

CANADA

“I WAS NEVER SO
FRIGHTENED IN MY ENTIRE
LIFE”: EXCESSIVE AND
DANGEROUS POLICE
RESPONSE DURING
MOHAWK LAND RIGHTS
DEMONSTRATIONS ON THE
CULBERTSON TRACT

AMNESTY
INTERNATIONAL



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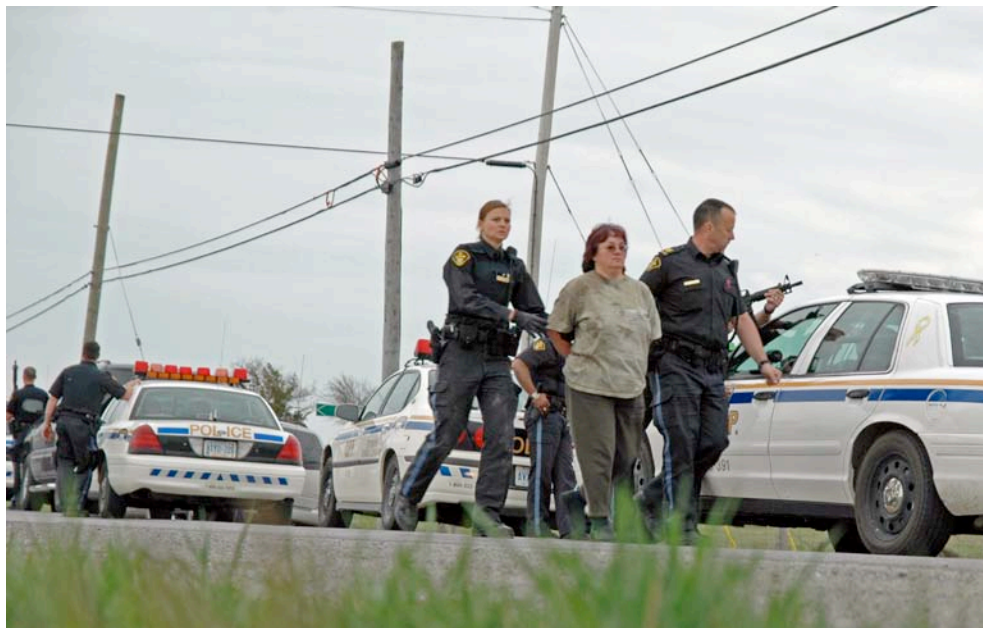
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April 25, 2008: After an OPP officer mistakenly called out that he had spotted a gun among the protesters, officers retrieved high-powered assault rifles from their cars. The police remained on alert with guns drawn and assault rifles raised for at least 40 minutes after the false alarm. At several points, witnesses described rifles being aimed at protesters and bystanders. The parents of one of the protesters, James and Rhonda Kunkel (shown in the bottom photo), said they were arrested at gun-point when they arrived at the site to see if their son was safe. Photo © Dominik Wisniewski of *The Napanee Beaver*.

INTRODUCTION

“I was never so frightened in my entire life.”

- Tyendinaga Mohawk community member Alberta Doreen recalling having an assault rifle pointed at her and her husband by an Ontario Provincial Police officer during an April 2008 land rights protest

“What were the Mohawks doing...that guns had to be drawn on them?”

Constable Elliott Burchart of the OPP Tactics and Rescue Unit:

“Nothing at the time.”

- Exchange during the Trial of *R. v. Daniel John Doreen, et al.*

1. Over the last five years, community members from the Tyendinaga Mohawk Territory in Eastern Ontario have carried out a series of blockades, land occupations and other protest actions sparked by the federal government’s longstanding failure to restore, or protect, lands wrongfully severed from the Territory. While the protests have inconvenienced members of the public, and had the potential to lead to tension and conflict, no credible evidence has ever been brought forward to suggest that they represented a significant threat to public safety. Despite this, the Ontario Provincial Police have responded to the protests with a massive deployment of officers that, by its nature, contemplated the potential use of lethal force.
2. Between June 28-29, 2007 and again between April 21-28, 2008, hundreds of OPP officers were deployed to surround and contain protesters. These forces included members of the Tactics and Rescue Unit (TRU), commonly known as the sniper squad, which is typically deployed in response to violent situations that represent a significant threat to police and public safety.
3. During the April 2008 incident, the situation escalated to the point that police, panicked by a false report that a rifle had been sighted, drew handguns and levelled high-powered assault rifles at unarmed activists and bystanders. The dangerous escalation was the consequence of specific actions of officers at the scene, including the breakdown in communication between senior officers and the decision to forcefully arrest leaders of the protest rather than simply asking them to turn themselves in to police. The potential for tragedy was also greatly heightened by the presence on the scene of such heavily armed officers, including the TRU, “the highest order of force available” to the OPP.
4. The scale and nature of the OPP response to the Culbertson Tract protests, which in April 2008 reached the brink of the use of lethal force, contrast sharply with the mostly minor criminal charges that have been brought against the protesters. Although police laid 100 charges against 19 individuals involved in the protests, the only sentence of imprisonment handed down by a court was a single day in jail.
5. Amnesty International first brought its concerns to the attention of the province and the

OPP in August 2008 and has reiterated its concerns on several subsequent occasions. To the best of our knowledge, no action has been taken by government officials or by the OPP to investigate these concerns. The OPP and government ministers have refused to meet with Amnesty International representatives.

6. In many of its details, the police handling of protests at Tyendinaga recalls the events in 1995 at Ipperwash Provincial Park, in which protester Dudley George was shot and killed by a police sniper. Testimonials by eyewitnesses and police establish that OPP handling of the Tyendinaga protests contravened police policies put in place after Ipperwash and many of the key recommendations made by a provincial inquiry into Ipperwash, all of which emphasized the de-escalation of conflict, minimum use of force, and respect for the legitimate role of public protest.
7. The provincial government has a responsibility to ensure a thorough and impartial review of police actions at Tyendinaga. Such a review must determine accountability for the dangerously excessive police response and ensure that the policies affirmed by the Ipperwash Inquiry are fully implemented and operationalized.
8. In the meantime, the underlying land dispute has not been resolved. A gravel quarry that has been at the center of protests since March 2007 has not resumed operation. The proposed housing development which sparked the April 2008 protests has not gone ahead. Many of those who participated in the demonstrations and land occupations have said that they will carry out such actions again so long as the land rights of the Tyendinaga Mohawk people are denied.

PREPARATION OF THIS BRIEF

9. Amnesty International has been in dialogue with members of the Tyendinaga Mohawk community since the summer of 2008. We are grateful for the time that community members have taken to describe their concerns and perspectives. Amnesty International has also had the opportunity to review 32 sworn affidavits and statements by activists and eyewitnesses. We would like to express our thanks to Stan Jolly and Larry Hay who made these statements available to Amnesty International. We would also like to thank Tracy Coates, Sebastian Jodoin, and Tiisetso Russell for their contribution to this research.
10. We regret the fact that the OPP repeatedly declined requests to interview officers who were on the scene or to meet with Amnesty International. In the absence of the opportunity to speak directly with the OPP, Amnesty International has filed numerous access to information requests for OPP records. Most of these requests have been initially denied, forcing us to engage in lengthy appeal processes. We have also reviewed the transcripts of the various trials and other court proceedings of activists charged in connection with Culbertson Tract protests. Police testimony at these trials has been a crucial source of information on police actions.

HUMAN RIGHTS, PROTEST AND POLICING

11. Participation in public protest involves the exercise of basic human rights, including the right of free expression, the right of freedom of association, and the right of peaceful assembly. For many Aboriginal people in Canada, more confrontational forms of protest such as land occupations and blockades are sometimes seen as the only way to focus attention on longstanding, unresolved human rights violations, such as the denial of Indigenous land rights, that generally receive little attention in public debate.
12. Police have a duty to ensure that all protests are carried out lawfully and do not lead to injury or destruction of property. Police also have an obligation to protect the right of individuals to engage in protest and must ensure that protestors are safe from harassment and intimidation from others. In carrying out these duties, police themselves must abide by basic human rights standards established in Canadian and international law.
13. The United Nations *Code of Conduct for Law Enforcement Officials* emphasizes that law enforcement officials must at all times “respect and protect human dignity and maintain and uphold the human rights of all persons”.¹ Consistent with this principle, Ontario’s *Police Services Act* recognizes that one of the fundamental objectives in the delivery of police services is “safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the [Ontario] *Human Rights Code*.”
14. The UN *Code of Conduct*, as well as the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*,² state that force is to be used only in extreme circumstances where other measures are insufficient and only in proportion to the threat at hand. These standards also make clear that the use of firearms and the intentional use of lethal force shall only be permitted when it is strictly unavoidable in order to protect human life. The Inter-American Commission on Human Rights has summed up these principles by stating that police should resort to action that could cause death or injury only as a last resort to prevent death or injury.³
15. In 1994, the OPP adopted a “gradual application of force” model for crowd control and response to protests and began training officers in its use. According to the OPP, the Gradual Application of Force Model recognizes “that people have a constitutional right to freedom of assembly” and is “designed to ensure that the minimum use-of-force necessary is used.”⁴ The model covers not only the amount of force that is actually used by police, but also decisions about the number of officers deployed, whether to bring in specialized units like crowd control or sniper units, and whether the officers should wear their regular uniforms or “riot gear”, all of which are part of the preparation to use force. Under the model, officers are expected to continually evaluate their options based on context, including the behaviour of the crowd.

