has been institutionalized and acculturated within the OPP and its many structures and large force of officers.

- Adopt a provincial peacekeeping policy based largely on the OPP Framework for Aboriginal Critical Incidents to govern the province's response to Indigenous occupations and protests in order to – as stated in the *Report of the Ipperwash Inquiry* – “reassure both Aboriginal and non-Aboriginal Ontarians that peacekeeping is the goal of both police and government in this province, that treaty and Aboriginal rights will be respected, that negotiations will be attempted at every reasonable opportunity, and that the use of force must be a last resort.”
- Develop a specific written policy governing the use of injunctions during Indigenous occupations and protests in order to promote negotiated resolution of disputes and ensure that all reasonable measures are taken to avoid prosecution and incarceration of protesters.
- In any Indigenous land dispute that does come before the courts, ensure that the court is made fully aware of the underlying Indigenous rights issues, the duties of the Crown – especially the duty of meaningful consultation and accommodation – and the desirability of a negotiated solution.
- Facilitate – in the words of Justice Linden – “court-appointed counsel for interested parties in injunction proceedings if their participation would contribute to the court's understanding of the issues in dispute.”
- Build public support for Indigenous land rights by working with Indigenous peoples to develop and implement a comprehensive plan to promote public awareness of treaty and Aboriginal rights, including through the promotion of Indigenous perspectives and content in the elementary and secondary school curricula.

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INTRODUCTION

The regulation of natural resources is an area in which Aboriginal rights, non-Aboriginal economic interests, and court intervention can collide in a combustible mix before, during, or after an Aboriginal occupation or protest. Conflicts over natural resources often stem from sharply different understandings about the nature of the lands which Aboriginal peoples agreed to share with newcomers... First Nations people regarded and continue to regard the lands that they agreed to share as their “traditional lands”. The resources on those lands had for many years (indeed centuries) provided their sustenance. Although they agreed to give up their exclusive Aboriginal title to these lands in making treaties with the Crown, they never intended to abandon them. They continue to regard these lands as a major source of their sustenance and as fundamental to their identity. (*Report of the Ipperwash Inquiry*, May 2007, Volume 4: Executive Summary, p. 83)

The need to reconcile our interests is not solely about fish, moose, deer or trap lines. Fundamentally, this is about life and the land and resources that support our existence and well-being. We want to be full partners in a plan that fairly and equitably manages the great wealth that the natural resources of this province provide. We will not continue to be made the poorest of the poor while all around us people use and exploit our resources to enrich themselves at our expense. (Statement by the Chiefs of Ontario, quoted in the *Report of the Ipperwash Inquiry*, Volume 2: Policy Analysis, p. 105)

In September 1995, Indigenous rights protester Dudley George was killed by an Ontario Provincial Police officer while taking part in the unarmed occupation of disputed land at Ipperwash Provincial Park. A long overdue provincial inquiry into the events surrounding the killing of Dudley issued its recommendations on May 31, 2007. The final report of the Ipperwash Inquiry concluded that “the single biggest source of frustration, distrust, and ill-feeling among Aboriginal people in Ontario is our failure to deal in a just and expeditious way with breaches of treaty and other legal obligations to First Nations.” The report went on to state that “if the governments of Ontario and Canada want to avoid future confrontations like Ipperwash or Caledonia they will have to deal with land and treaty claims effectively and fairly.”¹

Amnesty International considers the Ipperwash Inquiry to be an important landmark in the understanding and advancement of the human rights of Indigenous peoples. Many of

¹ *Report of the Ipperwash Inquiry* (Toronto: Queen's Printer, 2007), Vol. 2, p. 77.

its recommendations are relevant not only to Ontario, but also to the rest of Canada and to many other jurisdictions around the world where the denial of Indigenous peoples' rights to land and resources is the cause of suffering and injustice.

Amnesty International has therefore welcomed the government of Ontario's public commitment to the full implementation of all the Inquiry's recommendations. We acknowledge the positive steps that have already been taken toward that end, including the agreement to return Ipperwash Park to the Chippewas of Kettle and Stony Point First Nation and the transfer the responsibility for Aboriginal Affairs from the Ministry of Natural Resources to a separate new Ministry devoted to these issues.

