

The Regulatory Role of
The Ontario Ministry of Natural Resources
and the Ministry's Relations with Aboriginal People

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I INTRODUCTION

In Part 2 of its mandate, the Ipperwash Inquiry intends to examine relevant policy issues and make recommendations directed at the avoidance of violence in situations similar to those surrounding the death of Mr. Anthony (Dudley) George. To achieve its stated objectives, the Inquiry has adopted a process that involves commissioning expert research and policy papers on topics the Inquiry considers relevant. Among the topics to be addressed in Part 2 is the role of regulatory agencies in Aboriginal rights disputes in Ontario.¹

The Inquiry suggested such a research paper would include:

- Inventory of provincial and federal regulatory agencies that potentially impact Aboriginal rights, such as the Ontario Ministry of Natural Resources and the federal Department of Fisheries and Oceans
- List and analysis of regulatory agency enforcement mechanisms
- Analysis of historic and current relationship between enforcement agencies and Aboriginal peoples
- Analysis of enforcement protocols employed by regulatory agencies
- Oversight mechanisms
- Gathering and use of intelligence
- Relationship between agencies and police

The purpose of this paper, therefore, is to assist the Inquiry by providing information specific to the regulatory role of the Ontario Ministry of Natural Resources (MNR) in rights disputes in Ontario. While it is not comprehensive in responding to all issues identified by the Inquiry, it will provide at least a general overview of how the MNR specifically is approaching its relationships with Aboriginal people. This paper discusses where the compliance and enforcement components of MNR's legislative and policy framework have the potential to bring MNR and Aboriginal people into conflict and MNR's general response. Relationships with the Aboriginal community, consultation, assistance in the economic growth of Aboriginal communities (where this corresponds to MNR's mandate) are also described.

¹ The Inquiry has already received submission drafted by Jean Teillet entitled, "The Role of Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario." This paper is in part a response to that submission, including an Appendix intended to correct factual errors the MNR perceives in Ms. Teillet's paper as they relate to MNR's business and activities.

II THE ONTARIO MINISTRY OF NATURAL RESOURCES: ITS MANDATE AND ITS RELATIONSHIPS WITH ABORIGINAL PEOPLE

Many people, particularly those who live in southern Ontario, are not familiar with the role of the Ministry as custodian of Ontario's Crown lands and natural resources, and so it is necessary to first describe its mandate and organization in order for the Commission to understand its role as a regulatory agency.

The Ministry of Natural Resources is the steward of Ontario's provincial parks, forests, fisheries, wildlife, mineral aggregates, and the crown lands and waters that make up 87 per cent of the province. This is a major responsibility which MNR manages through a diverse legislative mandate and an array of programs aimed at meeting the needs of a broad client base.

The Ministry vision is to contribute to the environmental, social and economic well-being of Ontario through the sustainable development of our natural resources. This broad mandate and vision guides MNR in the overall delivery of its programs. Policy direction is provided by *Our Sustainable Future*, the Ministry's Strategic Directions document.²

To deliver its mandate, the Ministry is structured into divisions which are, broadly; policy development, program delivery, and corporate support. The areas having the most contact with Aboriginal people include:

- Fish and Wildlife Program
- Lands and Waters Program
- Parks and Protected Areas Program
- Forest Management Program

Program delivery is largely the responsibility of the Ministry's Field Services Division which is organized into three administrative regions of the province, based roughly on ecological areas, with 25 district and 15 area offices. It is at this level that most of the interaction between the Ministry and the Aboriginal community occurs; through the day to day work of Ministry staff, through consultation with First Nations, or one-on-one interactions with Conservation Officers.

A discussion of the enforcement mechanisms used by MNR has to look at the full range of compliance activities and functions delivered by Conservation Officers and by MNR staff generally. MNR's role in regulatory compliance is best described as a continuum. At one end, staff are engaged in promotion and education components, moving through to training and inspection, and finally, to investigation and possibly prosecution at the other end. MNR Conservation Officers, for example, interact with Aboriginal people across this spectrum of activities some of which, obviously, have more potential to create conflict than

² *Our Sustainable Future*, Ministry of Natural Resources Strategic Directions, February 2005.

others. All such activities, however, are carried out with the highest degree of professionalism and with a view to ensuring resources are ultimately managed sustainably for the enjoyment and/or benefit of all Ontarians. MNR continues to enhance its ongoing training and supervision of Conservation Officers to ensure understanding and sensitivity to issues pertaining to Aboriginal and treaty rights. MNR is working cooperatively with Aboriginal organizations and communities who have expressed an interest in ensuring the Aboriginal perspective is included in such training. MNR also continues to work with First Nations directly where there is interest in training Aboriginal Conservation Officers, an important initiative that further enhances everyone's understanding and support for day-to-day enforcement activities (in the various form those activities take).

As relationships with Aboriginal communities are developed at all levels of the Ministry, MNR maintains a central unit to provide policy development and guidance to staff in their interactions with Aboriginal people. Twenty-three non-legal staff members are dedicated solely to the Ministry's Aboriginal affairs portfolio. They provide policy, negotiation and liaison support to field and program staff and engage in direct delivery themselves. In addition, staff at provincial, regional and district office levels of operation are involved in Aboriginal community liaison as part of their day to day work.

MNR's relationships with Aboriginal peoples span more than 130 First Nations and Aboriginal communities, Provincial/Territorial Organizations, and provincial Métis organizations, within a complex mosaic of pre- and post-confederation treaties which is unique in Canada. Ontario's Aboriginal population is the largest of any province in Canada.

MNR is committed to working closely with First Nation communities and the federal government on various issues as they may relate to MNR's mandate including governance issues, land claim settlements, resource allocations, economic development opportunities, and cultural needs.

MNR's structural organization and strategic direction, along with its legislative and regulatory framework, equip it to implement the legislative and policy agenda of the government with respect to natural resource management. However, MNR's management activities also take place within a constitutional framework which sees division of provincial and federal powers and other constitutional issues posing unique challenges. Jurisdictional questions complicate disputes over resource management and regulatory enforcement. Continuing uncertainty about the nature and scope of the rights intended protected by section 35 poses other challenges.

It is acknowledged that the historical policies and practices of provincial and federal governments have resulted in the ongoing disenfranchisement and displacement of Aboriginal people from their lands and traditional practices in Canada. Prior to 1982, court decisions continued to support these policies and were repeatedly decided in favour of governments and the guiding policy of the day.³

³ The Inquiry has received other submissions which discuss and detail this history. The present paper does not intend to revisit or elaborate on that history but, rather, will focus on relations, efforts and initiatives of the present.

Section 35 of the *Constitution Act, 1982*, signaled a profound shift in political and public attitudes. Policies and legislation necessary to effectively implement the protection afforded by section 35 have not followed quickly enough for some. This should not equate to unwillingness on the part of governments to do so, or that governments are not making significant efforts to effect the institutional shifts that are also required to ensure the meaningful implementation of section 35 within their legislative mandates.

In the 23 years since the passing of the *Constitution Act, 1982*, Aboriginal relations in Ontario have been guided by six different governments, each with their own legislative and policy agenda. While there have been variations in the nature of the political relationships between the government of the day and Aboriginal leaders, operational relationships continue to develop through day to day activities and as influenced by case law. Beginning with the *Sparrow* decision in 1990, there have also been numerous landmark decisions which guide and inform the Ministry's activities and relationships. The legal landscape continues to evolve, most recently with the Supreme Court of Canada's decisions in *Haida*, *Taku River*, and *Mikisew*.

The often differing views regarding the nature and scope of treaty rights and of the meaning and intent of the treaties themselves can create additional challenges. This need not be a barrier to productive relationships nor result in dispute or conflict. Parties may seek to reach agreement on rights definition, or seek agreement on approaches to resource management matters through negotiation (without prejudice to principles and definitions that may emerge through evolving case law), or have recourse to the courts for a determination of rights in specific circumstances. A court decision, even from the Supreme Court of Canada, is no guarantee that the parties will see the decision as clear direction on how to advance their relationship.

MNR manages in this changing environment as proactively as it can. It does this through placing emphasis on relationship building, negotiation of agreements, and creating forums for dialogue.

While enforcement of resource regulatory regimes has, historically, been the source of conflict between the Crown and Aboriginal people, such disputes are often distinguishable from disputes over the resources themselves. Disputes over resources, and allocation of resources, often arise due to the ongoing uncertainty about the nature and scope of the rights protected by section 35 but, also arise as efforts are made generally to realize benefits and participate in the development of economic exploitation of resources that would see improved conditions to Aboriginal communities. Such disputes raise different issues and are not specifically addressed herein. Similarly, disputes which arise over conflicts of values and management objectives, and not necessarily as a result of impacts on treaty or Aboriginal rights (although often framed this way by Aboriginal communities) are also disputes of a different nature not specifically addressed in this paper.

Despite these myriad complexities, MNR continues to interact with Aboriginal peoples, for the most part positively, as the Ministry exercises its mandate to manage and protect

Ontario's natural resources. Ontario has an abundance of natural resources and, as stewards of these resources, the Ministry is working to promote healthy, sustainable ecosystems and the resource economies and communities that depend on them. In this context, and in fulfilling the Crown's constitutional obligations, this Ministry continues to engage directly with aboriginal communities on a day-to-day basis.