16. More so than other protests, Aboriginal land rights protests can create complex challenges for police and politicians. Such protests take place in a context of a long history of systemic discrimination against Aboriginal peoples in Canadian society as a whole that has led to a significant gulf in trust and understanding between police and Aboriginal people. Where Aboriginal protests inconvenience members of the general public through road closures and blockades, police and politicians may face considerable pressure to bring the protests to a quick and decisive end. It is important, however, that police functions remain politically neutral and do not favour, or appear to favour, the interests of governments that are parties to land claims disputes, or any other sector of society, over the rights and interests of Aboriginal peoples. This is especially important when land claims remain unresolved or where acknowledged violations of Aboriginal land rights have not been remedied.
17. The Inter-American Special Rapporteur on the right of freedom of expression has said that even when protesters engage in unlawful activities, the public interest in prosecuting these crimes needs to be weighed against the consequence for the exercise of human rights. The rapporteur, an independent expert appointed by the Inter-American Commission on Human Rights, has said that great care must be taken to avoid denying rights to those for whom public protest may be the only means to affect public policy:
- Curtailing free speech by imprisoning those who make use of this means of expression would have a dissuading effect on those sectors of society that express their points of view or criticism of the authorities as a way of influencing the processes whereby state decisions and policies that directly affect them are made.*⁵
18. In September 1995, the OPP deployed a force of approximately 200 officers, including snipers, to respond to the occupation of Ipperwash Provincial Park by a small group of Aboriginal protesters. The protest was meant to focus attention on the longstanding failure of the federal and provincial governments to restore Aboriginal lands taken in the 1890s and 1930s. On the night of September 6, the situation escalated when police suddenly moved against the protesters. One man was badly beaten by police and another man, Dudley George, was fatally shot by a police sniper.
19. The report of the subsequent 2006-7 provincial inquiry into the events at Ipperwash points out that occupations and blockades “occur when members of an Aboriginal community believe that governments are not respecting their treaty or Aboriginal rights, and that effective redress through political or legal means is not available. It is typical of these events that governments have failed to respect the rights at issue or to provide effective redress, for a very long time, and a deep sense of frustration has built up within the Aboriginal community.”⁶
20. The inherent rights of Aboriginal peoples are affirmed in international and domestic law, including the nation-to-nation treaties concluded with Aboriginal peoples, and in the Canadian Constitution. Indigenous peoples’ rights to lands and resources are part of this framework of law. Protection of Indigenous land and resource rights is also essential to fulfill other human rights, including rights to culture and livelihood.

21. In a series of decisions concerning Indigenous land and resource rights, Canadian courts have said governments must always deal “honourably” with its historic and contemporary obligations toward Indigenous peoples.⁷ The Ontario Court of Appeal has stated: “In approaching the terms of a treaty...the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.”⁸ The British Columbia Superior Court has called the duty of reconciliation of Aboriginal rights “a matter of national honour, an obligation all Canadians are bound to uphold and respect.”⁹
22. In 1996, the Canadian Royal Commission on Aboriginal Peoples (RCAP) concluded that the land base set aside for the use of Aboriginal peoples had diminished by fully two-thirds since Canadian Confederation in 1867. As RCAP noted, the erosion of Indigenous peoples’ lands and resources has taken place in violation of treaties and other legal standards.
23. Effective and timely redress for such wrongs is a basic standard of justice. International human rights bodies have said that Indigenous peoples’ rights to lands, territories and resources include a right to the restitution of lands that have been wrongfully taken from them.¹⁰ The United Nations Declaration on the Rights of Indigenous Peoples states:

*Indigenous peoples have the right to redress, by means that can include restitution or, **when this is not possible**, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent [emphasis added].¹¹*
24. Where disputes remain unresolved, governments have a clear obligation to ensure that Indigenous peoples’ ability to use and benefit from the land that is eventually returned to them will not be eroded by the actions of the current landowners. The Supreme Court of Canada stated, for example, that,

*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** [emphasis added].¹²*
25. Unfortunately, despite international human rights standards and a body of rulings from Canadian courts, Indigenous peoples in Canada have found it notoriously difficult to have their rights recognized or protected through the available mechanisms of government negotiations or bringing a claim to court. The federal government uses the term “specific claims” to describe disputes over the implementation and honouring of historic treaties and agreements. (This is in contrast to comprehensive claims which

involve negotiation of contemporary treaties.) In March 2011, a federal government official told a parliamentary committee that there were 526 specific claims currently being assessed or under negotiation and another 77 cases before the courts. Furthermore, the official testified that more than 500 cases had been rejected or closed by the government without reaching any agreement with the affected First Nations.¹³

26. Despite court decisions calling for Indigenous peoples to be involved in all decisions that might affect their rights, on a scale ranging from meaningful consultation through to obtaining consent, development on disputed lands continues without regard for Indigenous peoples' rights. The Inter-American Commission on Human Rights (IACHR) has recently concluded that the options available in Canada to resolve Indigenous land disputes do not meet international standards of justice, in part because they are simply too slow and burdensome and in part because they have largely failed to restore an adequate land base to Indigenous peoples.¹⁴
27. Police do not have the authority to resolve the underlying injustices fuelling Aboriginal land protests. However, police do have the power to ensure that these injustices are not compounded by treating protesters as common criminals or by resorting to unnecessary, potentially life-threatening use of force.
28. After the tragic death of Dudley George, the OPP agreed to implement a number of reforms, including the creation of specialized Aboriginal Relations Teams to liaise with protesters and community members and the institution of specific training on Aboriginal protests, as well as general sensitivity training. In 2000, the OPP introduced a *Framework for Police Preparedness for Aboriginal Critical Incidents* and updated it in 2005. The Framework 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.” The stated purpose of the OPP Framework is to:
- *Promote an operationally sound, informed and flexible approach to resolving conflict and managing crisis in a consistent manner;*
 - *Offer a framework that demonstrates accommodation and mutual respect of differences, positions and interests of the involved Aboriginal community and the OPP; and*
 - *Promote and develop strategies that minimize the use of force to the fullest extent possible.*¹⁵
29. During the Ipperwash Inquiry, the OPP characterized the Framework as a “centerpiece of the OPP’s vision, strategy, and culture” and “a policy that has been determined to be of extreme importance to the OPP.” The OPP’s closing submission to the Inquiry stated:

The Framework represents the OPP’s key internal policy addressing its response to Aboriginal occupations and protests. It is now part of the Police Orders system and

the OPP’s “critical policy.” Equally important, the OPP has taken steps to ensure that it is used across the Province.¹⁶

30. Throughout the Inquiry, the OPP repeatedly called for the federal and provincial governments to adopt policies based on the Framework. The OPP also stressed the importance of greater public awareness and understanding of the Framework. In its closing submission, the OPP noted that the Inquiry’s endorsement of the Framework’s peacekeeping approach is essential because Aboriginal protests often take place in a climate of public misunderstanding and hostility toward Aboriginal protests:

Intemperate, aggressive, hateful or racist expressions inflame any incident, make its peaceful resolution more difficult, and leave scars in the community not easily healed.¹⁷

31. In the final *Report of the Ipperwash Inquiry*, Commissioner Justice Linden, in fact, called for the province to adopt, “as soon as it is practical to do so,” 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.” 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.¹⁸

32. The *Report of the Ipperwash Inquiry* also stated: “Police discretion at Aboriginal occupations and protests does not mean that law-breakers are never charged. It simply means that law-breakers should be charged when it is neither dangerous nor needlessly provocative to do so.”¹⁹
33. Amnesty International has welcomed the OPP and the province’s stated commitment to a peacekeeping approach to Aboriginal protests. In Amnesty International’s own submission to the Inquiry, the organization called for an independent evaluation of the extent to which the OPP Framework has actually been adopted and integrated into police operations and culture. The Inquiry report agreed, noting that an independent evaluation of the Framework is “the next obvious step” in its implementation and calling for “significant and meaningful participation by Aboriginal representatives in the design, oversight and analysis of the evaluation.”²⁰

34. During the trial of one Mohawk activist charged after protests in June 2007, then Ontario Provincial Police Commissioner Julian Fantino downplayed the Framework, saying that it is “not a firm and fixed mandated way of doing business.” During the trial of 13 Mohawks charged in connection with incidents in April 2008, a Tactics and Response Unit (TRU) officer told the court he was “not terribly” familiar with the Framework.²¹ These remarks highlight the need for an independent evaluation of just how well the Framework has been supported and implemented within the OPP.
35. It has been almost four years since the release of the Ipperwash Inquiry report. Although the Province of Ontario has officially committed to implement fully the Inquiry recommendations, the province has yet to adopt a provincial peacekeeping policy and to date there has been no such independent evaluation of the OPP Framework. The following account of the protests at Tyendinaga underlines the necessity and importance of such measures.