At the same time, Amnesty International is becoming increasingly concerned over the seeming failure to move ahead in a timely manner on many of the Inquiry's core recommendations dealing with the underlying issue of Indigenous peoples' land and resource rights. Our work with Indigenous peoples' organizations and communities across Ontario reveals a clear disparity between the province's official support for implementation of the Ipperwash report and the continued "business as usual approach" being taken in the crucial area of natural resource management.² In short, the reality on the ground does not reflect the government's rhetoric.

In our view, the government of Ontario needs to demonstrate substantially greater political commitment to full and timely implementation of those critical recommendations dealing with the central issue of land and resource rights. Only by doing so can the province both promote the cause of justice in Ontario and set a positive example for other governments in Canada and around the world.

THE DUTY TO RESPECT, PROTECT AND PROMOTE THE LAND RIGHTS OF INDIGENOUS PEOPLES

In our work with Indigenous peoples' organizations and communities across Canada and around the world, Amnesty International has seen time and again that secure ownership of, access to and control over lands, territories and natural resources is indispensable to Indigenous peoples' enjoyment of their fundamental human rights. The central importance of Indigenous peoples' land rights has been affirmed both by Canadian courts and by international human rights bodies.³

² See for example, Amnesty International Canada, "Canada: Algonquin leader faces jail time while Ontario government ignores the law," News release, 18 February 2008 and Amnesty International Canada, "Critical breakthrough at Grassy Narrows a perfect opportunity for government of Ontario to take a stand for the human rights of Indigenous peoples," News release, 6 June 2008.

³ See, for example, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388; Committee on the Elimination of Racial Discrimination, General Recommendation XXIII concerning Indigenous Peoples, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997); UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295, (adopted by the UN General Assembly on September 13, 2007).

In 2006, in a case involving mineral exploration on the traditional territory of the Kitchenuhmaykoosib Inninuwug First Nation in northern Ontario, an Ontario Superior Court judge concluded that, “the relationship that aboriginal peoples have with the land cannot be understated. The land is the very essence of their being, it is their very heart and soul. No amount of money can compensate for its loss.”⁴ Similarly, Erica Daes, the former chair of the UN Working Group on Indigenous Populations, has written:

Few if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food and shelter, the right to self-determination, and the right to exist as a people.⁵

Although Canada deservedly enjoys a reputation for international leadership in the protection of human rights, it is also true that the human rights of Indigenous peoples in Canada, including their land rights, have been repeatedly violated over the course of a great many decades. First Nations, Métis and Inuit communities in Canada almost universally face a dramatic erosion of their land base, unjust barriers to continued use of their traditional territories, and little meaningful say in decision-making over use of land and resources central to their cultural identities and continued ways of life. The result has been levels of impoverishment, ill-health and social strife that would never be tolerated for any other segment of society.

While the Canadian Constitution and historic and contemporary treaties establish specific federal responsibilities in respect to Indigenous peoples, it is often provincial and territorial governments that have the most dramatic impacts on the rights of Indigenous peoples through the management of natural resources and the oversight of resource extraction and other development activities. Without an adequate framework of laws, regulations and policies to ensure that such actions are consistent with the rights of Indigenous peoples and contribute to the fulfilment of these rights, provincial and territorial governments run a significant risk of breaching the legal duties applicable to all levels of government and inflicting further harm on Indigenous peoples.

Canadian Law

In the landmark 1997 *Delgamuukw* decision, the Supreme Court of Canada found that the Crown’s duty to deal honourably with the Indigenous peoples over whose lands and lives it had assumed jurisdiction necessarily requires “the involvement of aboriginal peoples in decisions taken with respect to their lands.”⁶ Subsequent court decisions have affirmed that in every instance when governments consider decisions that could potentially have an impact on Indigenous peoples’ rights and interests, there must always be good faith consultations for the purpose of identifying and accommodating those rights and interests. In the 2005 *Mikisew Cree* case, the Supreme Court determined that this

⁴ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al.*, [2006].

⁵ Daes, Erica-Irene A., UN Special Rapporteur, Commission on Human Rights, *Final Report on Indigenous peoples’ permanent sovereignty over natural resources*, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004.