Governments will always be subject to criticism for not having done enough or quickly enough. This criticism will be leveled from all perspectives as Aboriginal and non-Aboriginal people alike compete for limited resources, be it fish or forests or land or water. Governments are in the unenviable position of making decisions which seek to balance these competing interests in a complex legal, economic and social framework.

In recognition of the particular perspective and interests - including the constitutionally protected rights - of Aboriginal people in resource management activities and decisions, the MNR continues to engage: at local levels, through protocols for consultation and dialogue negotiated between District offices and local Aboriginal communities; and at broader, strategic planning levels such as in the Northern Boreal Initiative, a process with far north Aboriginal communities regarding land use planning relevant to their communities.

Fundamental differences in perspective and approach do exist. However, as dialogue continues to develop and constructive working relationships emerge, it becomes clear that Ministry and Aboriginal perspectives often coincide. Both tend to bring to bear the need for conservation, while at the same time providing for economic development through sustainable management and harvest practices. Western science and traditional ecological knowledge can both, for instance, contribute to informed decision-making and the Ministry continues to make efforts to find ways and means of incorporating diverse perspectives in its management and planning activities.

The Ministry's efforts to engage across a broad spectrum of initiatives and decisions, and its emphasis on enhancing relationships and involving Aboriginal people in the issues and decisions that affect their lives more generally, continues to meet with success. Certainly, from the Ministry's perspective, rights disputes and conflict can be significantly minimized when common interests and objectives are identified and sought.

In the meantime, the Ministry does have a regulatory role and mandate to fulfill. The sections that follow provide further detail and explanation of that regulatory role and provide some concrete examples of the MNR's efforts, within its extensive legislative mandate, to avoid or minimize disputes that may arise regarding Aboriginal and treaty rights that may be impacted through the implementation of the province's regulatory regimes. The examples provided are perhaps not comprehensive of MNR's activities but are, certainly, *representative* of the Ministry's approach to aboriginal issues and people as they are engaged across the spectrum of the Ministry's activities.

III FISH AND WILDLIFE MANAGEMENT

Policy development, direction and a leadership role in the protection and management of Ontario's fish and wildlife resources comes under the jurisdiction of MNR's Fish and Wildlife Branch. Its major legislative authority comes from *The Fish and Wildlife Conservation Act* and the *Ontario Fishery Regulations, 1989*. Other direction comes from, for instance, the federal *Fisheries Act*, the federal *Migratory Birds Convention Act*, federal and provincial *Species at Risk Acts*, the Strategic Plan for Ontario Fisheries, MNR's annual business plan, and the Great Lakes Fisheries Commission documents. Such guidance is, in turn, consistent with principles for sustainable use of fish and wildlife for human use and benefit enumerated in international standards such as the World Conservation Strategy.

Corporate direction for fish and wildlife management comes from the Ministry's strategic planning document, *Our Sustainable Future*, which carries the following MNR commitment:

“Provide leadership and oversight in the management of Ontario's fish and wildlife resources, including species at risk; Great Lakes management; fish culture and stocking; resource monitoring, assessment and allocation; research, food safety and disease control; enhancing fishing and hunting opportunities.”

1) Subsistence Harvesting

a) Legislative Framework and Policy Guidance

The Fish and Wildlife Program provides leadership in sustaining healthy ecosystems, managing and conserving the province's fish and wildlife resources and in maintaining or enhancing the social, economic, cultural and environmental benefits derived from those resources. In achieving diverse fish and wildlife populations as part of healthy aquatic and terrestrial ecosystems, sustainable benefits are provided to society's present and future requirements for a high quality environment, wholesome food, employment and income, recreational activity and cultural heritage.

The Fish and Wildlife Conservation Act (FWCA), proclaimed in 1999, and regulations under the federal *Fisheries Act*, as they pertain to Ontario's waters, are currently the primary mechanisms for regulating, licencing and managing fish and wildlife in Ontario.

Pursuant to these Acts, harvesting of fish and wildlife in Ontario requires a provincial licence. Hunting (and trapping) licences are typically specific to species (ie; moose, deer, small game, wild turkey) and may have seasonal or area restrictions. Fishing, for sport, personal consumption, or commerce, also requires a licence and similarly will restrict the holder to specific species, allowable catch (quotas), as well as areas and seasons.

The *FWCA* also imposes conditions for safety and methods of hunting or trapping in certain circumstances, prohibits harvesting on private property without permission, and addresses specific conservation objectives by making it an offence to, for instance, waste wildlife (i.e.; by abandoning or allowing to spoil), or to sell or purchase fish and wildlife or wildlife parts (except with a licence).

The regime, as currently drafted, does seek to support recreational and tourism goals, largely through management of harvest by general allocation schemes. Like most other jurisdictions in Canada, Aboriginal subsistence harvesting (harvesting for personal/communal food, social and ceremonial needs) has not, to date, been directly addressed or regulated through this provincial scheme. Specific measures employed in implementation of the scheme and in pursuit of broader goals (such as allocations), have not required or resulted in curtailment of Aboriginal subsistence harvesting. Such a need could arise where the interests of conservation demand, but the Ministry's approach in such circumstances would require that other users have first, or equally, been curtailed.

Enforcement of the *FWCA* and the *Ontario Fishery Regulations* is conducted by provincial Conservation Officers, who carry out regular patrols through the province, conduct inspections, investigate suspected violations of the Acts, and ultimately lay charges where warranted.

Certain enforcement activities such as routine inspections, including requests to produce the applicable licence (or, in the case of Aboriginal people, proof of Aboriginal status), can create conflict with Aboriginal individuals who see such routine enforcement activities as a further means of attempting to manage or regulate their activities. Conservation Officers are in the difficult position of being unable to ascertain the identity of the person, or nature of the activity in question, without asking for appropriate documentation and information from the individual. Issues such as these highlight the importance of ongoing Ministry efforts to enhance awareness among Aboriginal people about the nature of Conservation Officer activities, as well as Ministry efforts to increase awareness and sensitivity among Officers in their dealings with the public, particularly with regard to their interactions with Aboriginal people who may be exercising Aboriginal or treaty rights.

These interactions, and any subsequent enforcement and investigation activities, including the laying of charges, are informed and guided by the province's *Interim Enforcement Policy*.

b) The *Interim Enforcement Policy*

The provincial legislation that MNR currently implements, fish and wildlife related and otherwise, does not purport to directly regulate Aboriginal or treaty rights protected by section 35. Indeed, there are various and significant issues with respect to provincial regulation of Aboriginal and treaty rights including federal-provincial division of powers issues, and *Indian Act* and *Charter of Rights and Freedoms* concerns. The Ministry, like other Canadian jurisdictions, continues to consider the means by which Aboriginal and

treaty rights considerations might be appropriately incorporated in its legislation and the ensuing consultation obligations that would flow from such legislative amendment, if proposed.⁴

In the meantime, and in the absence of direct regulation or recognition, the Ministry developed an *Interim Enforcement Policy* to reflect the protections provided by section 35 of the *Constitution Act, 1982*, and to respond to evolutions in the common law, largely as a result of Supreme Court of Canada decisions in the early 1990s. The most significant of these was the *Sparrow* decision in May of 1990. This was the first decision to consider the meaning of section 35 and found that, to give meaning and purpose to the section, the Aboriginal right to harvest fish for food, social and ceremonial purposes must be given priority after conservation and resource management concerns have been satisfied.

The *Interim Enforcement Policy* is a policy directing the exercise of enforcement discretion and was designed to recognize the priority rights of Aboriginal people exercising a constitutionally protected right to harvest fish and wildlife for personal or community subsistence purposes. Pursuant to the policy, Aboriginal people harvesting fish or wildlife for personal consumption or for social or ceremonial purposes are not required to hold the otherwise applicable Ontario licence and will not be subject to enforcement action, except in certain circumstances. These exceptions include:

- hunting in an unsafe manner;
- taking fish or wildlife for commercial purposes (where no right is known to exist and no licence is held);
- taking fish or wildlife in a manner which puts conservation objectives at risk, such as:
 - destruction of fish habitat,
 - fishing or hunting in sanctuaries otherwise justifiably closed,
 - taking threatened or endangered species;
- hunting or fishing on privately owned or occupied land without permission of the landowner.

Significantly, the *Interim Enforcement Policy* also recognizes the principle enunciated in the *Sparrow* decision which says that the relationship between the Crown and Aboriginal people should not be adversarial. To promote this non-adversarial relationship, the *Interim Enforcement Policy* indicates the willingness of the province to negotiate with Aboriginal people regarding their Aboriginal rights to hunt and fish for food when necessary or appropriate. To date, the province and Aboriginal people have successfully negotiated community specific harvesting arrangements (some of which are detailed later in this paper) and the province continues to pursue negotiations in various other circumstances.

⁴ A demonstration of the complexity of these issues can be seen with regard to the use and advisability of non-derogation clauses, which continue to be under review by the House of Commons Standing Committee on Aboriginal Affairs. Provincial and federal governments/departments, and Aboriginal organizations and communities alike, look forward to their report and recommendations as a great deal of uncertainty continues with regard to clauses which speak to non-derogation or recognition of Aboriginal and treaty rights.