MOHAWK LAND RIGHTS AND THE CULBERTSON TRACT

36. Aboriginal land rights in the Tyendinaga Mohawk Territory are protected under the 1793 *Simcoe Deed*, also known as Treaty No. 3½. The Culbertson Tract is a 923 acre parcel of land on the eastern edge of the recognized territory. The land was severed from the community in 1836 and 1837. For more than 170 years, the people of Tyendinaga have sought its return. In 1995, the Mohawk Council of Tyendinaga submitted a claim to the Culbertson Tract under the federal Specific Claims Policy. The federal government then conducted an eight-year review of the history and legal status of the land. In 2003, the federal government acknowledged that the removal of the Culbertson Tract land was unlawful under the terms of the *Simcoe Deed* and the federal government had an “outstanding lawful obligation” to redress this wrong.
37. The Culbertson Tract is now almost entirely in private hands. Much of the town of Deseronto is located within the Culbertson Tract. The federal government has taken the position that it will only offer financial compensation based, in part, on the current market value of the land. The federal government has refused to purchase lands in the Culbertson Tract so that they can be returned to the Tyendinaga Mohawk community, even where the current owners have indicated that they are willing to sell.
38. The federal government’s position was rejected by the Tyendinaga Mohawk Council because, among other reasons, it would make the people of Tyendinaga, not the federal government, responsible for buying back land that is rightfully theirs. The compensation offered by the federal government would also likely fall short of the real cost of repurchasing the land, especially if the land does not become available for years. The Tyendinaga Mohawk Council has taken the position that the federal government has an

obligation to buy back the unlawfully severed land, designate it as reserve land and then return it to the Tyendinaga Mohawk Territory as part of its reserve lands.

39. Chief R. Donald Maracle of the Tyendinaga Mohawk Council was quoted in a local newspaper as saying: “We will not be extinguishing Indian title for cash – the Culbertson Tract is not for sale or surrender.”²² He also stated, “When we agreed to embark on negotiations with Canada, we made it very clear to Indian Affairs...that our goal was to restore the Culbertson Land claim to our people.”
40. The federal government’s refusal to take responsibility for buying back lands to return to the Tyendinaga Mohawk people is contrary to international human rights standards which clearly establish that governments are obligated to restore lands to Indigenous peoples whenever possible.²³ While acknowledging that it will not always be possible to return lands to Indigenous peoples, the Inter-American Court of Human Rights, which is considered a highly authoritative source of interpretation of international human rights standards, has said that the decision to provide other forms of redress such as compensation must not be based on “purely discretionary criteria of the State” but on a mutual agreement with the affected peoples.²⁴ The federal policy also disadvantages private landowners within the Culbertson Tract. Rather than initiating a process in which their interests could be fairly considered and addressed, the government’s refusal to consider buying back land has prolonged the uncertainty and the potential for conflict.
41. Negotiations between the Tyendinaga Mohawk Council and the federal government reached an impasse in October 2008. Under revisions to the Specific Claims Policy introduced in 2008, the Mohawks of Tyendinaga may have the option of taking their case before a tribunal after October 2011. The Culbertson Tract land claim is currently described by Indian and Northern Affairs Canada as being in “active litigation”.²⁵
42. In the meantime, there is widespread concern within the Tyendinaga community over the fact that the Mohawk people have no say in the continued development of the Culbertson Tract land. The failure of the federal government to take any action to protect Mohawk rights and interests in the land pending its return means that development activities are being permitted that could strip resources from the land without compensation, reduce the land’s future usability to the community, or increase the eventual cost of purchasing the land.
43. The elected Chief and Council of the Mohawks of the Bay of Quinte First Nation have stated that they are firmly opposed to development on the Culbertson Tract while the dispute remains unsettled. They have written to federal, provincial and local officials to urge that there be no development on the Culbertson Tract. While there may be differences of opinion within the Tyendinaga community over strategy and tactics, there is broad-based opposition to development on the Culbertson Tract until the land claim is resolved.²⁶

ESCALATING POLICE RESPONSE TO THE CULBERTSON TRACT PROTESTS

44. The Culbertson Tract has been the flashpoint of a series of demonstrations and protests since November 2006. The numbers of people participating in these actions has varied, and at times there have been only a small number of people involved. It is apparent, however, that the protests reflect a deeply felt sense of frustration shared by many in the community over the failure of the federal and provincial governments to uphold their legal rights. As one police officer stated, in the notes from the OPP command post during a Mohawk protest action on June 29, 2007, the people participating in these actions are “passionate about this cause”.²⁷

NOVEMBER 2006

45. On November 15, 2006, a one-day demonstration was held at the site of a proposed private housing development on the Culbertson Tract. The demonstration drew a large number of supporters – approximately 200 – from the Mohawk community. The Tyendinaga Mohawk Police Service (TMPS), which is funded through an arrangement with the OPP but accountable to the Tyendinaga Mohawk Council, took the lead in responding to the protest on the basis that it involved Mohawk people and was taking place on land claimed by the community.
46. The day began peacefully with a sunrise ceremony in which officers from the TMPS participated. However, the situation escalated when a group of military personnel, apparently on a training exercise, drove through the protest site by accident. One community member claimed to have been nearly struck by one of the vehicles. One of the military vehicles was slightly damaged and heated words were exchanged. After approximately 10 minutes, TMPS officers were able to calm the crowd and the convoy was able to continue on its way. The protest ended that day.
47. Two months later, the OPP laid charges against three activists in connection with the November protests. Shawn Brant was charged with three counts of uttering threats, Jerome Barnhart was charged with two counts of uttering threats and one count of mischief, and Mario Baptiste Jr. was charged with two counts of assault and one count of mischief. While Mario Baptiste Jr. was convicted, the charges against the other two men were dismissed in April 2008. Mario Baptiste Jr. received a suspended sentence with one year probation on one charge and conditional discharges with 12 months probation on the other two charges. While the cases were before the courts for more than a year, the three men were subject to bail conditions requiring that they not participate in further protests.

JANUARY 2007

48. On January 10, 2007, some 30 members of the Mohawk community set up barricades to prevent trucks entering and leaving a gravel quarry on the Culbertson Tract. The community members objected to the removal of gravel from land that should eventually be returned to the community and to the possibility that the quarry would supply gravel for a planned housing project on the Culbertson Tract.
49. According to Larry Hay, who was the Chief of the TMPS at the time, the Mohawk police had known of the planned demonstration in advance and had worked out an agreement with the OPP that the OPP would only intervene if the TMPS was unable to handle the situation. The protest ended peacefully that same day.

MARCH 2007

50. On March 22, 2007, a group of Mohawk community members occupied the quarry. As in the January protest, the TMPS was aware in advance of the planned occupation and had worked out an agreement with the OPP that the TMPS would take the lead in responding to the situation. In this instance, however, the occupation did not end quickly. Instead, the activists began an ongoing occupation of the quarry. The numbers of community members engaged in the occupation of the quarry ranged from 20 to 200 at various times during the first three to four weeks.
51. TMPS Chief of Police Larry Hay gave his officers explicit instruction that the primary focus of policing should be on “preventative measures... to ensure the safety of participants, police, non-aboriginal citizens, other law enforcement, or military personnel during the demonstration.” Hay says that as the occupation continued, this approach led to tensions between the TMPS and the OPP which he felt was anxious to have the occupation ended as quickly as possible in order to protect the property rights of the quarry owner.
52. On April 17, 2007, the OPP told TMPS Chief Hay that the OPP would be taking over policing of protests outside the existing boundaries of the Tyendinaga Mohawk Territory and that the funding arrangement for the TMPS would no longer cover their involvement in policing the quarry occupation. The next day the OPP informed the Tyendinaga Chief and Council that Chief Hay’s appointment as a First Nations Constable had been suspended. (The stated reason was an article in a local student newspaper in which the TMPS Chief had made general comments about systemic racism in policing in Canada. The suspension and subsequent removal of his appointment as a First Nations Constable is the subject of a complaint which is now before the Ontario Human Rights Tribunal.) From this point, the OPP assumed full control of the land protests in the Culbertson Tract. The OPP did not, however, take action to end the occupation.
53. As of April 2011, the operations at the quarry had not resumed. Mohawk activists have said that they would resume the occupation if there were any moves to restart quarry operations. Neither the OPP, the province, nor the owners and operators of the quarry have sought an injunction to allow the quarry to resume operation.