⁶ *Delgamuukw v. British Columbia*.

minimum duty exists even though the land in question has been formally surrendered to the Crown and traditional land use rights are restricted by the terms of a treaty.⁷ The court found that the government was still “under an obligation to inform itself of the impact its project will have on the exercise of traditional land use rights, to communicate its findings, and attempt to deal with the community’s concerns in good faith, and with the intention of substantially addressing these concerns.” Justice Linden described this decision as being “particularly relevant to Ontario since it involved treaty rights on off-reserve “traditional” or “surrendered” lands.”⁸ He noted that although the “provincial Crown owns approximately 87% of the land in Ontario...[m]uch of this land is also the traditional territory of Aboriginal peoples.”⁹

Considerable debate remains over what measures must be taken to fulfil the duty of consultation and accommodation. In the *Delgamuukw* decision, the Supreme Court concluded:

...even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the *full consent* of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.¹⁰

The subsequent *Haida* decision suggested a number of factors leading to a duty to go beyond good faith consultation, including the existence of “a strong *prima facie* case” for Aboriginal or treaty rights, whether the potential impact on these rights “is of high significance to the Aboriginal parties,” and whether “the risk of non-compensable damage is high.” In the *Haida* decision the Court concluded that the requirement of consent recognized in the *Delgamuukw* decision “is appropriate only in cases of established rights, and then by no means in every case.”¹¹ At the same time, the Court found that interim measures are often necessary to protect Indigenous interests during the typically long and arduous process of establishing their rights. The decision stated:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.... *To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.*¹²

⁷ *Mikisew Cree First Nation v. Canada*.

⁸ *Report of the Ipperwash Inquiry*, p. 102.

⁹ *Ibid.* p. 108.

¹⁰ *Delgamuukw v. British Columbia*.

¹¹ *Ibid.*

¹² *Haida Nation v. British Columbia*.

Interim measures employed by provincial and territorial governments in Canada to protect Indigenous rights pending the resolution of disputes have included withdrawing disputed lands from licensing and putting limited duration moratoria on new development activities. In general, however, the tendency of governments in Canada has been to do exactly what the Supreme Court has criticized: allowing logging, mining and other developments to proceed without any protection for Indigenous peoples' interests so long as their rights remain in dispute. This raises concerns that by the time Indigenous peoples' rights are finally recognized, the impacts of development on the land will make it impossible to exercise these rights. Furthermore, by allowing other sectors of society to freely benefit from the exploitation of lands and resources while Indigenous rights remain in dispute, governments help create financial incentives to resist the timely resolution of such disputes.

Inadequate Protection

Unfortunately, the available recourse for Indigenous peoples to establish their land and resource rights – land claims proceedings and legal challenges – have proven unacceptably slow and ineffective. As independent authorities, such as the UN Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples, have noted,¹³ land claims and court proceedings have a distinctly adversarial character as federal, provincial and territorial governments use their considerable resources to promote the interests of other sectors of society over those of Indigenous peoples and try to minimize their own liability for providing redress. The *Report of the Ipperwash Inquiry* characterized the current treaty claims process as “largely ineffective, painfully slow, and unfair.”¹⁴ Engaging in processes that may take years or decades to resolve, and risk building enormous debt in legal fees, is simply beyond the means of many Indigenous communities.

A further concern resulting from the failure of governments to adequately protect the rights of Indigenous peoples is the frequent resort to courts to force a short-term “resolution” of land disputes by bringing injunctions against Indigenous activists engaged in blockades or other occupation of disputed lands. Although there have been some important decisions reached by lower courts in such contexts – such as the initial decision by the Ontario Superior Court in the case of *Platinex Inc v. the Kitchenuhmaykoosib Inninuwug First Nation* – it is apparent that the lower courts rarely have the capacity or inclination to give full and fair consideration to the complexities of Indigenous rights. As the Supreme Court of Canada itself has noted, the criteria typically used by courts in balancing competing legal claims “tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to ‘lose’ outright pending a final determination of the issue.”¹⁵

¹³ United Nations Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, *Report of the Mission to Canada*, 2 December 2004, E/CN.4/2005/88/Add.3.

¹⁴ *Report of the Ipperwash Inquiry*, p. 77.

¹⁵ *Haida Nation v. British Columbia*.