As a result of the *Interim Enforcement Policy* and the negotiations it endorses, conflict with Aboriginal people over subsistence harvesting activities has been greatly reduced. Conservation Officers routinely check Aboriginal individuals who are in the field harvesting and, for the most part, these routine checks are without incident and result in no further follow-up where the *Interim Enforcement Policy* would direct.

When charges do result against Aboriginal people, they are usually safety related or are the result of continued uncertainty or dispute in law, a typical example being whether or not the activity took place within the treaty or traditional area of the community asserting the right to the activity. It is often in these cases that negotiations and agreements over harvesting parameters are sought, to give certainty and clarity to all parties.

c) MNR's Pursuit of Negotiated Arrangements

i) Algonquin Harvesting Arrangements

The Algonquin people in Ontario have asserted unextinguished Aboriginal rights and title to approximately 14 thousand square miles (8.9 million acres) in eastern Ontario. They are currently variously represented by the status, *Indian Act* recognized, community of Pikwakanagan, and various other communities in the Ottawa River watershed of eastern Ontario. It appears that the Algonquians never entered into a treaty with the Crown. The absence of treaty or specific judicial determination of the nature and scope of the existing rights of the Algonquin people generally, has left both the province and the Algonquians in a state of uncertainty.

In an attempt to resolve these issues and bring greater certainty and clarity to all, Ontario, later joined by Canada, has entered into negotiations with the Algonquians in Ontario. Decisions to enter such negotiations are informed by significant historical research and legal opinion which suggest there is merit to the claim.⁵

These negotiations have been ongoing since 1991 but have been hampered by issues internal to the broader Algonquin community concerning representation and specific community identification. The negotiation process has been difficult and complex but demonstrates the commitment of all parties to resolving these issues in the longer term.

While these negotiations continue, and in recognition of a certain degree of ongoing uncertainty until the broader negotiations are resolved, the MNR and the Algonquians have sought to accommodate a level of subsistence harvesting, without the requirement of an otherwise applicable provincial licence. The MNR has attempted to engage all interested Algonquians in negotiations to this end and has met with some success, although, engaging the participation of all potentially interested parties at a single table has been as challenging

⁵ See "The Resolution of Land Claims in Ontario: A Background Paper," Ontario Native Affairs Secretariat submission to the Ipperwash Inquiry – Part 2, April 27, 2005, for detailed discussion of Ontario's approach to the resolution of such claims.

for MNR as it has been for Canada and Ontario at the comprehensive claim table. A process has recently been concluded by the Algonquin negotiator which may clarify the identification and representation of the potential beneficiaries of an eventual agreement. MNR is hopeful that, to the extent that the representation issue has been resolved, the MNR specific negotiations will be more fruitful.

In general, the arrangements negotiated are intended to ensure conservation and public safety. The arrangements have provided for a certain level of harvest in Algonquin Provincial Park in an area where hunting is otherwise prohibited but which appears to form a part of the asserted traditional territory of the Algonquin. The arrangements have addressed harvesting areas generally, as well as agreed to seasonal restrictions, harvest levels, eligibility, and monitoring and reporting.

For those communities who have chosen to participate, the arrangements negotiated have proven a useful and important tool in accommodating harvesting while minimizing conflict until such time as a final negotiated settlement is reached with the province and Canada.

ii) The Anishinabek/Ontario Resource Management Council

The A/ORMC is an advisory body that provides advice to the Minister of Natural Resources and the Grand Council Chief for the Anishinabek Nation on the management of natural resources affecting Anishinabek First Nations. A Memorandum of Understanding, signed by both parties in 2000, established the A/ORMC for a period of three years, and this has been renewed.

The goal of the Anishinabek/Ontario Resource Management Council (AORMC) is to improve communication, dialogue, and relations between the Anishinabek Nation and its 42 Member Nations and the Ministry of Natural Resources. The forum is largely focused on practical, operational issues between the parties and does not purport to substantively address higher-order issues such as treaty interpretation differences or federal-provincial division of powers issues of significance to Aboriginal people.

The AORMC provides an opportunity for the Anishinabek First Nations and the Ministry to discuss resource management issues, exchange information, facilitate a common understanding, and collaborate on the resolution of issues. The Council provides First Nations and MNR with a formal, bilateral table through which priority matters within the following broad themes are discussed:

- Communication
- Policy and Intergovernmental Affairs
- Forestry
- Hunting/Fishing/Trapping
- Land Use Planning
- Other issues/initiatives brought forward by First Nations or MNR.

The Anishinabek Nation and Ministry of Natural Resources affirm the basic principles of mutual respect, recognition, responsibility and sharing, and work toward a relationship based on sustainable trust. The parties recognize and respect the right of each First Nation or group of First Nations to pursue its own agenda and priorities. 6

MNR is in preliminary discussion separately with Grand Council Treaty #3 and Nishnawbe-aski Nation (Treaty 9 and that part of Treaty 5 within Ontario's borders) regarding the potential for similar arrangements appropriate to their circumstances. It is too soon to tell whether these efforts will be successful.

iii) Métis Harvesting Negotiations

While section 35(2) of the *Constitution Act, 1982*, defines the Aboriginal people whose rights are protected to include the Métis people of Canada, it was not until the Supreme Court of Canada's decision of September 2003 in *R. v. Powley* that some greater definition and certainty was achieved as to who comprise the Métis people of Canada.

Despite this historic decision, uncertainty and confusion remains. The Supreme Court itself recognized the potential for this ongoing uncertainty and identified the need for the development of a systematic method for identifying section 35 Métis rights-holders on an urgent basis. The challenges in identifying Métis rights-holders should not be minimized. These include: determination of contemporary Métis communities that are continuous with historic Métis communities; determination of who are the individual members of these communities; consideration of what entities can represent the Métis communities in a process identifying rights-holders; and consideration of what is the appropriate role of political organizations in identifying rights-holders.

In implementing the *Powley* decision in Ontario, the province continues to participate in federal-provincial multi-lateral processes in the interests of information sharing and coordination. Independently, Ontario has engaged the Métis political organizations in the province on various issues of interest, including consultations on Ontario's renewal of its Aboriginal policy framework.

With regard to subsistence harvesting, MNR has sought to accommodate harvesting activities through negotiated interim arrangements with Métis.⁷ These arrangements have been pursued through the Métis political organizations currently in existence in Ontario. Indeed, although of limited success, these negotiations preceded the September 2003 Supreme Court decision by several years. These negotiations are complex and present unique challenges in comparison to negotiations with First Nation communities.

⁶ More information is available from the website: http://www.anishinabek.ca/IA_Website/aormc.asp

⁷ Further details regarding these negotiations are provided in Appendix 1, considered necessary to respond to what the MNR perceives as factual errors contained in Jean Teillet's paper (*supra*, note 1), previously submitted to the Inquiry.

There are currently three Métis political organizations in Ontario: the Métis Nation of Ontario, the Ontario Métis and Aboriginal Association, and the Red Sky Independent Métis Nation. Smaller, locally based organizations that claim to represent Métis interests also appear from time to time. There appears to be little consistency among these organizations regarding membership criteria and definition of Métis and all, for example, claim to represent that historic Métis community, and its members, confirmed by the Supreme Court of Canada at Sault Ste. Marie.

None of the organizations have membership criteria that entirely reflect the principles set out by the Supreme Court in *Powley*. At least one of these organizations has indicated that it equates membership in the organization itself with proof of being a section 35 Métis rights-holder. There is also no agreement among the organizations as to where and what constitutes a Métis community and who should represent them.

Despite these uncertainties and challenges, MNR has remained committed to accommodating subsistence harvesting through negotiated interim arrangements while greater certainty is sought and achieved over the longer term. The Ministry has approached these negotiations on an informed and principled basis that would see negotiated arrangements that reflect the *Powley* principles and that are legally defensible otherwise. To that end, MNR has sought to negotiate arrangements that included independent reviews of the organizations' registry systems for compatibility with *Powley*, as well as collaborative identification and pursuit of historic research that might be required to resolve outstanding areas of dispute over, for instance, historic community existence.

In the absence of agreement, and in the face of ongoing uncertainty, the Ministry continues to have a resource management and stewardship role. While negotiations continue, the Ministry acknowledges and implements the *Powley* decision through its exercise of enforcement discretion and application of the *Interim Enforcement Policy*. As example, consistent with the Supreme Court's direction that harvesting rights are geographically specific and limited, and guided by research and information currently available, the Ministry considers the area where harvesting occurs and considers enforcement action as may be appropriate in the circumstances. Charges do continue to be pursued against individuals asserting a Métis right, but this is generally in circumstances where there is uncertainty about the individual's ability to meet the *Powley* criteria, or about the geographic scope of the asserted right. All parties agree that negotiated approaches would ultimately be preferable to adversarial litigation processes, and work continues to this end. There is also recognition, however, that courts can serve a useful purpose in bringing certainty to issues the parties may otherwise be unable to resolve.