JUNE 28-29, 2007

54. The Assembly of First Nations called for a National Day of Action for June 29, 2007, to highlight the inequalities and injustices facing Aboriginal people in Canada. Chief R. Donald Maracle of the Mohawk Council of Tyendinaga was quoted in a local newspaper as saying that the point of the Day of Action “was to call the public's attention to the longstanding neglect by the Crown to honour aboriginal and treaty rights for First Nations people and to deal fairly with First Nations issues.”²⁸
55. On the evening before the National Day of Action, a group of up to 75 Mohawk activists blockaded a secondary highway near Tyendinaga and then blocked the rail line. The OPP, apparently concerned that bystanders could become trapped on the road if the blockades extended to the primary highway, chose to close a 30 kilometer stretch of Highway 401.
56. The OPP Commissioner at the time, Julian Fantino, took a direct role in supervising the police response and in attempting negotiations with the activists. Around 1:30 A.M. on the morning of June 29, he met with a group of community members who he asked to serve as mediators with the protestors. These community members recall that, although the Commissioner expressed a desire to avoid violent confrontation, they were left with the impression that the OPP would move forcefully if the protestors didn't disperse quickly. Many later described fears that bloodshed would result.
57. Commissioner Fantino also spoke with Shawn Brant a number of times over the course of the night. Using a special emergency provision of the *Criminal Code*, the OPP had wiretapped Brant's cell phone. A transcript of those wiretaps, released by the court, shows that while the Commissioner expressed sympathy for the situation of Indigenous peoples, he insisted that the protest had to end before daytime traffic began. While Brant repeatedly explained that it would take time for the demonstrators to decide as a group what their next step would be, the Commissioner appeared to become increasingly impatient over the course of the night. At one point, the Commissioner appeared to threaten personal retaliation against Brant if the protest continued, stating: “I don't want to get on your bad side but you're gonna force me to do everything I can within your community and everywhere else to destroy your reputation.”
58. The last wiretapped conversation between the Commission and Brant took place just before 7:00 A.M. The Commissioner told Brant, “We can no longer wait and wait and wait. There's just too much at stake here.”²⁹ The conversation ended with the Commissioner saying, “I'm now telling you pull the plug or you will suffer grave consequences.”³⁰
59. Police records from that night show that officers felt pressured by the Commissioner to end the occupation before morning in order to avoid public embarrassment. Police notes for 4:12 A.M. summarize communication from the Commissioner as “...how long B4 we lose credibility? This is anarchy.”³¹ At 5:40 A.M., there is a notation of a conversation between two senior officers which reads: “commissioner would not/could not tolerate

401 being closed all day – he wants contingency plan ready on his go.”³² Police notes from 7:03 A.M. state: “Commissioner wants it taken down – Tactically poss[ible] but there is significant risk.”³³

60. In the end, the OPP Incident Commanders chose to not forcibly dismantle the blockades. As one Incident Commander stated in the notes: “I’m not about to put people at risk for a piece of pavement”.³⁴ The Mohawk activists held a press conference on the morning of June 29 and announced that they had no intention of disrupting traffic on Highway 401. The OPP then removed their roadblocks and traffic was flowing by late morning. The barricades on Highway #2 and the CN rail line were disbanded peacefully at midnight on June 29, the official end of the Aboriginal “Day of Action”.
61. Larry Hay, the former Chief of Police with the Tyendinaga Mohawk Police Service, comments that OPP impatience during the June 2007 protests reflects a potentially dangerous misunderstanding of how decisions were being made among the Mohawk activists. He says, “Activists following the traditions of Mohawk culture make their decisions collectively and with as much engagement of the community as possible. Police officers need to appreciate that no one individual can simply call off a demonstration. Understanding how these processes work is critical to reaching a peaceful resolution.”
62. Shawn Brant was the only community member to be charged. He was charged with four counts of mischief and one count of breaching a condition of his recognizance of bail. In September of 2008, he was found guilty of two charges of mischief and was given a 90-day conditional sentence and 12 months concurrent probation.

APRIL 21-22, 2008

63. Early on the morning of April 21, 2008, Mohawk activists occupied a Culbertson Tract site that was slated for housing development. There were immediate problems with a number of non-Aboriginal people from the area driving by the site, making abusive comments and even throwing beer bottles at the protesters. Activists complained that no protection was provided by the OPP. At about 5:30 A.M., the protestors began to block road access to the site.³⁵ The OPP set up checkpoints at the Mohawk road blockades to divert local traffic.
64. Early that evening, an agreement was apparently reached between activists and the OPP that the Mohawk roadblocks would be dismantled on Highway #2 even as the protest continued. However, there was renewed tension on the site after some non-Aboriginal people from the area organized a counter-demonstration with signs saying “This is white land”. The OPP and the Mohawks both re-established blockades or checkpoints on the highway to control access to the protest site.³⁶
65. On the following morning, April 22, 2008, community members observed a massive build-up of OPP forces, including police helicopters circling overhead. By this point, fewer than a dozen activists remained at the road barricades and another dozen were in

the protest area. The demonstrators began to clear the protest area, taking down a tipi that they had set up, and were talking with police about dismantling the road barricades and withdrawing from the area. Even as they did so, however, some 200 members of the Public Order Unit moved in. The officers were wearing full riot gear with shields, helmets and batons, and were accompanied by police dogs. Members of the Tactics and Rescue Unit were also present.

66. In a subsequent trial of activists who participated in the protest, a TRU officer acknowledged that members of the Tactics and Rescue Unit had their rifles at the ready in full view of the activists. Jacqueline Brant, one of the defendants who was representing herself in court, asked, “What were the Mohawks doing... that guns had to be drawn on them?” The Constable answered: “Nothing at the time.”³⁷
67. The road barricades were taken down by the Mohawk activists under the threat of overwhelming police force. Dan Doreen, a key spokesperson for the Mohawk activists, may have averted a serious confrontation when he called on the other activists to leave the highway. Many of the activists went to the quarry. Dan Doreen later expressed his frustration about the attempt to negotiate with the OPP:

I was exhausted and felt really discouraged about dealing with the OPP. I brought them everything – the Simcoe Deed, their laws, our laws, everything – but it was of no use. The OPP refused to acknowledge and respect our position about the land...³⁸

APRIL 25-28, 2008

68. On April 25, the OPP arrested Shawn Brant after he had spoken with journalists at various points in the Culbertson Tract and was en route to the quarry site. As Mohawk activists and other community members began to congregate, the OPP blocked access in and out of the quarry, which had been occupied without police intervention for more than a year.
69. The OPP senior criminal investigation officer on the scene at the time, Detective-Sergeant (now Detective-Inspector) Nicholas, testified at trial that he planned to arrest a number of people including Shawn Brant, Dan Doreen and others who had been identified by the OPP as leaders in the protest three days earlier. The OPP had no judicial warrants for the arrests and had not given the activists the opportunity to voluntarily turn themselves in to police, as they had previously. Detective-Inspector Nicholas also testified that the OPP were in the process of seeking a warrant to search the quarry, based on claims by a confidential informant that there were guns on the site.³⁹ According to Detective-Inspector Nicholas’ testimony and the testimony of other OPP officers, the plans to carry out the arrests were not communicated to other key officers, including the Aboriginal Relations Team and the Critical Incident Commander who had been put in place on April 21.⁴⁰

70. As more community members gathered to find out why Shawn Brant had been arrested, the activists met with the officer in charge of the OPP Aboriginal Relations Team to discuss how to defuse mounting tensions. The activists agreed that they would return peacefully to the quarry after escorting elders from the scene. However, when they tried to do so, OPP officers suddenly and forcefully arrested four of the activists, throwing them to the ground and handcuffing them.
71. In the subsequent trial of these and other activists, Justice Geoffrey Griffin of the Ontario Court of Justice summarized the situation by saying: “A group of the accused acted in good faith. People would wonder about the honour, integrity and word of the Ontario Provincial Police if one officer is saying it is fine, and another officer is saying it is not.” Detective-Inspector Nicholas answered: “Right.” He later acknowledged: “...we did have a breakdown in communication between the ART/MELT person and myself for this specific incident...”⁴¹
72. With the forceful arrest of the four activists, the situation began to escalate out of control as the men fought back and bystanders yelled at the police. In the midst of this confusion, an officer called out that he had spotted a man with a rifle on the hill. The report appears almost certainly to have been a false alarm. On a police videotape, another officer points out that what had been seen was a “a kid with a stick.”⁴² The videotape shows a young man with a stick, not a rifle.
73. The false alarm triggered a further escalation of police response. Police testified at trial that in response to the false alarm a number of officers drew handguns while others retrieved assault rifles from their cruisers.⁴³ One officer called for backup, reporting that a gun had been seen.⁴⁴
74. Nicole Storms (Karennenha:wi), a para-legal who happened to be on site at the time, describes the police response to the false alarm:

This prompted every officer to pull out his or her gun. Some were pulling handguns out of their belt holsters. Other officers suddenly appeared with automatic assault rifles. The officers who were pointing their handguns had both of their hands on their handguns as they pointed them. Police officers were yelling at Deanna [Brant] and me to get down as they ran to position themselves behind cruisers. Deanna and I were telling the police officers that there were no guns at the quarry.⁴⁵

75. Jacqueline Brant recalls that for many of the protesters it was immediately obvious that police were reacting to a false alarm.