Injunction hearings can also lead to pressure for police enforcement against Indigenous protesters. Given the fact that these protesters usually hold the genuine conviction that they are acting within their rights, and that these rights may eventually be affirmed in the course of negotiations or legal proceedings, governments should make every reasonable effort to avoid enforcement actions that could lead to unnecessary arrests and criminal prosecution. Amnesty International has expressed concern over punitive prison sentences brought down as leaders of the Kitchenuhmaykoosib Inninuwug First Nation and Ardoch Algonquin negotiator Bob Lovelace over their opposition to mineral exploration that was licensed without consultation. It is apparent that this situation would not have arisen if the province had met its own legal obligation to ensure meaningful, prior consultation and accommodation before allowing mineral exploration to begin or if it had removed disputed lands from staking.¹⁶

Such developments highlight the urgency of the full implementation of the Ipperwash report. Indigenous leaders and organizations across Ontario have called for such implementation. It is Amnesty International's view that implementation is in the interest of all people in the province and the cause of human rights more generally.

The Relevance of International Human Rights Standards

UN human rights treaty bodies have underscored how important it is that Indigenous peoples play a meaningful role in decisions about their lands and resources. The expert committee responsible for the interpretation and oversight of the *UN Convention on the Elimination of All Forms of Racial Discrimination* has called on states to:

- Ensure that members of indigenous peoples have *equal* rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their *informed consent*...
- Recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their *free and informed consent*, to take steps to return those lands and territories.¹⁷

These principles are reaffirmed in the *UN Declaration on the Rights of Indigenous Peoples*. The Declaration was adopted by the UN General Assembly on September 13, 2007 after more than two decades of deliberation. Its provisions include:

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by

¹⁶ Amnesty International Canada, "Canada: Canada: Algonquin leader faces jail time while Ontario government ignores the law," News release, 18 February 2008.

¹⁷ Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXIII concerning Indigenous Peoples, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).

themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.

While the UN Declaration and the recommendations of treaty bodies are not in themselves binding on states, they provide authoritative guidance for the interpretation of state obligations, including those established in binding human rights conventions, and should contribute to the interpretation of federal and provincial laws. As former Supreme Court Chief Justice Dickson observed, international human rights instruments were part of the context in which the *Canadian Charter of Rights and Freedoms* was drafted and adopted, and should be viewed as “a relevant and persuasive source” for Charter interpretation. Moreover, the Court has emphasized that “the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents.”¹⁸

KEY RECOMMENDATIONS ON LAND AND RESOURCE RIGHTS

Amnesty International Canada is calling on the province to work closely with Indigenous peoples to ensure that the important recommendations on land and resource rights highlighted below are implemented as an urgent priority.

1. Impartial and effective resolution of disputes over land and treaty rights

In our submission to the Ipperwash Inquiry, Amnesty International highlighted the need for the federal and provincial governments “to collaborate with Indigenous peoples in developing impartial and expert mechanisms to resolve land and treaty disputes in an integrated and streamlined manner taking full account of all rights protected in national and international law.” These concerns are addressed by the Inquiry report recommendation that calls on the province to establish an adequately funded, independent land and treaty commission. The report recommends that such a commission

independently and impartially assist the governments of Ontario, Canada and First Nations to negotiate settlements of land claims... oversee the negotiation process to make sure that the parties are working effectively and making progress... [and] significantly reduce the adversarial quality of the process by imbuing it with the principles of treaty interpretation set out by the Supreme Court of Canada.¹⁹

¹⁸ Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 348-350.

¹⁹ *Report of the Ipperwash Inquiry*, p. 86.

As the Inquiry noted, the idea of an independent treaty commission has long been considered in Ontario. In the view of Commissioner Linden, the establishment of an independent treaty commission “is the single most important recommendation I am making regarding land claims and treaty rights.”²⁰ The report’s recommendation has been supported by Indigenous peoples’ organizations in Ontario, such as the Chiefs of Ontario.

Amnesty International calls on the government of Ontario to work in collaboration with Indigenous peoples in Ontario to develop a specific timetable for establishing such a commission. We agree with Justice Linden when he wrote that the establishment of and the provision of adequate human and financial resources for this commission “is ‘job one’ for the new minister [of Aboriginal Affairs] – to take the necessary steps to ensure that a new Ontario Treaty Commissioner is in place by a specific date.” Justice Linden suggested that the Commission should be established by May 31, 2008, one year after the release of his report.²¹ That date has of course passed.