2) Commercial Fishing

a) Legislative Framework and Policy Guidance

Ontario fisheries were managed under the *Fisheries Act* (1859, 1867) by the federal government until about 1900. After 1900, the Province of Ontario was "delegated"

authority to participate with Canada in managing fisheries in Ontario waters. Thus Ontario effectively manages its fisheries under the *Ontario Fisheries Regulations* of the *Fisheries Act*, as supported by the *Fish and Wildlife Conservation Act*.

Ontario's scheme for the management of sustainable commercial fisheries includes the use of a licence. Licences provide a means to ensure that those participating in the activity do so in accordance with management objectives, reflected in the terms and conditions set out. Restrictions around seasons, gear, areas and quotas, among others, provide clarity and certainty to the participants, minimize conflicts over gear and others matters on the water and, ultimately, provide for the ongoing sustainability and availability of the resource. A licence also provides the means by which to monitor purchase and sale of fish which provides necessary information about harvest levels and sustainability. In addition, commercial fish licencing provides an important mechanism in the monitoring and enforcement of the sale of contaminated fish and the unwholesome handling of fish.

Until 1994, the only legislative mechanism available to the Minister of Natural Resources for regulation of commercial fishing by any person was the Ontario Commercial Fishing Licence (OCFL). Since late in 1994, the Minister has been authorized by the federal Minister of Fisheries and Oceans to make use of a second fisheries regulatory tool, namely, the Aboriginal Communal Fishing Licence (ACFL). The ACFL can be issued to an Aboriginal community as a legal mechanism for regulation of subsistence or commercial fish harvesting, enabled through the *Aboriginal Communal Fishing Licence Regulations* under the federal *Fisheries Act*.

The Government of Canada developed the ACFL licencing option specifically for Aboriginal communities because it saw a need for an approach to licencing that:

- contemplates the communal nature of the Aboriginal and treaty harvesting rights and activities and could accommodate the terms and conditions of agreements between the Crown and Aboriginal communities
- allowed for flexibility in administrative arrangements, so that an ACFL could make provision for a role for the Aboriginal community in administering harvesting activity by its members.

The licence, OCFL or ACFL, provides the regulatory means to ensure compliance with terms and conditions important to ensuring sustainable commercial harvest, including;

- Quantities and kinds of fish
- Fishing area
- Who can fish
- Identification to be carried
- Harvest reporting
- Gear specifications

MNR's expressed preference with regard to Aboriginal commercial fishing has been to negotiate agreements. These negotiations focus on achieving agreement on appropriate

terms and conditions for the exercise of the commercial harvest activity. In addition, however, agreements are sought as to the means by which the parties can cooperatively manage the fishery, through shared scientific data and data collection, joint compliance activities, financial and administrative commitments, quota determination, and so on. While often negotiated in the context of proven or asserted Aboriginal or treaty rights to engage in the activity, the Ministry's approach has been to focus on improving relationships (structured by the agreements) and enhancing economic opportunities to the communities, while at the same time meeting or addressing any constitutional obligations the Crown may have.

In order to bring these agreements within the current legislative scheme and ensure enforceability, as necessary, the MNR also seeks to have the specific terms and conditions negotiated implemented by way of a licence, preferably an ACFL. Typically this includes just those terms and conditions specific to the harvest activity – gear, species, quota, areas, and so on. The remainder of the terms of the agreements – the relationship and capacity and cooperative management terms – continue to be implemented by way of the agreement itself. As discussed above, the terms and conditions that are licenced are critical to the overall management scheme and provide an accountable and consistent mechanism amongst all commercial fishers (Aboriginal and non-Aboriginal alike) as they share the resource and interact with the Ministry, with each other, and with purchasers of their catch.

As the Ministry exercises its management responsibility, including the ability to licence Aboriginal harvest (confirmed by the Supreme Court of Canada in the *Marshall* decisions and other lower court decisions), and meets its constitutional obligations to Aboriginal people, it fulfills an important role in balancing competing interests and ensuring a managed and sustainable commercial fishery. In this context, a licence provides a necessary and valuable tool to ensure consistency and certainty among all users – fishers, processors, and the ultimate consuming public.

The Ministry's approach has proven largely successful across the province such that disputes over commercial fishing rights have been minimized or eliminated. Some examples follow.

b) MNR's Pursuit of Negotiated Arrangements

i) Great Lakes and Inland Fisheries

Ontario has successfully negotiated agreements with a number of First Nations, including Sagamok, Serpent River, and Mississauga #8. These agreements are supported and implemented through ACFLs which contain terms and conditions negotiated by the parties and consistent with the needs of the management of the fishery overall. As the licences themselves result from a process of negotiation, non-compliance with the terms and conditions is almost non-existent and community interest and support in ensuring the terms and conditions are upheld is enhanced.

MNR is currently seeking to negotiate similar arrangements in Ontario's larger inland lakes. These negotiations are not without challenges and many communities continue to assert their right to harvest without regulation. However, MNR is committed to fulfilling its mandate and ensuring viable fishing resources for all users and will continue to seek negotiated resolutions to commercial fishing issues where possible.

ii) Saugeen Ojibway

In 2000, MNR and the Saugeen Ojibway (comprising the Saugeen #29 First Nation and the Chippewas of Nawash Unceded First Nation) successfully concluded a commercial fishing agreement, the result of several years of negotiation.⁸ The Agreement represented a comprehensive cooperative approach to the management of the fishery in the waters subject to the Agreement and, as a licence under the *Fish and Wildlife Conservation Act*, provided regulatory enforceability to important management conditions (such as total allowable harvest, reporting, net marking).

This agreement, which expired in 2003 brought peace to an otherwise volatile issue and set the stage for an improved relationship between MNR, the First Nations and recreational fishing groups. Negotiations ensued prior to, and after, the expiry of the 2000 Agreement, resulting in another Agreement, largely unchanged, for a further 5 year period, renewable for five years.

While informed and, to an extent, precipitated by the decision of Justice Fairgrieve in *R. v. Jones and Nadjiwon*, the Agreement provides significantly greater access to the fishery than contemplated in the court decision. Given differences between the asserted claims of the First Nations and Ontario's interpretation or understanding of the decision, the parties ultimately reached an Agreement that would see the development of a practical fisheries management approach, while agreeing to disagree on the full nature and extent of the rights and obligations of either the First Nations or the province.

The Saugeen Ojibway commercial fishing agreements provide a clear indication that Ontario is willing to agree to more co-operative approaches to fisheries resource management planning and decision making and to co-operative approaches to harvest regulation.

iii) Anishinabek/Ontario Fisheries Resource Centre

The involvement of First Nations in fisheries – both for food and commercial purposes – led the Ministry and the Union of Ontario Indians to engage in a long-term partnership in fisheries information sharing: the Anishinabek/Ontario Fisheries Resource Centre (A/O

⁸ While it is MNR's preference to focus on current relationships and demonstrate positive results continuing to be achieved, the history of the MNR's relationship with the Saugeen Ojibway and the negotiation process leading to the 2000 Agreement are discussed further in Appendix 2. This Appendix and detail was considered necessary to respond to MNR's perception of factual errors in Jean Teillet's paper (*supra*, note 1), previously submitted to the Inquiry.

FRC). Many fisheries disputes begin with disagreement over available scientific data. In 1993, the Ministry of Natural Resources and the Anishinabek Nation (as represented by the Union of Ontario Indians) negotiated a framework agreement for fishing negotiations entitled the “Anishinabek Conservation and Fishing Agreement.”

Among other things, the Anishinabek Conservation and Fishing Agreement included a commitment to establish a Fisheries Resource Centre that would act as a competent but neutral source of fisheries technical expertise that could be available at the request of the parties involved in a fishing negotiation or issues relating to conservation, management, or allocation of fisheries resources.

The A/OFRC has been involved in several commercial fishing issues (Lake Nipissing, Lake Nipigon) and has undertaken numerous local fisheries assessment projects proposed by individual First Nations, or by a First Nation and MNR collectively, as well as several major projects, such as the Lake Huron-Lake Superior whitefish project. It has sponsored a number of fisheries technical training workshops for Anishinabek community members, and in 2003 it facilitated a workshop entitled “Towards harmony and sustainable use among the Ontario fisheries community.”

This Centre, and the Framework Agreement, provide an important neutral resource that can serve as a model for other areas and issues in the province. The financial and other support the MNR provides is a demonstration of MNR’s commitment to finding cooperative approaches and to minimize disputes that may arise in the management of regulated resources in the province.

3) Commercial Trapping

a) Legislative Framework and Policy Guidance

Since the early 1900’s Ontario has used a legislated licencing system to regulate commercial trapping activity that has been applied to all Aboriginal and non-aboriginal trappers. Pursuant to the *Fish and Wildlife Conservation Act*, licences issued establish quotas and regulations establish seasons and other restrictions pertaining to the harvest of furbearing mammals. In the late 1940’s, a system of trapline registration was introduced. That system and its regulatory framework remained in place and went largely unchallenged until the mid-1990’s.