We all looked, and you could see that it was a young kid on the hill leaning on a stick. All of us Mohawks started yelling to the kid on the hill: “Get down. Get down.” The kid turned and walked away. I could hear siren after siren coming from the east...toward the area after that. From that moment on, there were OPP everywhere. The police had their rifles pointing at us. Other police officers were pointing rifles towards the quarry. It was scary – total chaos.⁴⁶

76. Despite at least one officer realizing that the reported man with a rifle was actually a young person with a stick, police remained on alert with guns drawn and assault rifles raised for more than 40 minutes. According to numerous eyewitnesses, the OPP aimed assault rifles toward the quarry where the protesters remained and also pointed assault rifles at bystanders. Steve Chartrand, who was among the people arrested that day, said that assault rifles were pointed at people from a distance of only three to six meters.
77. The parents of Dan Doreen hurried to the site to ask about their son. They describe being confronted by an OPP officer who pointed an assault rifle at them from less than 10 meters away as they sat in their truck. Almost three years later, Alberta Doreen recalled: “I was never so frightened in my entire life.”⁴⁷
78. James and Rhonda Kunkel, parents of one of the activists who was arrested, also rushed to the site to make sure their son was okay. When they arrived by truck, they were ordered out of the vehicle with assault rifles pointed at them. James Kunkel, then 59, describes the incident:

We left the quarry entrance and drove north on the Deseronto/Boundary Road down the hill towards the junction with Bridge Street. There were 12-15 OPP cruisers parked at the intersection. I slowed the truck to a crawl. From where we were, I could see about 2 officers for each cruiser – about 25-30 officers. Every officer was holding a rifle, and every rifle was pointed at my truck.⁴⁸

79. Rhonda Kunkel recalls, “I saw police with handguns, shot-guns, machine guns or something like machine guns all pointing right at us. I said to my husband, ‘Oh my God, what do we do now?’”⁴⁹
80. James and Rhonda Kunkel were arrested, and their truck was searched. No weapons were found on their person or in their truck. They were detained for six hours and then released without charges. During her detention, Rhonda Kunkel – who suffers from arthritis, lumbar stenosis and myopathic stenosis – was taken to the local hospital to be treated for pain.⁵⁰ James Kunkel says he was restrained in plastic handcuffs for the six hours that he was held in custody, first with his hands tied behind his back and then with his wrists bound in front. Use of restraints for such a lengthy period is in contravention of *Ontario Provincial Police Orders*.⁵¹
81. After the gun-point arrest of James and Rhonda Kunkel, older activists persuaded a group of four teenagers to leave the quarry for their own safety. The teenagers and numerous witnesses say that as the young people walked from the quarry, the OPP aimed their assault rifles at them. Jessica Culbertson, then 17 years of age, was one of the teenagers. She recalls that police asked the youths if there were firearms in the quarry and they all said that they did not see any. However, even though police had aimed guns at the teenagers, the OPP did not search them for firearms. “The police did not ask us to turn around. They did not search us.... None of us had firearms or weapons of any kind. The police never asked us if we had firearms or weapons on us.”⁵²

82. Protesters report that the OPP then attempted to intimidate the Mohawk activists into leaving the quarry which they had occupied for more than a year. Kevin Maracle, who was one of the activists occupying the quarry, recalls,

The male OPP officer with the megaphone spoke to us at the quarry: “Men in the quarry on the top of the hill proceed down the hill with your hands up and you won’t be harmed.” He repeated this order numerous times.... At this time, there were 10-15 Mohawk people at the quarry. Half of them were women. There were some... youths and a few men. The OPP officer with the megaphone repeated the order for about 15 minutes. The Deseronto/Boundary Road was still blocked. None of us knew why the police were there or why they were trying to get us out of the quarry. One of the Mohawk men yelled: “You’ll have to kill us to get us out!”⁵³

83. Early in the Friday evening, April 25, the activists set up a roadblock on Lower Slash Road, to control access to the quarry through the woods. They later reinforced that blockade by using a backhoe to dig a deep trench across the road a short distance away. On the following day, April 26, the OPP issued a statement that its officers had no plan to “go into the quarry at this time”. However officers were observed to have assault rifles at the ready until the evening of the 26th.⁵⁴
84. According to eyewitnesses, by the morning of the 28th there were only four men left at the Mohawk barricade on Lower Slash Road. Some 200 officers, some equipped with helmets, shields and batons and others with rifles, dismantled the barricade and brought in equipment to repair the road. There was a brief tense confrontation between these OPP forces and community members at the boundary between the reserve and the Culbertson Tract as the OPP took control over the road. By the end of the day, however, both police and protesters had dispersed.
85. As a result of the incidents from April 21 to April 28, 2008, 61 charges of mischief were laid against a total of 17 Mohawk activists. Nine of the protesters were each charged with multiple counts of mischief from the same incident, with separate charges being brought for different roadblocks that made up the protest. In the end, the court convicted eight people on 30 charges of mischief. In addition, one man was convicted of assaulting a police officer, another man was convicted of obstructing a police officer, and a third man was convicted of two charges related to possession of brass knuckles as well as charges of assault with a weapon and committing bodily harm. Finally one man was convicted for breaching the term of a probation order.

OPP BIAS AGAINST THE PROTESTERS

86. Amnesty International has heard numerous complaints from members of the Tyendinaga Mohawk community that OPP handling of the protests was biased toward private interests in the disputed lands and toward the policies of the federal government. Larry Hay, the former Chief of Police of the Tyendinaga Mohawk Police Service (TMPS), has expressed concern over the OPP approach. Hay states, “By mid-April [2007] I was irritated by the apparent attitude of the management of the OPP and the seeming inability of some of my OPP colleagues to understand the reasons behind the protest and the danger to the protesters. Rather, the management of the OPP appeared to view the protesters as criminals – persons who were criminally interfering with the private property rights of the gravel company.”
87. Testimony at trial suggests that at least some of the OPP commanders had only limited knowledge of the legal dispute over the Culbertson Tract and may, in fact, have been biased against the protesters. Testifying in court on July 20, 2010, the OPP Detachment Commander, Inspector Patrick Finnegan, explained the OPP position on the land dispute as, “we want to do everything we can to understand the issue, to maintain public peace and public order in relation to the stakeholders who potentially could become adversaries.”⁵⁵ However, the Detachment Commander also said that while he was not familiar with the history of the severing of the Culbertson Tract, and the many efforts made by the Mohawks to recover the land, he was very familiar with the Federal Government's position on the claim. Asked if he Federal Government's position influenced police decisions, he replied, “Yes, it does.”⁵⁶
88. Inspector Finnegan explained that the Federal Government has made it “crystal clear” that the Mohawk claim to the Culbertson Tract does not in any way affect the exclusive right of the current land owners to do “as they see fit” with the land.⁵⁷ He stated that the Federal Government position “leaves me, as the Detachment Commander and police officers in general who police these issues, with the clear understanding that until a willing buyer, willing seller transaction takes place, then the landowner who's complaining... has rights associated with that land [and] is therefore, as in this case, a victim of mischief.”⁵⁸
89. Amnesty International is concerned by the implications that OPP responses to the protests may have been influenced by a prior determination that efforts to block development on the Culbertson Tract were acts of criminal mischief. Amnesty International is also concerned that the Detachment Commander apparently reached this conclusion based only on the federal government's assertions about Mohawk rights in the Culbertson Tract.
90. Mohawk rights to the lands of the Culbertson Tract were affirmed by the 1793 *Simcoe Deed*. The federal government has acknowledged that these legal rights were violated when the land was unlawfully severed from the community and sold into private hands. The privatization of the Culbertson Tract has created a situation in which there are now

competing interests in the land. A just resolution of this dispute requires acknowledgement and protection of the rights of all parties. Unfortunately, this has not happened, despite decades of efforts by the Mohawks of Tyendinaga. National and international legal standards and precedents suggest that the Mohawks have, at the very least, a right to protection of the land pending resolution of the dispute. The federal government’s position to the contrary, that only the current land-owners have any rights in respect to the land, is not a neutral statement of the law, but a politically convenient assertion by a party to the dispute. As such, it should not be the basis of police decision-making.

EVALUATION OF POTENTIAL THREATS TO PUBLIC SAFETY

91. Beyond measures to ensure the safety of the protesters and the exercise of their right to protest, any additional deployment of police officers, efforts to contain the protest, or attempts to prosecute protesters should have been based on an informed assessment of the potential threats to public safety. While the Culbertson Tract protests inconvenienced members of the public, and had the potential to lead to greater tension and conflict, no credible evidence has ever been brought forward to suggest that they posed a threat to public safety such as would justify the scale and aggressive nature of the OPP response detailed above.
92. In the trial of the thirteen activists charged in connection with the April 2008 incidents, Justice Geoffrey Griffin began his Reasons for Judgment with the following statement:

Nine men and four women of the Mohawk Nation, all members of the Mohawk[s] of the Bay of Quinte, as well as residents of Tyendinaga Mohawk Territory, are facing criminal charges arising out of the concern and need to protect land known as the Culbertson Tract....The men and women charged with criminal offences were motivated by a desire to see that the Culbertson Tract land remains undeveloped until the land claim is resolved.⁵⁹

93. Accounts by protest participants and eyewitnesses show that at tense moments during the various incidents, some activists became rowdy and aggressive toward police and bystanders. The accounts also show that other activists took responsibility for calming these individuals and preventing violence. Eyewitnesses described how protest leaders also worked hard to prevent clashes with non-Aboriginal people who sometimes confronted them at the barricades.
94. Amzy Doreen, a retired motorcycle mechanic, recalls:

What I saw on April 21, 2008 really opened my eyes. I saw my son, Dan Doreen, run himself ragged, after no sleep, to four different Mohawk barricades to try to keep peace when tempers flared on both sides – Mohawk and non-Mohawk. I saw a man drive quickly up to the west barricade at First Street and Highway #2 and demand to know why the Mohawks were blocking the road. I saw the man’s brother walk up with a bat to protect the fellow in the car when they were confronted. I saw Dan defuse that situation before he was called away to deal with another problem. In my view, this makes a peaceful demonstration a little hard.⁶⁰