2. The legal duty of consultation and accommodation

As noted above, Canadian courts have repeatedly affirmed that any decisions that have the potential to impact on the rights and interests of Indigenous peoples require the involvement of the affected peoples. The nature of this duty varies with the extent to which Indigenous rights may be affected and with how clearly these rights have been established in law. In every instance, however, there is a clear, minimum legal duty to carry out prior consultation with the sincere intent of accommodating Indigenous concerns. In most instances, the duty of accommodation will require further steps to protect their rights from harm, up to and including agreeing not to proceed without their consent.²² International human rights bodies have also recognized a state obligation to seek the free, prior and informed consent of Indigenous peoples as a necessary safeguard for rights affirmed in international human standards and protected in binding international human rights treaties.²³

The final report of the Ipperwash Inquiry placed considerable emphasis on the importance of the province living up to its duty of consultation and accommodation, stating:

The duty to consult and accommodate is extremely important. It offers the real prospect of reconciling Aboriginal rights and interests in land[,] water[,] and resources by promoting peaceful, meaningful consultation with Aboriginal peoples and through their participation in decision-making with respect to natural resources. Thus, the duty to consult and accommodate, if properly and effectively

²⁰ Ibid., p. 171.

²¹ Ibid., p. 172.

²² See *Delgamuukw v. British Columbia*, *Mikisew Cree First Nation v. Canada*, and *Haida First Nation v. British Columbia*.

²³ For example, CERD, General Recommendation XXIII.

fulfilled, offers the very real potential to significantly reduce the number of Aboriginal occupations and protests.²⁴

The report called on the province to collaborate with Indigenous peoples to establish laws, regulations and policies that formalize the Crown's duty of consultation and accommodation. The Inquiry report also recommended that the Ministry of Aboriginal Affairs take the lead in ensuring that all laws, policies and regulations are brought in line with this responsibility.

Such reform is particularly urgent for the province's resource laws. The Ontario *Mining Act*, which permits staking and exploration activity without notification to land owners, has become particularly notorious for fostering conflict between corporations and Indigenous peoples. Situations such as the as yet unresolved conflict between the Kitchenuhmaykoosib Inninuwug First Nation and Platinex or the conflict between Frontenac Resources and Algonquin communities in eastern Ontario illustrate the fact that reform to these laws cannot be delayed.

Amnesty International is aware that the province is currently exploring a number of new consultation models and approaches. As possible models are considered, Amnesty International emphasizes that the province's legal duties cannot be fulfilled by consultation measures that are initiated after resource extraction activities are already approved or which are arbitrarily limited to mitigating the impacts of already approved plans. For consultation and accommodation to be meaningful, a full range of land use options, including those proposed by Indigenous peoples themselves, must be given full consideration before any decisions are made.

Amnesty International is also concerned about the apparent attitudes of provincial officials toward the duty of consultation and accommodation. More than once we have been told by officials that their "hands are tied" by natural resource laws that fail to include provisions on consultation and consent. It is important to note, however, that the duty of consultation and meaningful accommodation is clearly established in Canadian law as a constitutional duty and that the needed reform of provincial natural resource laws does not justify continued failure to uphold this duty.

Amnesty International therefore urges that, pending more substantial legal reform, the province should ensure that clear instruction is provided to all relevant government ministries on upholding the rights of Indigenous peoples, including the right of consultation, accommodation and consent.

3. Promoting Indigenous peoples' land and resource rights

Domestic courts and international human rights bodies have repeatedly affirmed that Indigenous peoples' ownership, use and control of lands and natural resources is both a human right in itself and a critical precondition for the enjoyment of a wide range

²⁴ *Report of the Ipperwash Inquiry*, p. 109-110.

of]human rights that all too often go unfulfilled. In Amnesty International's view, not only does the province have a clear legal duty to uphold the treaty and Aboriginal rights affirmed in Canadian law, the province also has a positive obligation to ensure Indigenous peoples have access to the lands and resources necessary for the fulfilment of the full spectrum of their social, cultural, economic, and political rights.

The *Report of the Ipperwash Inquiry* recommended that the province "continue to work with Aboriginal organizations in Ontario to develop co-management arrangements and resource-sharing initiatives... and provide financial or other support to Aboriginal organizations and third parties to develop capacity, identify best practices, and formulate strategies to promote co-management and resource sharing."²⁵ Amnesty International strongly supports this recommendation, as well as Justice Linden's call for an independent evaluation of one or more current co-management initiatives to be "undertaken with the co-operation and participation of Aboriginal organizations."²⁶

4. Preventing miscarriages of justice

It is worth recalling two statements by Commissioner Linden in his final report:

- "Occupations...are...usually the resort of people who feel that they have no other way to make their voices heard and little left to lose. That Aboriginal people in Ontario resort to occupying land indicates not only the depth of their feelings about the issues, but also the depth of their despair."²⁷
- "In my view, the provincial government should not rely on prosecutions to determine the scope and extent of Aboriginal rights. This is not consistent with the honour of the Crown."²⁸

While noting that a negotiated resolution is always preferable, the final report of the Ipperwash Inquiry recommended that the province develop policies on how to respond in the unfortunate event of Indigenous land conflicts becoming the subject of third-party initiated injunction proceedings. Such a policy, the Report recommended, should be "consistent with respect for Aboriginal rights and with the OPP peacekeeping approach to Aboriginal rights disputes,"²⁹ and it should include provisions for intervening in cases before a court to ensure that the court is made fully aware of the underlying rights issues, the duties of the Crown, including the duty of consultation and accommodation, and the desirability of a negotiated solution. Such a policy, the report stated, "will help ensure that the use of injunctions is consistent with respect for Aboriginal rights and promote transparency and accountability."³⁰ The report also recommended that "[t]he provincial

²⁵ Ibid., Recommendation 16, p. 123.

²⁶ Ibid., Recommendation 17.

²⁷ Ibid., p. 26.

²⁸ Ibid., p. 122.

²⁹ Ibid., p. 219.

³⁰ Ibid.

government should facilitate court-appointed counsel for interested parties in injunction proceedings if their participation would contribute to the court's understanding of the issues in dispute."³¹

Amnesty International strongly supports these recommendations. We are deeply disappointed that the province has not acted on the recommendations of the Inquiry in respect to cases now before Ontario courts.

5. Ensuring appropriate and unbiased policing

The *Report of the Ipperwash Inquiry* described an appropriate police response to Indigenous land rights protests as one that minimizes the risk of violence while contributing to the protection of all relevant rights, including Aboriginal and Treaty rights. After the tragic killing of Dudley George at Ipperwash Provincial Park, the Ontario Provincial Police adopted a Framework for Police Preparedness for Aboriginal Critical Incidents, which recognizes that Indigenous land protests involve a variety of rights issues and affirms that "it is the role of the OPP and all of its employees to make every effort prior to a critical incident to understand the issues and to protect the rights of all involved parties throughout the cycle of conflict."³² The Framework included a number of significant structural reforms, including the establishment of an Aboriginal Relations Team, and called for the deployment of a Critical Incident Mediator in the event of a confrontation.

In our submission to the Ipperwash Inquiry, Amnesty International welcomed this new Framework, as well as other reforms implemented since the confrontation at Ipperwash. We recommended that there should be an independent evaluation of this Framework and its implementation to determine how well the new direction signaled by the Framework has been institutionalized and acculturated within the OPP and its many structures and large force of officers.

In the year since the release of the Ipperwash report, the OPP have engaged with Indigenous protesters at Caledonia, Ardoch and Tyendinaga. Although each incident involves outstanding land disputes requiring political resolution, the protests have had both similarities and dramatic differences. It is not apparent, however, whether these differences alone account for the significant differences in how the OPP have responded to each. According to media accounts, OPP responses have ranged from admirable restraint, often in the face of public pressure for immediate police action, through to readiness to use overwhelming force to end a protest that presented little or no threat to public safety.³³

In his report, Justice Linden called independent evaluation "the next obvious step" in the implementation of the Framework and called for "significant and meaningful

³¹ Ibid.

³² OPP Framework for Aboriginal Critical Incidents, cited in the *Report of the Ipperwash Inquiry*, Vol. 2, p. 197.

³³ CBC Radio, "The Long Hot Summer", *The Current*, March 26, 2008.

participation by Aboriginal representatives in the design, oversight and analysis of the evaluation.”³⁴

The Inquiry report also called for the province to adopt, “as soon as it is practical to do so,”³⁵ a provincial peacekeeping policy based largely on the OPP Framework, in order to “codify the lessons learned at Ipperwash and reassure both Aboriginal and non-Aboriginal Ontarians that peacekeeping is the goal of both police and government in this province, that treaty and Aboriginal rights will be respected, that negotiations will be attempted at every reasonable opportunity, and that the use of force must be the last resort.”³⁶ Such a policy, the report stated,

will compel provincial or police officials who wished to pursue a more aggressive policing response in the future to explain publicly why peacekeeping is inappropriate. It will also be considerably more difficult for a provincial official to demand that protesters leave a site within a limited time period or to downplay the importance of negotiations. Police leaders, incident commanders, and individual officers will also have additional assurance that peacekeeping is the appropriate and justified strategy, irrespective of any real or perceived governmental pressure otherwise.³⁷

Amnesty International encourages the province to treat the implementation of this recommendation with particular urgency.