As the role of government underwent re-definition in the mid-1990’s, MNR established a “new business relationship” with non-aboriginal trappers and established the Ontario Fur Manager’s Federation (OFMF) which is primarily a body charged with issuing Ministry licences pursuant to the FWCA. Consistent with the “user pay” concept of the times, licence fees were increased to raise the revenue required to fund the OFMF.

The management system currently in place for commercial fur is intended to ensure that furbearing mammal populations continue to be maintained in a sustainable manner, and

also addresses concerns such as science and information management, humane treatment of furbearing mammals, and trapper education and training.

ii) MNR's Pursuit of Negotiated Arrangements

Negotiation of trapping agreements had actually begun in 1992 with Grand Council Treaty #3 (GCT#3) and Nishnawbi-Aski Nation (NAN), in recognition of the difficult fit of Ontario's regime with the historic trapping practices of their member communities. With the imposition of both a fee increase and a non-governmental licence issuing body in 1997, GCT#3, NAN and the Union of Ontario Indians completely rejected the provincial system. They issued their own "harvesting certificates" at their own fee to their trappers.

The Ministry passed a regulation in 1997 deeming these treaty organization issued permits to be Crown licences which enabled Aboriginal trappers to continue to sell their fur and maintained the integrity of the international agreement on humane trapping standards which protects Canadian trappers' access to the international fur market.

Negotiations with all three treaty organizations continued, and adjusted with changing times. Administrative capacity had been developed on a pilot project basis in the three treaty organizations and negotiations have reached successful conclusion of agreements. The agreements address, among other things;

- Licensing of First Nation trappers
- Retention of licence revenue by Native trapping administrations
- Trapper and Instructor training
- Trapline transfer
- Commitment to review of registered trapline area allocation system which was last amended in the 1980's without regard for treaty and Aboriginal rights
- Creation of a mechanism to refund amount equivalent to Crown royalties paid by Native trappers
- Commitment to non-binding discussion of longer-term issues and grievances.

Through negotiation of these agreements, MNR has helped Aboriginal organizations put in place the administrative capacity to enable their own delivery of services to their own trappers and to resolve sources of conflict as trapping is otherwise managed and regulated in the provincial trapping system.

Initial funding support for these new arrangements is shared by Canada and Ontario. However, on an ongoing basis, resourcing will remain a significant challenge on this, and many other natural resource management fronts.

III LAND MANAGEMENT

The Ministry of Natural Resources is charged with the responsibility of managing the Crown lands that belong to the people of Ontario. Approximately 87 percent of the land in Ontario is owned and managed by the province. This includes the lands under most navigable waterways. The Ministry's goal for the Crown Land Management Program is:

"To contribute to the environmental, social and economic well-being of the province by providing for orderly use and sustainable development of Ontario's Crown land."

In this context, MNR also recognizes and is sensitive to the fact that Aboriginal people in Ontario continue to maintain various title or reserve land entitlement claims to Crown lands in the province. MNR does not have the mandate to resolve such disputes and must continue to manage Crown land in all Ontarian's interests while title and land rights disputes wend their way through claims processes with the applicable federal and provincial bodies, or through the courts.

The challenge for the Ministry of Natural Resources is to manage Ontario's Crown land, mindful of constitutional obligations that may exist, in a way that balances all of the competing interests - social, economic, environmental - now and into the future. To do this, the Ministry administers two major pieces of legislation related to the management of public lands, the *Public Lands Act*, and the *Provincial Parks Act*.

1) Legislative Framework and Policy Guidance

a) Public lands

The *Public Lands Act* is the major piece of legislation in Ontario for managing the use of Crown land. The *Public Lands Act* provides MNR with the authority and mechanisms to consider the disposition of Crown lands, the granting of authority to occupy Crown land and the ability to manage the use of Crown land through the requirement for "work permits" to undertake certain activities on Crown land.

One of the underlying principles of Crown land management is that these lands are managed for the benefit of all Ontarians. It is for this reason that those that benefit from the use of Crown lands (particularly commercial uses) pay a fee to the Crown, based on the market value of the benefit received. Funds generated in this manner are used to provide a variety of benefits and services for all the people of Ontario, Aboriginal and non-Aboriginal.

Decisions involving Crown land under authority of the *Public Lands Act*, such as whether to sell an area of Crown land or to issue a work permit to undertake an activity on Crown land, take into account environmental, ecological and social implications – consistent with the Ministry's *Environmental Assessment Act* responsibilities and our commitment to the

sustainable management of Crown land and resources. For example, activities that are approved on Crown land commonly have conditions attached that are specifically designed to protect natural resources or the Crown's interest in the land. The *Public Lands Act* provides an important tool in Crown land stewardship and environmental protection. MNR uses the work permit review process to ensure that sound resource stewardship and conservation decisions are made before any types of structures are allowed on public land. The issuance of a work permit is seen as a disposition of rights to a Crown resource and policy guidance informs the Ministry as to how such dispositions are to be considered.

The Ministry has established specific policy to provide for consultation with Aboriginal communities where a disposition of Crown land (eg. through sale, lease, or work permit) may impact on the exercise of existing Aboriginal or treaty rights, or where the disposition involves land subject to an Aboriginal land or title claim. This policy direction also provides the opportunity for local MNR field offices to establish protocols with local Aboriginal communities on the nature of this consultation.

Consultation with Aboriginal communities (and, indeed, all other potentially affected parties) is also provided for in the Ministry's Class Environmental Assessment for Resource Stewardship and Facility Development Projects (Disposition of Rights to Crown Resources).

Consultation with Aboriginal communities on land disposition proposals is aimed at understanding the community's perspective on the potential of the disposition to impact their various interests, particularly protected treaty and Aboriginal rights. Where Aboriginal title or land based claims exist, disposition proposals may be deferred by the Ministry, pending resolution of the claims through litigation filed by the community or through negotiations with the appropriate federal and/or provincial bodies. In other instances, terms and conditions of the disposition may be modified to take into account Aboriginal concerns, where required or appropriate in the circumstances.

MNR also recognizes that general enforcement of the *Public Lands Act* has the potential to impact on the exercise of Aboriginal and treaty rights. In general, Aboriginal people exercising their Aboriginal and treaty rights on Crown land are free to do so and enforcement action will not occur, subject to the *Interim Enforcement Policy*, described earlier in this paper. Enforcement activity is only undertaken where the activity appears to present a significant risk to ecological or resource sustainability, or where there are other compelling and competing public land management program goals. The result of this approach is that there are relatively few charges against Aboriginal people regarding the use and occupation of Crown land.

The right of Aboriginal people to construct or use buildings on public land as incidental to the exercise of their protected hunting or fishing rights was confirmed by the Supreme Court of Canada in the *Sundown* decision of 1999) and presents unique issues for the MNR and its management of Crown lands. While confirming this "incidental" right, the Supreme Court's decision also discusses compelling public objectives with which that right must be balanced.

MNR's current approach to such buildings takes into account both provincial objectives in managing Crown lands (e.g. competing uses, conservation and sustainability issues) and the nature of the rights asserted by the community seeking to build such a structure, as well as the needs of the community (rights being communal in nature, so too are the "incidental" rights) for shelter for their members exercising their rights. In requiring a work permit to construct a shelter incidental to the exercise of treaty and Aboriginal rights, MNR is exercising its interest in the location of the shelter to ensure that the location considers both ecological and safety concerns (e.g. health, flooding, forest fire protection). MNR is currently in discussion with Aboriginal organizations about this approach.

b) Protected Areas

The Ontario Parks branch provides policy and programme leadership for the identification, establishment, and management of Ontario's protected areas - provincial parks and conservation reserves. Ontario Parks' goal, broadly stated, is:

"To ensure that Ontario's provincial parks [and other protected areas] protect significant natural, cultural, and recreational environments, while providing ample opportunities for visitors to participate in recreational activities."

Provincial parks are regulated under *The Provincial Parks Act*. This Act is the enabling legislation that establishes a framework for creating provincial park boundaries and for developing regulations to guide their use. It provides minimal direction about how they will be managed, specific management plans for each park being drafted at the local park level pursuant to an extensive body of policies for planning and management of provincial parks. Planning occurs through a process of public and aboriginal consultation. There are currently 319 provincial parks comprising 7,804,882 hectares of provincial Crown land.

Conservation reserves are regulated under O. Reg. 805/94 of *The Public Lands Act*, which was approved in 1994.⁹ While the regulation prohibits certain industrial uses, Crown lands within conservation reserves are generally managed in a manner similar to other Crown land. There is a formal body of planning and management policy direction, but this is less extensive than for provincial parks. There are currently 280 conservation reserves comprising 1,422,324 hectares of provincial Crown land.¹⁰

Issues arising in MNR's implementation of the applicable Acts that tend to be of most concern to Aboriginal people are the result of the establishment of protected areas or amendment of their boundaries. The perception many people have as protected areas are

⁹ Conservation reserves, like provincial parks, are created with the primary goal of protection of natural heritage features, while allowing compatible uses. These areas have fewer restrictions on recreational and commercial uses than provincial parks and are not formally operated to provide facilities, services or collect fees.