95. Justice Griffin also recognized the efforts of the protest leaders to avoid violence. He concluded that one of those arrested, Steve Chartrand, *was acting with the firm belief that he was doing something both necessary and right to protect Mohawk land, and more often than not, he was conducting himself in a respectful, albeit forceful manner. While the Crown points to the aggravating factor, Mr. Chartrand having a leadership role, it must be noted that but for his calm, and largely civilized approach, this entire incident could have had a much more negative outcome.*⁶¹
96. With reference to Jana Hill, who was acquitted on all charges of mischief, Mr. Justice Griffin concluded: “Ms. Hill... was a reasonable woman who wanted to maintain an appropriate level of calm in a situation that was by its very nature explosive.”⁶²
97. Overall, accounts by protest participants, eyewitnesses from the community, members of the Tyendinaga Mohawk Police Service, and OPP officers testifying at trial consistently depict a situation in which protesters may have required greater protection from police than was offered, but who themselves posed little threat to public safety. At no point have the OPP or the Provincial Government produced credible evidence otherwise.
98. Significantly, despite the deployment of police snipers during the June 2007 and April 2008 incidents, the OPP have never produced any evidence that the activists had firearms at either protest. The activists themselves have consistently denied having guns. Credible accounts from eyewitnesses who had full access to the protest sites also indicate that the protesters did not have guns.
99. In advance of the June 2007 protest, Shawn Brant was quoted in a Canadian Press story as saying, “We won’t have weapons on the line.” However, he also went on to state that guns “are not far away if we need them.”⁶³ He was also quoted as saying, “We’re not going to be fired upon and not be in a position to defend ourselves....We’re certainly not going to fire the first shot.”⁶⁴
100. Although Brant’s statement leaves the impression that the protesters had at least ready access to firearms, Brant has since stated emphatically that the protesters were committed to a peaceful demonstration and did not have guns. “I had given my word to the community... that there would be no firearms during the protest and I kept to my

word.”⁶⁵ This statement is supported by the accounts of other protesters and community members.

101. Ralph Doreen, who was 63 years old at the time of the June 2007 protests, said he remembers that shortly after the protest began he read a posting somewhere on the internet – possibly the news article quoting Shawn Brant – stating that the protesters might have guns.

I did not believe it and decided to go there and see for myself. I drove to the CN rail line at Wyman's Road where 5 or 6 of our people were positioned and spoke to them. I learned that they did not have guns and that everything was peaceful. I next drove to the intersection of Wyman's Road and Hwy. 2 and spoke to 10 or 12 people there. They included a woman in a wheelchair. They also confirmed for me that there were no guns present. I then drove to the Wyman's Road overpass and the 401. I learned that they did not have guns either and that the OPP had closed down the 401 Highway. There was a media woman present on the overpass with the people. There were no signs of any trouble and everything seemed calm so I went home at around 4:30 [A.M.].⁶⁶

102. It is not clear whether or not the OPP believed the activists had guns during the June 2007 protest. During the preliminary hearing for Shawn Brant in August of 2007, former OPP Commissioner Julian Fantino told the court “my state of mind then and still today is that guns were there.”⁶⁷ However, in three wiretapped conversations between the Commissioner and Shawn Brant during the night of the protest, the Commissioner never asked about or referred to guns. When he expressed concern about possible bloodshed during the protest, he seemed to be referring to the possibility of protesters getting hurt if the police moved to dismantle their barricades. Similarly, the available police notes from that night flag concerns about possible violence if police moved to forcibly dismantle the barricades, as the Commissioner was urging, but do not make any mention of the protesters having guns.
103. Detective-Inspector Nicholas testified in court that during April 2008 incident the OPP were in the process of seeking a warrant to search the quarry, based on claims by a confidential informant that there were guns on the site. No evidence was presented to the court to elaborate on the informant’s claims or to demonstrate their reliability. However, a number of officers who were present that day testified in court that they had not received any briefing or other warning about “the possibility or actuality of guns in the quarry.”⁶⁸ Furthermore, more than a dozen officers testified in court that they had not seen any sign of firearms during the April 2008 incident. A search was never carried out, although protesters occupying the quarry site said that they were prepared to be searched by officers from the Tyendinaga Mohawk Police Service.
104. Winston Brant, a former Regional Co-ordinator of Aboriginal Programs for Corrections Canada, describes the April 21, 2008 protest and the use of the Public Order Unit the following morning:

I went to the Mohawk protest site on the east side of Deseronto. Everything was quiet. It was more like a social event with a tepee and drumming. It reminded me of a pow wow. The barricades were up on Highway #2. I spoke with Dan Doreen, Sergeant Flynn [of the OPP] and others. ...when the protest was winding down, about 30 members of the OPP Public Order Unit – dressed in full riot gear with shields, batons, helmets and face masks – showed up at the east end by Friendly Manor. It was like something out of Darth Vader.... There was nothing threatening about the Mohawk barricades. There were just a couple of vehicles blocking Highway #2. Nothing was burning. There was no debris. There were definitely no firearms among the Mohawk community members.⁶⁹

DISPROPORTIONATE AND DANGEROUS POLICE RESPONSE

105. According to information obtained through access to information requests, the OPP deployed more than 600 officers between April of 2007 and December of 2010 and expended more than 137,000 police officer hours for policing and follow-up in an operation dubbed “Project Culbertson.” According to information obtained under additional access to information requests, between March 2007 and December 2010, overtime, vehicle costs, accommodations, helicopters, aircraft and other expenses of “Project Culbertson” had cost the OPP \$9 million above normal operating costs for the OPP in the Tyendinaga-Deseronto area. Of this \$9 million in additional expenses, approximately \$7.5 million was for police officer overtime and benefits.
106. Police forces deployed in the June 2007 and April 2008 incidents included members of the Tactics and Rescue Unit (TRU), colloquially known as the “sniper unit.” According to the OPP website, TRU officers are deployed in response to “some of the most serious threats to peace and order ... extreme circumstances such as hostage taking, barricaded persons, sniper incidents, search of an armed or dangerous fugitive, execution of a high risk warrant, and occurrences involving explosives, V.I.P. security and prisoner escort.” An OPP officer with TRU who was on duty at the protests on April 21 and 22 stated during the trial of the Mohawk protesters that TRU is “the highest order of force available to be used on site in this kind of operation”.⁷⁰
107. The deployment of such large numbers of officers to respond to an Indigenous land rights protest contravenes the OPP’s stated policy, reflected in its Aboriginal Critical Incidents Framework, to minimize the use of force, de-escalate potential conflicts, and ensure public order wherever possible through negotiation with the protesters. Even more worrisome, the deployment of TRU demonstrates an implicit preparation to use lethal force.

108. The risks of such an approach are demonstrated by the April 25 incident. An already tense situation was further exacerbated by a breakdown in communication between OPP sergeants – and hence between the OPP and the Mohawk activists – and by the decision to forcibly carry out public and warrantless arrests of identified protest leaders. The OPP are trained to ready their firearms only if there is a justifiable intention to use them. OPP policy states that officers “shall not draw a handgun or discharge a firearm unless they believe on reasonable grounds, that to do so is necessary to protect against loss of life or serious bodily harm.”⁷¹ Yet on April 25th, firearms remained readied, and in some cases aimed, long after it should have become apparent that the report of a rifle on the hill had been a false alarm. Guns were pointed at Mohawks at the quarry, four teenagers, the parents of one of the protesters and at least six Tyendinaga community members who came to the site to inquire about the safety of their relatives. While tragedy was fortunately averted, the very act of aiming the weapons demonstrates a preparedness to use lethal force even though no credible evidence of a threat to public safety has ever been established.
109. Significantly, all of this took place in a context in which, as Justice Griffin stated, protesters were acting in the “firm belief” that they were only doing what was necessary to protect their own legal rights.
110. As stated earlier in this Brief, the United Nations *Code of Conduct for Law Enforcement Officials*, as well as the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*⁷² state that force is to be used where other measures are insufficient and only in proportion to the threat at hand. These standards also make clear that the use of firearms and the intentional use of lethal force shall only be permitted when it is strictly unavoidable in order to protect human life. The Inter-American Commission on Human Rights has summed up these principles by stating that use of force is a last resort intended to prevent a more serious harm than is likely to be caused by that use of force.⁷³

DISTURBING GAPS IN ACCOUNTABILITY AND OVERSIGHT

111. Police wield extraordinary powers, including the authority to use lethal force. Effective oversight and accountability is essential to prevent abuse of these powers and to ensure the public trust that is necessary for police to perform their duties effectively. This requires public transparency, effective internal reporting and discipline within police services, and independent review mechanisms and processes, including appropriate oversight at the political level. Amnesty International’s research into the police handling of the protests at Tyendinaga reveals worrying shortcomings in all of these dimensions.