6. Building public support for Indigenous peoples’ land and resource rights

The decisions of government and police are not made in a vacuum. As we have seen in Ontario, Indigenous land rights protests can generate enormous pressure on government and police to respond to public perception of these events. These perceptions, unfortunately, are often tainted by limited public understanding and appreciation of the history and legal basis of Indigenous land rights and by the systemic racism faced by Indigenous individuals, families and communities in Canada.

The Inquiry noted that the public school system has not adequately addressed this problem. While Native Studies courses are part of the provincial high school curriculum, the Inquiry pointed out that such course[s] “are not compulsory and availability depends on the number of students who enroll. The majority of secondary schools do not offer these course[s] or do not offer them consistently.”³⁸ Amnesty International strongly supports the Inquiry’s recommendation that the province work with Indigenous peoples to develop and implement a comprehensive plan to promote public awareness of Treaty and Aboriginal rights, including through the promotion of Aboriginal perspectives and content in elementary and secondary schools.

³⁴ *Report of the Ipperwash Inquiry*, p. 206.

³⁵ *Ibid.*, p. 216.

³⁶ *Ibid.*, p. 215.

³⁷ *Ibid.*

³⁸ *Ibid.*, p. 160.

CONCLUSION

Amnesty International believes that action on the foregoing recommendations is of critical importance.

The failure to uphold Indigenous peoples' rights is an affront to justice. As the Ipperwash Inquiry states, blockades and occupations are a response to these injustices. Justice Linden has concisely delineated the costs and potentially tragic consequences of the continuing failure to resolve land rights disputes in a fair and timely manner:

- Risk of violence
- Expenditures associated with major police operations
- Effect on communities through road blockades, police stops, disruption of employment and the operations of local businesses, school closings, feelings of insecurity and fear for personal safety
- Effect on First Nations and Aboriginal Peoples, such as the disruption of relations within a First Nation or Aboriginal community, the expression of racist or hateful sentiments and the resulting corrosive effect on Aboriginal/non-Aboriginal community relations
- Effect on police by reducing or straining police resources elsewhere and the sometimes enduring stress and trauma on individual officers
- Effect on police/community relations through a strong perception of unfairness in the application of the rule of law and consequent allegations of “two-tier justice”
- Effect on public institutions when the inability of a government to prevent or end an Aboriginal occupation may result in a loss of public confidence in government institutions
- Economic loss and uncertainty at the provincial, regional and local level, such as a decline in property values, loss of business revenues (including tourism), loss of municipal tax revenues, loss of Aboriginal and non-Aboriginal jobs, difficulties for residents in obtaining mortgages and property insurance and stalled economic development.³⁹

³⁹ Ibid., p. 32-36.

Quite simply, the price of continued inaction on the implementation of the recommendations of the Ipperwash Inquiry is simply too high. The urgency of immediate implementation of the key recommendations from the Ipperwash Inquiry was succinctly stated by Justice Linden in the report which he released more than one year ago:

My analysis has convinced me that Aboriginal occupations and protests are not inevitable, nor are they inevitably violent. If I could sum up this report in a single thought, it would be this: The provincial government and other institutions must redouble their efforts to build successful, peaceful relations with Aboriginal peoples in Ontario so that we can all live together peacefully and productively.... We must move beyond conflict resolution by crisis management. And we cannot be passive; inaction will only increase the considerable tensions that already exist between Aboriginal and non-Aboriginal citizens in this province. Research in the course of the Inquiry showed that the flashpoints for Aboriginal protests and occupations are very likely as intense today as they were during Ipperwash, Oka, Burnt Church, or Gustafsen Lake. No one can predict where protests and occupations will occur, but I am convinced that the fundamental conditions and catalysts sparking such protests continue to exist in Ontario, more than a decade after Ipperwash. Indeed, it appears that the flashpoints for Aboriginal protests and occupations may be intensifying.⁴⁰

⁴⁰ Ibid., p. 2.