¹⁰ Conservation reserves and provincial parks combined comprise 9,227,206 hectares of the total Ontario land mass of 107,807,505 hectares (approx. 8.5% of the total land mass).

created or boundaries are modified is that the amount of Crown land available for the exercise of treaty and Aboriginal rights, or to settle outstanding land claims, will be reduced. Concerns are also raised over the general management of protected areas and the management planning process that results in the establishment of permitted uses in protected areas.

Increasing the size and number of protected areas has been a priority of successive governments of recent years. The *Ontario Living Legacy Land Use Strategy* (1999) that resulted from extensive consultations across the province recommended 378 new protected areas comprising 2.4 million hectares. Rather than permanently eliminate such lands from potential settlement lands in Aboriginal title or land claims, the *Provincial Parks Act* and *Public Lands Act*, Regulation 805/94, allow that protected areas can be deregulated if appropriate and required for this purpose. In fact, this has been done – examples include the Rainy River Land Claim settlement, and in the creation of the Lake Nipigon Ojibway Reserve. In the meantime, and while land claims continue to be resolved, protected area designation generally has the effect of preserving the lands from other disposition and exploitation.

With regard to the potential to reduce Crown lands available for the exercise of treaty and Aboriginal rights such as hunting and fishing, this issue is largely addressed informally or, where appropriate, through park management planning. In general, the creation of protected areas is not intended to restrict the exercise of Aboriginal and treaty rights; in many protected areas these rights are exercised in a manner identical or similar to the manner in which they are exercised on adjacent Crown lands. Where there are potential conflicting uses, or conservation needs, balancing of these various interests can take place through the planning process. The planning process also provides a means to address Aboriginal concerns not specifically associated with aboriginal or treaty rights, such as development of and participation in commercial tourism opportunities. In general, MNR has been successful in gaining the engagement of Aboriginal people in planning and management processes, and conflict over many issues has been avoided.

2) MNR's Pursuit of Negotiated Arrangements

Protected areas planning and management has provided some unique opportunities to work cooperatively on a local level with Aboriginal communities. Where protected areas and designated uses have posed potential conflicts with asserted Aboriginal needs and uses, creative solutions that balance various competing uses can be found.

At Lake Nipigon Provincial Park, for example, the local Aboriginal communities sought unrestricted access for the pursuit of cultural interests related to their historical use of the area. Park officials and the local communities cooperatively found an appropriate location within the Park to establish a sweat lodge, and negotiated appropriate access to the Park for its use.

Serpent Mounds Provincial Park was in fact regulated in 1957 to protect a significant Aboriginal cultural site. Most of the land was leased from a First Nation for this purpose. A campground and day use area was developed and MNR operated the park until the lease expired in the mid-1990s. At that time Ontario opted not to renew the lease after consultation with the First Nation. The assets were turned over the First Nation which now operates the park successfully, providing jobs and local economic benefits.

The petroglyphs, or rock carvings, that are located within Petroglyphs Provincial Park are considered a spiritual and sacred place to First Nations of Canada, in particular with the Ojibwa-Anishinabe. Referred to by local First Nations as Kinomagewapkong, or “The Rocks that Teach,” the site and the park itself are used for Aboriginal ceremonies, traditional teachings and spiritual visits.

In 1988, in recognition of the significance of the petroglyphs to both the Aboriginal community and Ontario and Canada’s history, the Ministry of Natural Resources built a Visitor Centre to complement “The Teaching Rocks.” Due to other priorities and funding constraints, the interior was not finished. In 1994 a committee was formed consisting of Ontario Parks staff and volunteers from Curve Lake First Nation (designated by the United Anishnaabeg Council as the spiritual caretakers of “The Teaching Rocks”) to determine the feasibility and appropriateness of the exhibits and messages. Over a two-year period, the committee approached elders, interested community members and others to develop themes and terms of reference. It successfully sought funding and, through the efforts of this joint committee the Visitor Centre was finally opened in 2002.

Parks and protected areas management has also resulted in some significant cooperative efforts to manage wildlife populations. For example, through on-going monitoring MNR determined that increasingly large herds of white tailed deer were damaging ecosystems in three provincial parks – Pinery, Rondeau and Presqu’ile. Through public planning processes, decisions were made that deer herds should be reduced in size by culling. For all three parks agreements were negotiated with local First Nations to undertake culling on a joint basis, starting with Pinery and Rondeau in the late 1990s and in Presqu’ile in 2004. These joint deer herd reductions have been a basis for building trust and cooperation with First Nation communities, while dealing effectively with significant resource management issues.

V FOREST AND FIRE MANAGEMENT

The Ministry of Natural Resources' goal in forest management is to ensure the long-term health of forest ecosystems for the benefit of local and global environments, while enabling present and future generations to meet their material and social needs. These goals are variously achieved through forest management activities that are focused on managing the harvest of forest resources, ensuring renewal and protection of forest resources, and conserving and protecting other forest values. Forest fire prevention and management programs are also very important to ensuring the long-term health of forest ecosystems.

1) Legislative Framework and Policy Guidance

a) Forest Management Planning Process

Ontario's forest management planning system for Crown forests is based on a legal and policy framework that has sustainability, public involvement, Aboriginal involvement, and adaptive management as key elements.

The Crown Forest Sustainability Act (CFSA) and *The Environmental Assessment Act (EA Act)* provide the legislative framework for forest management on Crown land in Ontario. The forest management planning requirements of the CFSA and the provisions of the environmental assessment approval under the EA Act are incorporated into the Forest Management Planning Manual, which provides the direction for preparing a forest management plan.

Harvesting of Crown forest resources in Ontario is largely a commercial enterprise and, in that context, the harvesting of Crown timber requires a licence issued by the Crown. MNR's compliance activities are designed to ensure that a licensee follows the rules and the plans that are in place to maintain the sustainability of the forest. An Aboriginal person or company issued a licence to harvest Crown forest resources, is subject to the same compliance monitoring as any other licensee. Where an Aboriginal person or company failed to follow the rules of their licence or the provisions of the relevant Forest Management Plan, or harvested Crown timber without a licence, they would be subject to the remedies and enforcement provisions of Part VII of the CFSA.

Forest operations compliance involves monitoring and evaluating adherence to a set of rules or requirements in order to achieve desired behaviour. In forest management this means that Crown forest users respect the principles, practices, rules and standards designed to ensure that forests are sustainably managed. Preventing damage to the Crown forest, and ensuring remedial action when damage does occur, is the primary focus of forest operations compliance.

Occurrences of Aboriginal forest harvesters being in non-compliance with the terms of licenses they hold are rare. Smaller scale (non-commercial) uses of forest resources for individual Aboriginal and communal purposes are acknowledged and, to some extent,

provided for through forest management planning such that conflict over these uses is also rare. Where not specifically provided for in planning, Ministry reaction and enforcement regarding forest resource related activities of Aboriginal people are guided by provisions of the *Interim Enforcement Policy*. As a result, conflict and disputes over individual activities and protected rights are rare.

Disputes that do arise between the MNR and First Nations regarding forestry activities are usually raised in the forest management planning process and relate to ongoing uncertainty, or differing perspectives, on the nature and scope of existing Aboriginal and treaty rights which might be impacted by forest management activities. The forest management planning system is designed to determine how to best manage the forest resources on the Crown lands already designated available for forest management purposes. It is not a process intended to revise these previous land use decisions.

The Forest Management Planning (FMP) process is also not intended to be a vehicle for the resolution or definition of the nature and scope of treaty and Aboriginal rights, where uncertainty or disagreement continues to exist. Those issues being raised in consultation with Aboriginal communities which are essentially jurisdictional in nature may need to be resolved through litigation or appropriately mandated processes at the federal/provincial level.

The new FMP manual and its processes are, however, responsive to the need to consider Aboriginal interests generally as they may be affected by planning and subsequent operations. Each Aboriginal community in or adjacent to a forest management unit is approached and afforded opportunities to customize their involvement and consultation. Community specific meetings are offered, as is opportunity for, and assistance in, the preparation of documentation dealing with identification and protection of specific Aboriginal values in the management unit. Representatives of Aboriginal communities may be invited to participate on planning teams and, as a result, can play an integral role in plan preparation. This has led to more interaction between Aboriginal and non-aboriginal planning team members facilitating better understanding, issue avoidance and resolution and consequently improved relationships.

While there are underlying jurisdictional issues and broader treaty interpretation issues that may require resolution at levels higher than that of a line Ministry such as the MNR, the MNR will continue to build relationships and ensure forest management planning takes into account Aboriginal interests, as appropriate, and in consultation with those communities potentially affected by forest management activities.

b) Forest Fire Management

The prevention and control of forest fires is vitally important to both the health and sustainability of Ontario's forest ecosystems, but also to the health and safety of Ontario's residents. The MNR administers Ontario's forest fire prevention and management programs through its implementation of the *Forest Fires Prevention Act*. This Act defines

Ontario's "fire season," and establishes conditions for outdoor burning and when burning permits are required. It includes prohibitions on the accumulation of flammable debris and refuse, and provides officers acting under authority of the Act sufficient powers to extinguish fires, order their extinguishment, and otherwise ensure the Act is being respected.