112. The OPP is one of the few police services in Canada to be subject to an independent civilian investigatory body, the Special Investigations Unit or SIU. Had the confrontations with protestors resulted in a serious injury or death, there would have been an automatic and mandatory investigation by the SIU. Given that such a tragedy was fortunately avoided, any investigation, whether internal or external, will only take place at the discretion of the OPP or the provincial government.
113. In its closing submission to the Ipperwash Inquiry, in a section about police accountability, the OPP stated that mandatory review of police handling of “Aboriginal critical incidents” such as protests and occupations is “a central feature of internal accountability respecting Aboriginal critical incidents.” According to the OPP submission, such a review should ensure “not only the systemic review of the OPP response to a critical incident, but the sharing of lessons learned with Commanders, and the incorporation of those lessons” into police training.⁷⁴ Amnesty International has not been able to determine whether or not such a review has taken place in respect to police handling of the Culbertson Tract protests. If it has, the results have not been made public.
114. Amnesty International first called for a review of police handling of the Tyendinaga protests in November 2008. At the time, Amnesty International presented evidence of a disproportionate police response that contemplated use of lethal force against unarmed protesters asserting rights protected by treaty and law. As this brief demonstrates, these concerns have since been substantiated by ample eyewitness testimony and evidence presented at trial by police and defendants.
115. In response to Amnesty International, Chris Lewis, then Deputy Commissioner and now Commissioner of the OPP, said in 2008 that individuals with concerns should make use of the police complaints process. There are many reasons why individuals may be reluctant to use such a procedure, particularly if they are already facing charges. The OPP actions during the June 2007 and April 2008 incidents – including the disproportionate use of force, the failure to keep commitments made during negotiations, and the perceived lack of respect for the motivations of the protest – had all contributed to a further erosion of trust. Accordingly, many of the protestors and witnesses who described serious concerns about police conduct also expressed doubt that their complaints would ever receive unbiased treatment by the OPP. Amnesty International has also been told by some Mohawk protestors and eyewitnesses that they would not use such a mechanism as doing so might be seen as accepting the jurisdiction of the OPP, something that they dispute on the grounds of Indigenous sovereignty.
116. While complaints procedures may provide an important venue for individuals to bring forward concerns, police accountability should not depend on whether the potential victims of abuse at the hands of police make use of this process. When credible evidence is brought forward in any manner that police overreacted to protests, violated their own policies and endangered the lives of protestors and bystanders, the OPP have a clear responsibility to investigate these concerns and ensure that appropriate action is taken.

117. In the course of this research, Amnesty International has also encountered unacceptable gaps in the OPP's internal reporting mechanisms. Under Ontario's *Freedom of Information and Protection of Privacy Act*, Amnesty International requested all Use of Force Reports pertaining to the policing of Tyendinaga protests on April 21-28, 2008 and June 28-29, 2007. In response, the OPP provided one Use of Force Report involving the drawing of a Taser gun. Amnesty International filed an appeal with Ontario's Information and Privacy Commissioner, arguing that there was clear evidence handguns had been drawn and rifles levelled in the April 2008 incidents. In response, an OPP Superintendent acknowledged that four officers had reported drawing a hand gun, but said that only one had submitted the required Use of Force Report and that that report could not be found.⁷⁵ The OPP also stated that no Use of Force Reports were filed for the levelling or aiming of rifles, apparently because of an interpretation that the requirement to file such reports applied only to handguns and tasers and not to rifles. The OPP states that this reporting requirement has since been clarified so that Use of Force Reports are now clearly required for the levelling or aiming of rifles.
118. In response to other access to information requests, the OPP initially refused to share most parts of their training manuals related to the use of firearms. Sections, but not all, of the training materials were gradually released after an appeal to the Information and Privacy Commissioner. The OPP has claimed that sharing this information would endanger the lives of police officers. While there may be some reasonable limits on public disclosure, public access to and knowledge of police policies and procedures is an essential part of accountability and transparency. This was acknowledged by the OPP in its final submission to the Ipperwash Inquiry in which it stated that the OPP recognizes the importance of transparency and accountability. The section on “external accountability” states that “existing OPP policies and protocols, including the Framework, are public, and provide significant external accountability.”⁷⁶
119. Like the OPP, provincial government officials have also refused to meet with Amnesty International to discuss these concerns. In the most recent correspondence⁷⁷, Jim Bradley, Ontario Minister of Community Safety and Correctional Services, states: “As minister, it would be inappropriate for me to discuss the operational activities of the OPP.” While an arms-length relation between government and police is necessary to prevent political interference or the appearance of biased policing, the ultimate responsibility for police conduct lies with the government. In this instance, the concerns brought forward by Amnesty International go beyond allegations of wrongdoing by individual officers. Of greater concern is the evidence that the OPP has failed to abide by its own policies to ensure peaceful resolution of land rights demonstrations and has acted in a manner inconsistent with the government's stated intention to ensure full implementation of the Ipperwash Inquiry recommendations.
120. In Amnesty International's view, the Minister has a duty to consider evidence of breaches of the *Framework* and mishandling of protests and to ensure that these incidents are fully investigated. In our submission to the Ipperwash Inquiry, which examined the issue of government relations with police in the context of a land protest,

we stated that “it is entirely appropriate and to some extent an obligation that governments assert leadership in pressing and demanding that police operations be conducted in full conformity with international human rights standards.” In its submission to the Ipperwash Inquiry, the OPP itself noted that the OPP does brief the government about its decisions and actions in respect to Aboriginal protests and occupations and that this sharing of information with government “contributes to external accountability of both government and the OPP.”⁷⁸

CRIMINALIZATION OF MOHAWK ACTIVISTS

121. Since April 2007, the OPP has laid a total of 100 charges against 19 different individuals involved in protests related to the still unresolved Culbertson Tract dispute. Almost all these charges were of a relatively minor nature. Of the 100 charges, the Crown obtained only 42 convictions. The only sentence of imprisonment handed down by a court was a symbolic one day in jail for Dan Doreen, the Mohawk spokesperson at the April 2008 protest.
122. The low rate of convictions and the limited sentences imposed by the court reinforce the view that police response to the Culbertson Tract protests was vastly disproportionate. At the same time, the multiple charges laid against community members perceived as leaders in the occupations and blockades has had a detrimental affect on their own lives and on the exercise of their rights. The trial and related court proceedings of 13 activists charged after the April 2008 incidents lasted approximately 43 days over a period of more than 2 years. As a consequence of the charges, five of the protesters spent a combined total of 207 days in pre-trial detention. The protesters have also faced the imposition of bail conditions restricting the exercise of their right to engage in public protest or to have contact with other activists. All of this has had the effect of taking people away from their families, causing substantial loss of income and legal and other costs and restricting their ability to engage in their fundamental right to protest.
123. As noted earlier in this Brief, the Inter-American Special Rapporteur on the Right of Freedom of Expression has stated that even when protesters engage in unlawful activities, the public interest in prosecuting these crimes needs to be weighed against the consequence for the exercise of human rights. The rapporteur, an independent expert appointed by the Inter-American Commission on Human Rights, has said that particular care must be taken to avoid denying rights to those for whom public protest may be the only available means to have any effect on government decisions affecting their lives and their rights.

SUMMARY OF CONCERNS

124. The federal government has acknowledged that the Culbertson Tract land was unlawfully severed from the Tyendinaga Mohawk Territory in violation of the *Simcoe Deed*. The wrongful removal of this land from community ownership and control represents an ongoing violation of Indigenous rights to lands, territories and resources that are clearly protected in Canadian and international law. The federal government’s arbitrary and unilateral refusal to take direct responsibility for repurchasing this land as it becomes available has perpetuated this injustice and denied the community its fundamental right to remedy for the violations they have endured. The failure to ensure a fair and timely resolution of the outstanding dispute has also created understandable concern among residents about the value and future of their land titles in the Culbertson Tract. Moreover, it has sowed the seeds of distrust and dissension between the Mohawks of Tyendinaga and their largely non-Aboriginal neighbours.
125. The Ontario Provincial Police response to the Culbertson Tract protests has been vastly disproportionate in terms of numbers of officers deployed, the unjustified resort to the Tactics and Rescue Unit, and the confrontational police tactics that were employed. While the OPP did engage in negotiations with the Mohawk activists involved in blockades, OPP senior officers have demonstrated little patience with the negotiating process and a lack of respect for, or understanding of, Mohawk traditions of collective and consensus-based decision-making. The OPP has consistently pressed for faster resolution than is reasonably possible and, in the April 2008 incidents, acted forcefully against the activists even as the negotiations were close to a peaceful resolution. The OPP’s approach contravenes its own *Framework for Police Preparedness for Aboriginal Critical Incidents* described by the OPP as the “key internal policy addressing its response to Aboriginal occupations and protests.”
126. In the April 2008 incidents, there was nearly a tragic outcome with panicked officers aiming assault rifles, high-powered scope rifles and handguns at unarmed activists and bystanders. The near-tragedy was the consequence of the actions of the OPP, in particular the breakdown in communication between senior officers at the scene, the decision to forcefully arrest leaders of the protest at a potentially volatile moment, and the fact that the OPP chose to put on the scene “the highest order of force available” in the form of the heavily armed Tactics and Rescue Unit.
127. Critical information about these protests should have been immediately available to the OPP command structure and to the provincial Minister responsible for civilian oversight of the OPP. Since November 2008, Amnesty International has been repeatedly calling for a full independent review of these incidents. We are deeply concerned that no such review has taken place.

RECOMMENDATIONS

RECOMMENDATIONS TO THE GOVERNMENT OF ONTARIO

- Adopt a government-wide “peacekeeping” model for policing of Aboriginal occupations and protests, as recommended by the Ipperwash Inquiry.
- Put in place a mechanism for ensuring the Ontario Provincial Police (OPP) and its officers are held accountable for any breach of the *Framework for Police Preparedness for Aboriginal Critical Incidents*.
- Work with Indigenous peoples’ organizations to establish a timetable and process for an independent evaluation of the OPP *Framework*.
- Establish an independent, impartial probe into OPP handling of the Culbertson Tract protests on June 28-29, 2007 and April 21-28, 2008 and make the findings of such a probe public.