The Act also creates a mechanism whereby agreements can be negotiated with local communities or municipalities for the control and suppression of fires. The Act also provides for cost recovery by the Crown where the MNR is required to act in the face of inadequate control or in the case of accidentally or deliberately set and uncontrolled fires.

There are two areas where enforcement of the Act may raise disputes over rights and bring the MNR and Aboriginal people into conflict: ceremonial fires conducted during restricted fire zone designations, and general enforcement and recovery of costs for fire suppression.

When the risk of wildfire is high in a particular area, it may be designated as a Restricted Fire Zone for a specified period of time. This designation prohibits all outdoor fires, unless authorized by a permit. First Nations construct sweat lodges and have ceremonial fires and view doing so as part of the exercise of their rights. The Act would nonetheless require a permit and is explicitly sensitive to the circumstances in which permits might be granted:

5. (2) An officer may issue a permit to a person for a fire outdoors in a restricted fire zone if the officer is satisfied that the fire can be made, tended, and extinguished safely, and is necessary for a ceremonial event or because of special circumstances O. Reg. 230/00, s.3.

In Restricted Fire Zones, aerial surveillance is heightened and all "smokes" are tended to either by dispatching a ground crew or by a water bomber. MNR requires First Nations to obtain a permit, for which there is no fee attached, so that the date, time and location of a ceremonial fire can be plotted, eliminating the need for needless dispatch of a fire crew. Some First Nations view the requirement of a permit itself to be an infringement of their rights, while the MNR considers it to be a public safety consideration and a matter of proactive communication intended to avoid unnecessary deployment of fire suppression resources and accidental disruption of cultural practices. For the most part, MNR obtains cooperation from Aboriginal communities in this regard and information sharing and communications with communities continues to increase awareness and minimize disputes.

With respect to the recovery of costs incurred by the Crown in forest fire management and suppression, MNR's policy guidance requires that action to recover costs only be taken in consultation with the related First Nation and the Government of Canada. Similarly, the Fire Program does not pursue a strong approach to enforcement (i.e. charges) with respect to fires on and around reserves provided that other interests are not affected.

Consistent with the Act and Ontario's and MNR's general approach to Aboriginal issues, the Aviation and Forest Fire Management Program also has a long history of employing Aboriginal fire crews during the forest fire fighting season and negotiating alternative

service delivery models with Aboriginal peoples/communities. This commitment is contained in MNR's guiding strategy for forest fire management which reads as follows:

“Working with First Nations – OMNR will continue to work closely with First Nations throughout Ontario to enhance existing, or develop new partnerships for fire management delivery, to develop fire prevention initiatives, and to minimize social disruption resulting from forest fires.”

To that end, co-operative tripartite discussions are ongoing between the MNR, the Nishnawbe Aski Nation (representing Ontario's far north Aboriginal communities) and Indian and Northern Affairs Canada regarding the concept of shifting responsibility for the delivery of forest fire protection of Aboriginal communities from the MNR to an Aboriginal forest fire management organization. Oversight of this Aboriginal fire organization would be provided by a three-party advisory board (MNR, INAC, and NAN) to help ensure that Aboriginal peoples increasingly participate in decisions that affect their lives. Pending the outcome of these discussions, there is potential for MNR to assist with First Nations capacity building and advanced skills enhancement in this far north area in order to create long-term jobs and economic development opportunities for First Nations' people.

Following are examples of how the Ministry is meeting the commitment captured by the strategy:

- Lake Superior First Nation Development Corporation: 20 crews contracted; GIS work for district, food service contract for fire crews, and a Restricted Fire Zone contract;
- Atewehike Fire Services: combination of more than eight northern reserves that supply 40 fire crews;
- Pic River Development corporation: 15 Fire crews;
- M T Fire Services: 25 crews.

In addition, Type 2 Fire Crews (auxiliary-type crews) in the province are predominantly First Nation crews, with Aboriginal peoples representing 80 per cent of the total hires in a season. Of the contractors that supply these crews, approximately 66 per cent are First Nation contractors, while the remaining non-native contractors hire a number of Aboriginal crew people.

VI CONCLUSION

Consistent with the specific expressed interest of the Inquiry, this paper has attempted to provide a very general overview of the ways in which the Ministry of Natural Resources' enforcement of the regulatory regimes within its mandate have the potential to bring the Ministry and Aboriginal people into conflict over Aboriginal and treaty rights issues. The paper has provided examples of the Ministry's sensitivity to these issues and its general approach and attempts to minimize the potential for conflict and, indeed, improve and enhance relationships with Ontario's Aboriginal people and communities.

Although not comprehensive of the Ministry's activities and efforts, the examples provided are representative of the Ministry's general approach to Aboriginal issues and people. The Ministry is engaged with Aboriginal people across many other initiatives, some with a treaty and Aboriginal rights component, many others simply aimed at continued efforts to enhance relationships and involve Aboriginal people in issues and decisions that affect their lives more generally.

The Northern Boreal Initiative sees the Ministry engaged directly with far north Aboriginal communities in significant land use planning exercises. The Land Use Plans developed will lead to opportunities for communities to take a leading role in, for instance, the development of new, sustainable commercial forestry opportunities.

The Ministry's role in water management has seen significant dialogue on the development of policies and positions with regard to disposition of Crown land for water power development, including a preferential rating scheme to better enable direct Aboriginal involvement in development opportunities. Significant input from Aboriginal people, communities, and political organizations has also occurred with regard to the negotiations ongoing between the United States and Canada over the Great Lakes Charter Annex, a non-binding but important agreement over water diversion and protection issues.

The Ministry has taken an active role in providing opportunities for, in particular, Aboriginal youth to learn about natural resource management and development through the First Nation Ranger (Youth) Program, Aboriginal Intern Program, and a Summer Experience Program. These programs provide employment and awareness opportunities that have proved significant in encouraging and preparing Aboriginal youth to consider and pursue careers in natural resource management and development.

Aboriginal communities have also expressed interest in supporting their members become involved in enforcement and compliance activities directly. In several instances across the province, communities and the Ministry have worked together to find and foster interested and suitable candidates to train as Conservation Officers, or Deputy Conservation Officers. This has also proven an important vehicle to increase awareness and understanding of differing perspectives and approaches to issues. This program continues today.

The examples throughout this paper demonstrate the Ministry of Natural Resources' awareness and sensitivity to both the constitutional protections afforded Aboriginal people,

and the unique perspectives they can bring to bear on resource conservation and management issues. Where appropriate within its legislative mandate, the Ministry has also made significant efforts to assist Aboriginal communities in realizing improved economic benefits from various development opportunities in the province.

Although faced with a history of conflict, confrontation, disagreement, and lack of trust, relationships continue to improve and with that, better communication, better understanding of one another's perspectives, and less conflict follow. Ministry of Natural Resources' staff have played a significant role in the development and enhancement of relationships with Aboriginal people. This is not to say that disputes will not occur; they are inevitable as Aboriginal and non-aboriginal people alike seek greater clarity and certainty in a dynamic and evolving area of law, and as competition increases for limited resources. The efforts that have begun, however, will continue to result in less conflict and dispute, and greater cooperation and agreement, over resource conservation and management issues and decisions.

APPENDIX 1

The Ministry of Natural Resources' Harvesting Negotiations with the Métis Nation of Ontario

The nature and extent of the Ministry's efforts to implement the Supreme Court of Canada's decision in *Powley*, and the various negotiations toward harvesting agreements with Ontario's Métis political organizations is outlined with some detail in section II of this paper (beginning at page 13).

This Appendix is focused on aspects of those negotiations which took place specifically with the Métis Nation of Ontario. This Appendix was considered necessary and appropriate to respond to what the MNR perceives as factual errors or mischaracterizations of events in the submission to the Inquiry by Jean Teillet, "The Role the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario."

For ease of reference and comparison, MNR's comments that follow will refer to specific passages of Ms. Teillet's submission. As a whole, and combined with the description in Section II of this paper, these comments will provide the Inquiry with a clearer picture of the efforts undertaken by the MNR, and the reasonableness of MNR's approach and positions in a complex and charged negotiation.

P. 59; para. 5 (continued on p. 60): ... *The Ministry took the position that the stay meant that they could not negotiate an agreement that allocated to the Métis any part of the harvest because that would violate the stay and the law.*

Response:

During negotiations, MNR tabled written offers for Interim Arrangements that would have met the food needs of identified Métis harvesters, while ensuring conservation and fair allocations amongst users. These interim arrangements would have allowed the parties to postpone, on an interim basis, the difficult issues associated with Métis community and individual identification.

At no time did the MNR take a position that the stay granted by the Court of Appeal meant that Ontario could not negotiate an agreement. The stay issue was made clear at the negotiating table on numerous occasions and in writing. Ontario negotiated in good faith and was prepared at all times to enter into an interim agreement during the period of the stay.

P 60; 1st full para.: ... *Ministry officials assured the Métis negotiators that Métis who were harvesting for food within their traditional territory, would be screened, but that no charges would result.*

Response:

In the absence of an Interim Arrangement, the MNR made no assurances that charges would not be laid. In the context of a negotiated arrangement, however, the MNR was prepared to see parameters set around who could harvest, when and where, without charges resulting. MNO was unwilling to enter into such an arrangement. In the absence of agreement or other information to inform the MNR's screening process (see discussion of the *Interim Enforcement Policy, infra*, Section II), no promises were made as to the exercise of MNR enforcement discretion. The MNR's approach when in negotiations of this kind, however, is to exercise that discretion in a manner that allows negotiations to proceed productively.