RECOMMENDATION TO THE GOVERNMENT OF CANADA

- Actively pursue fair and timely resolution of the Culbertson Tract claim in a manner that is wholly consistent with Canada’s international and domestic human rights obligations, including through making a commitment to purchase lands as they become available.

RECOMMENDATION TO BOTH THE FEDERAL AND PROVINCIAL GOVERNMENTS

- Work collaboratively with the people of Tyendinaga to ensure that their land and resource rights in the Culbertson Tract are fully and effectively protected pending a resolution of the claim.

RECOMMENDATIONS TO THE ONTARIO PROVINCIAL POLICE

- Undertake a systemic review of the OPP response to the Culbertson Tract Protests in June 2007 and April 2008, if such a review has not already been carried out, and make the findings public.
- Ensure that all officers have been properly trained in the application of the *Framework for Police Preparedness for Aboriginal Critical Incidents*.
- Ensure that officers are held accountable for failure to submit required Use of Force reports.

ENDNOTES

¹ *Code of Conduct for Law Enforcement Officials*, GA Res. 34/169, annex. 34 U.N. GAOR Supp. (No. 46) at 186, UN Doc. A/34/46 (1979), adopted by the U.N. General Assembly on December 17, 1979, art. 2 .

² *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

³ IACHR, *Report on the Situation of the Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124/Doc. 5 rev. 1, 7 March 2006, paragraph 62.

⁴ *OPP Emergency Response Services: A Comparison of 1995 to 2006. Submission to the Ipperwash Inquiry*. July 17, 2006. pp. 5, 26.

⁵ IACHR, *Annual Report 2002*, Vol. III, Chapter IV, “Report of the Office of the Special Rapporteur for Freedom of Expression”, OEA/Ser. L/V/II. 117, Doc. 5 rev. 1, para. 35.

⁶ *Report of the Ipperwash Inquiry*, Vol. 2, p. 43.

⁷ *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771.

⁸ *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.) para 367.

⁹ *Tsilhqot'in Nation v. British Columbia and Canada*, 2007 BCSC 1700. para 1116.

¹⁰ cf. 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); Inter-American Court of Human Rights. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision*. Judgment of June 17, 2005. Para 217; Inter-American Commission of Human Rights, *Mary and Carrie Dann v. United States*. Case N° 11.140, Report No. 75/02 (27 December 2002).

¹¹ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. 61/295, 13 September 2007, Art. 28.

¹² *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at 27.

¹³ The Standing Committee on Aboriginal Affairs and Northern Development. Minutes of Proceedings. 1 March 2011.

¹⁴ Inter-American Commission on Human Rights. Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada. October 30, 2009, para. 37.

¹⁵ *Framework for Police Preparedness for Aboriginal Critical Incidents*, p. 2.

¹⁶ Ontario Provincial Police. *Submissions on Behalf of the OPP and its Senior Officers*. Submission to the Ipperwash Inquiry. pp. 16-7.

¹⁷ *Ibid*, p. 21.

¹⁸ *Report of the Ipperwash Inquiry*, Vol. 2, p. 216.

¹⁹ *Report of the Ipperwash Inquiry*, Vol. 2, p. 191.

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- ²⁰ *Report of the Ipperwash Inquiry*, Vol. 2, p. 206.
- ²¹ *R. v. Daniel John Doreen, et al.*, Court Transcript, p. 1075.
- ²² “Mohawk land not for sale: Chief” by Jeremy Ashley in *The Belleville Intelligencer*, January 15, 2009.
- ²³ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res. 61/295, 13 September 2007, Art. 28.
- ²⁴ Inter-American Court of Human Rights. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision*. Judgment of June 17, 2005, para. 151.
- ²⁵ *Status Report on Specific Claims*, December, 2010, Indian and Northern Affairs Canada.
- ²⁶ *R. v. Daniel John Doreen, et al.*, Court Transcript, pp. 403-404, 475, 477, 493-495; Tyendinaga Mohawk Council MCR #2006/07-116; “Native protesters shut down quarry. Mohawk chief says event sends a message to Canada” by Jeremy Ashley in *The Belleville Intelligencer*, March 23, 2007.
- ²⁷ OPP Scribe Notes, June 29, 2007, p. 21.
- ²⁸ *The Belleville Intelligencer*, December 29, 2007
- ²⁹ OPP transcript, interception of telephone calls between Commissioner Julian Fantino and Shawn Brant. 29 June 2006.
- ³⁰ *Ibid.*
- ³¹ OPP Scribe Notes, June 29, 2007, p. 5.
- ³² *Ibid*, p. 11.
- ³³ *Ibid*, p. 20.
- ³⁴ *Ibid*, p. 18.
- ³⁵ Affidavit of Steve Chartrand, July 31, 2008, paragraph 7.
- ³⁶ Affidavit of Jason Maracle, July 17, 2008, paragraph 12.
- ³⁷ *R. v. Daniel John Doreen, et al.*, p. 1084.
- ³⁸ Affidavit of Dan Doreen, July 17, 2008, paragraphs 10-12.
- ³⁹ *R. v. Daniel John Doreen, et al.*, pp 2535-2544.
- ⁴⁰ *Ibid*, p. 2842.
- ⁴¹ *Ibid*, pp. 2742-2743.
- ⁴² *R. v. Daniel John Doreen, et al.*, Court Transcript, p. 2518.
- ⁴³ These weapons became standard issue for the OPP in 2006 and are required to be available to officers in police cruisers.
- ⁴⁴ Notes in court made by Stan Jolly.
- ⁴⁵ Affidavit of Nicole Storms, August 25, 2009, paragraphs 13 and 14.
- ⁴⁶ Statement of Jacqueline Brant, paragraphs 19 and 20.

- ⁴⁷ Statement at a meeting of community participants in the Tyendinaga Research Project on February 8, 2011.
- ⁴⁸ Affidavit of James Kunkel, July 16, 2008, paragraph 10.
- ⁴⁹ Affidavit of Rhonda Kunkel, July 16, 2008, paragraph 9.
- ⁵⁰ *Ibid*, paragraphs 29-31.
- ⁵¹ In section 2.42.2 of the *Ontario Provincial Police Orders*, it states that nylon restraints “shall be removed as soon as it is reasonable to do so.”
- ⁵² Affidavit of Jessica Culbertson, August 19, 2009, paragraphs 21 and 22.
- ⁵³ Affidavit of Kevin Maracle, August 1, 2008, paragraph 18.
- ⁵⁴ Affidavit of Jason Maracle, July 17, 2008, paragraphs 41, 42 and 43.
- ⁵⁵ Court transcript of the testimony of Inspector Patrick Finnegan, the OPP Detachment Commander, during the trial of *R. v. Shawn Brant and Steven Chartrand*, pp. 26-27.
- ⁵⁶ *Ibid*, p. 50.
- ⁵⁷ *Ibid*, p. 19.
- ⁵⁸ *Ibid*, p. 50.
- ⁵⁹ *R. v. Daniel John Doreen, et al.*, Reasons for Judgment, p. 1.
- ⁶⁰ Affidavit of Amzy Doreen, August 6, 2008, paragraph 6.
- ⁶¹ *R. v. Daniel John Doreen, et al.*, Proceedings at Sentencing, October 4, 2010, pp. 22 and 23.
- ⁶² *R. v. Daniel John Doreen, et al.*, Reasons for Judgment, p. 51.
- ⁶³ “The Long Hot Summer” by Susanna Kelley on CBC Radio’s *The Current*, March 26, 2008.
- ⁶⁴ *Ibid*.
- ⁶⁵ Affidavit of Shawn Brant, August 1, 2008, paras. 5-9.
- ⁶⁶ Affidavit of Ralph Doreen, August 6, 2008, para. 3.
- ⁶⁷ *R. v. Shawn Brant*, Testimony of Commissioner Fantino, Court Transcript, p. 422.
- ⁶⁸ *R. v. Daniel John Doreen, et al.*, p. 1964.
- ⁶⁹ Affidavit of Winston Brant, August 6, 2008, para. 8.
- ⁷⁰ Testimony of Constable Elliott Burchart, Court Transcript, p. 1074.
- ⁷¹ *Ontario Provincial Police Orders Regarding Firearm Use*, Chapter 2.42.4.
- ⁷² *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.
- ⁷³ IACHR, *Report on the Situation of the Human Rights Defenders in the Americas*, OAS/Ser.LV/II.124/Doc. 5 rev. 1, 7 March 2006, paragraph 62.
- ⁷⁴ Ontario Provincial Police, *Closing Submission to the Ipperwash Inquiry*, p. 44, para. 99.
- ⁷⁵ IPC Order PO-2862, p. 3.

⁷⁶ Ontario Provincial Police, *Closing Submission to the Ipperwash Inquiry*, p. 47, para. 108.

⁷⁷ Jim Bradley, Ontario Minister of Community Safety and Correctional Services, letter to Amnesty International, received 5 January 2011.

⁷⁸ Ontario Provincial Police, *Closing Submission to the Ipperwash Inquiry*, p. 48, para. 109.