P 60, 3rd full para.: "...two big issues kept the parties far apart from any agreement."

Response:

In the summer of 2004, MNR made an offer to the MNO which would have brought certainty to the issue of Métis harvesting for MNO Harvesters in all of Northern Ontario. This arrangement, offered in a negotiated context and which was potentially broadly over-inclusive of individuals who may have s. 35 rights, would have applied to the vast majority of MNO harvesters.

In order to ensure the arrangement was legally defensible and consistent with the *Powley* decision, the arrangement offered would not have applied to areas where there is uncertainty as to the historic and legal basis for Métis identification. Part of the offer, therefore, included the need to agree on priority areas for further research, as well as a rigorous review of the MNO's own registry system, in order to ensure a longer-term agreement would also be defensible. In the interim, those areas not captured by the arrangement offered would continue to be screened on a case-by-case basis.

The MNO rejected this offer as they continued to assert that their members enjoy hunting rights throughout Ontario notwithstanding the tests laid out by the SCC.

Pp. 60-70: references to the *Four Point Agreement* reached between the MNO and the Minister of Natural Resources and intimations that the Minister of Natural Resources rescinded on promises.

Response:

The Minister and Ministry staff were clear throughout the negotiations that an agreement reached had to be consistent with the principles enunciated in the *Powley* decision and otherwise legally defensible. Immediately following the Minister's commitment to the four points of agreement, the Ministry, supported by the Minister, began to seek a forum to

discuss the implementation of the four points, consistent with *Powley* and consistent with the state of available historical research.

This was conveyed personally by the Minister to the MNO President in a face-to-face meeting they had July 12, 2004 (within 5 days of reaching agreement on the four points) and in writing on July 19, 2004. The MNO, however, despite the Minister's express request otherwise, continued to describe the four points of agreement in publications, in the media, and to their members, as complete and requiring no further discussion or clarity around implementation.

As a result of failing to reach agreement on how the four points should be implemented, and as a result of MNO's ongoing efforts to characterize the four points as complete, confusion and uncertainty arose. This created a climate for significant potential conflict in the field, particularly as hunting season approached. In order to ensure that conflict was avoided or minimized, and in the absence of agreement from the MNO otherwise (despite significant efforts on the part of MNR to engage the MNO to resolve outstanding issues), MNR took the proactive approach of communicating a message of enforcement discretion and leniency, consistent with the offer previously presented to the MNO. This had the effect of ensuring safety of all in the field, while allowing a Métis harvest to occur.

P. 49, footnote 145: Although included as a footnote in another section of Ms. Teillet's paper, the footnote refers to enforcement action targeted at Métis fishermen in Georgian Bay carried out jointly with the Ontario Provincial Police.

Response:

In fact, the incidents referenced were carried out with regard to Ontario Commercial Fishing Licence holders and suspected violations of the terms and conditions of those licences. This comprised standard enforcement activities of the Ministry and that some of the Ontario Commercial Fishing Licence holders may have been Métis was neither central to nor relevant to the enforcement carried out. This was not an issue or dispute about aboriginal rights in the sense implied by Ms. Teillet but, rather, enforcement of terms and conditions of licences held by various commercial fishers. Any press releases about this particular operation were issued jointly with the Ontario Provincial Police.

APPENDIX 2

Commercial Fishing Negotiations with the Saugeen Ojibway

As described in section II of this paper, the MNR and the Saugeen Ojibway have successfully negotiated commercial fishing agreements in 2000 and again in 2005. The negotiations which led to these agreements ensued over many years, years in which the legal landscape changed (both legislatively and through evolving case law) and political and public support and direction changed.

Throughout negotiations, and despite often emotionally charged public and Aboriginal reactions, the Ministry consistently communicated that it believed it was in the best interests of all concerned to negotiate an agreement that ensured conservation, recognized the priority of the aboriginal fishing harvest, and provided reasonable and appropriate access for all users of the fishery in the province.

Initially, the First Nation communities were reluctant to negotiate unless Ontario was prepared "to negotiate the relinquishment of its assumed powers over the fisheries of Lake Huron and Georgian Bay," and forgo the need or requirement of a commercial fishing licence.

Meanwhile, non-aboriginal residents and anglers were critical of both Aboriginal fishers and MNR, who was perceived as being non-responsive to what critics saw as Aboriginal over-harvest and fisheries infractions. Concerns were expressed regarding the health of lake trout populations in Georgian Bay. Commercial fishermen publicly announced fears of being put out of business. In addition, an announcement by the First Nations that they were taking control of the waters surrounding the Bruce Peninsula raised the concerns of residents and cottage owners. At the same time, First Nation members accused non-natives of destroying nets and boats, charging these were racist acts. Several incidents were investigated but no conclusive evidence resulted in charges and accusations about racism were not substantiated.

There is no dispute that these negotiations were difficult and protracted, complicated by the various surrounding circumstances over the years and by the differing perspectives of the parties on the *Jones and Nadjiwon* decision (discussed further below). Nonetheless, MNR's commitment to seeking a negotiated resolution did not waver, the result being the agreements already described, which agreements fulfill the Crown's constitutional obligations but, in addition, realize significant cooperative management and economic development and opportunity goals.

While not seeking to completely revisit the prolonged history of these events, this Appendix was considered necessary and appropriate to respond to what the MNR perceives as factual errors or mischaracterizations of events in the submission to the Inquiry by Jean Teillet, "The Role the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario."

For ease of reference and comparison, MNR's comments that follow will refer to specific passages of Ms. Teillet's submission.

P 53, para 1: ... *This [user group conflicts] has been exacerbated by a stubborn refusal on the part of the Ontario government to recognize that Aboriginal peoples in Ontario possess treaty or Aboriginal rights to the commercial fisheries.*

Response:

With regard to the Saugeen Ojibway fishery specifically, Ontario accepted, without appeal, the 1993 Ontario Provincial Court trial decision in *R. v. Jones and Nadjiwon*, which affirmed that the Saugeen Ojibway First Nations had Aboriginal and treaty rights to engage in sustenance commercial fishing. This decision, like many others in Canada that have found an Aboriginal or treaty right to commercial harvest, also confirms the right and responsibility of the Crown to manage and regulate that harvest.

On May 20, 1993, the Attorney General of the day announced Ontario's decision not to appeal and stated: *"The judgment recognizes the aboriginal rights of the Chippewas of Nawash to fish commercially for subsistence purposes. At the same time, it does not question the government's right to regulate aboriginal fishing; rather, it says that it must be regulated in a way that respects aboriginal rights and we are in full agreement with this approach."*

While accepting the various rights of certain of Ontario's Aboriginal communities to some level of commercial harvest, the MNR also must fulfill its responsibilities to manage the resource and balance competing interests and, as described in section II, continues to seek to do so in consultation and, where possible, in cooperation with Aboriginal communities seeking to exercise such rights. This does not equate to a ("stubborn") refusal on the part of MNR, or Ontario, to recognize such rights.

P. 55, 1st para: suggestion that MNR's use of the ACFL as a tool to regulate communal activities is evidence of MNR's position that: *"...communal use sufficiently recognizes Aboriginal collective fishing rights, while at the same time retaining, with the Ministry, all of the management and control of the fishery."*

Response:

As discussed above, and reiterated by the Supreme Court of Canada in its first decision in *R. v. Marshall*:

“...it is the Minister responsible, and not the First Nation, that is responsible for fisheries management”.

Despite this repeated confirmation by the courts of the Ministry's right and responsibility to manage the resource, the agreements negotiated with the Saugeen Ojibway provide clear

demonstration of Ontario's willingness to seek and agree to more co-operative approaches to fisheries resource management planning and decision making and to co-operative approaches to harvest regulation, rather than a unilateral fulfillment of the Minister's responsibilities.

The Government of Canada developed the ACFL licencing option specifically for Aboriginal communities because it saw a need for an approach to licencing that contemplates the communal nature of the Aboriginal and treaty harvesting rights, and allowed for flexibility in administrative arrangements. MNR has adopted the use of this tool for similar, and very practical reasons (as discussed in section II).

P. 56, last full para: *“The province did not appeal Justice Fairgrieve’s ruling and in June of 1993, the Saugeen Ojibway offered to negotiate a co-management agreement with the Ministry. A year after the First Nations’ request, the Province eventually agreed to negotiate.”*

Response:

In fact, the Ministry had offered to negotiate and had been in negotiations of one form or another with the Saugeen Ojibway since 1989, four years *prior* to the *Fairgrieve* decision. As described earlier, negotiations were complicated by the First Nations’ precondition that Ontario be prepared "to negotiate the relinquishment of its assumed powers over the fisheries of Lake Huron and Georgian Bay." Such jurisdictional disputes are complicated and challenging but do not alter the Ministry’s commitment to find workable resolutions to issues, within its legislative authority and mandate.