IN THE MATTER OF an Inquiry pursuant to the *Public Inquiries Act* R.S.O. 1990, c. P.41, as amended, into the events surrounding the death of Dudley George and the avoidance of violence in similar circumstances.

SUBMISSIONS OF THE PROVINCE OF ONTARIO

PART 1 – EVIDENCE

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Colour of Right

The Law

46. An honest mistake concerning property rights, whether based on a mistake in fact or in law, may constitute a colour of right.

***Lilly v. The Queen* (1983), 5 C.C.C. (3d) 1 (S.C.C.)**

47. As a defence to a criminal charge, colour of right involves a lack of *mens rea*. In that sense, colour of right is "an honest belief in a state of facts or law which, if it existed, would be a legal justification or excuse." If upon all the evidence it may fairly be inferred that the accused acted under a genuine misconception of fact or law, there would be no offence committed because there is colour of right.

***R. v. Howson*, [1966] 3 C.C.C. 348 (S.C.C.) at pp. 356-357**
***R. v. De Marco* (1973), 13 C.C.C. (2d) 369 (Ont.C.A.) at p. 372**
***R. v. Pena* (1997) 148 D.L.R. (4th) 372 (B.C.S.C.)**
***R v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.) at p. 213**

48. There are three conditions to the application of the defence of colour of right:

1. The accused must be mistaken about the state of a private law, not a moral right;

2. That law, if it existed, would provide a legal justification or excuse;

3. The mistaken belief must be honestly held.

***R. v. Howson*, [1966] 3 C.C.C. 348 (S.C.C.) at pp. 356-357**
***R. v. Hemmerly* (1976), 30 C.C.C. (2d) 141 (Ont. C.A.), *per* Martin, J.A. at p. 145 and authorities cited therein.**
***R. v. Pena* (1997) 148 D.L.R. (4th) 372 (B.C.S.C.)**
***R. v. De Marco* (1973), 13 C.C.C. (2d) 369 (Ont.C.A.)**
***R. v. Creaghan* (1982), 1 C.C.C. (3rd) 449 (Ont. C.A.)**
***R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que.C.A.)**
***R. v. Billy* (2004), 191 C.C.C. (3d) 410 (B.C.S.C.)**

49. In cases arising from occupations or blockades of where the accused were charged with mischief for occupying what they thought were aboriginal lands, the Courts have focused on the issues of a whether there was a moral as opposed to legal right, and the accused's "honest belief".

> ***R. v. Pena*** **(1997) 148 D.L.R. (4th) 372 (B.C.S.C.)**
> ***R v. Penashue*** **(1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.)**
> ***R. v. Drainville*** **(1991), 5 C.R. (4th) 38 (Ont.Ct.(Prov.Div.))**
> ***R. v. Potts*****, [1990] O.J. No. 2567 (Q.L.) (Ont.Ct.(Prov.Div.))**

50. The case of *R. v. Drainville* dealt with a protest over the construction of a road over lands in the Temagami area that the accused believed belonged to aboriginal people. In rejecting the defence of colour of right, the judge addressed the issue of moral claims and the rule of law:

> "As noble and honourable his motives might be, they are really irrevelant in our considerations pertaining to "colour of right". Unless it can be demonstrated to this Court, that his honest belief in the existence of a state of facts, in this case title to the subject lands, is based on a mistake of fact or law, his defence cannot succeed on moral conviction alone. Moral convictions though deeply and honestly felt, cannot transform illegal actions into legal ones; only the "rule of law" must prevail."

> ***R. v. Drainville*** **(1991), 5 C.R. (4th) 38 (Ont.Ct.(Prov.Div.)) at pp. 12-13**

51. The test for the presence of an honest belief is subjective, but there must be an air of reality to the claim before the defence is put to the jury.

> ***R. v. DeMarco*** **(1973), 13 C.C.C. (2d) 369 (Ont. C.A.).**
> ***R. v. Robertson*** **(1987), 58 C.R. (3d) 28 (S.C.C.).**

52. In *R. v. Roche*, the Court considered the "air of reality" requirement in relation to an aboriginal protest over land at the Goose Bay Airport. The court found that denial of the fact of Canadian sovereignty over the land and jurisdiction of the Canadian courts was "not a reasonable or practical

assertion in the 1990's", and therefore did not assist the accused in asserting an air of reality.

***R. v. Roche* (1990), 90 Nfld. & P.E.I.R. 199, [1990] N.J. No. 395 (QL) at par. 32**

53. In *R. v. Pena,* a case involving an aboriginal land occupation, the judge considered the following facts in determining whether there was an "air of reality" to the defence:

> a) the registered land owner had been approached by the accused for permission to use the land for ceremonial purposes and permission was granted;
>
> b) subsequent to the ceremony the accused and others entered into an agreement with the registered owner of the land agreeing to conditions as to its use for ceremonial purposes;
>
> c) subsequent to the ceremony the accused and others indicated they were investigating the possibility of advancing a land claim in respect of the land;
>
> d) during the occupation, there were numerous assertions by the occupiers to the effect that they were a sovereign nation on sovereign territory, so they could not be charged or disturbed.

54. The judge in *R. v. Pena* found that all the evidence was to the effect that the accused was well aware of the identity of the registered owner of the land that had been occupied, and there was no evidence of anyone asserting a belief that anyone else was the owner of that land, as recognized by the laws of the Province. Furthermore, there was no evidence that any accused harboured an honest mistake about the laws of this country as they exist, whether public or private; only a belief as to what the law should be if it were to reflect what they believed to be their just cause. The judge found there was no evidence to support any

conclusion other than that the accused held a belief in a moral right to the land despite the law. He therefore rejected the defence of colour of right.

R. v. Pena **(1997) 148 D.L.R. (4th) 372 (B.C.S.C.), at pars. 20, 23-26**

55. It is permissible for the Court to consider the objective legal status of an accused's claim. In addition, while an accused's claim does not need to be objectively reasonable, a trier of fact may consider the reasonableness of the claim as a factor in determining whether the belief was an honest one.

R. v. Hammerbeck **(1991), 68 C.C.C. (3d) 161 (B.C.C.A.)**
R. v. Billy **[2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at par. 21**

56. An aboriginal right does not exist merely because it has been asserted to exist. In the context of colour of right, there must be some basis for a belief in the existence of aboriginal title beyond a bare assertion.

R. v. Billy **[2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at pars.11, 15**

57. The case of *R. v. Billy* involved the blockade of the road to Sun Peaks, which had existed as a public highway for more than 20 years. The accused were convicted of intimidation at trial, and their appeal was dismissed. The appellate judge had this to say about the protesters' bare assertion of ownership:

> "Asserting aboriginal title on a roadway that has existed for some time, as the appellants in this case do, is not sufficient to raise a prima facie case as to their entitlement. The trial judge commented that the appellants' claim was based on a "presumed entitlement" and that they "posit an entitlement to….lands which, rather than having title, they claim title.
>
> …..The trial judge rightly concluded that a bare claim of ownership of the land was insufficient [to establish colour of right]."

R. v. Billy **[2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at pars.14, 15**

58. The case of *R. v. Penashue* also involved a protest at the Goose Bay airport by Innu. Aboriginal protestors gained entry to the airbase that had been in existence for over 40 years by rushing the gate and going under barriers, despite warnings by a security guard and a request by the R.C.M.P. that they leave the airbase. The trial judge reviewed the law with respect to colour of right and rejected the defence. In his decision, the learned judge observed that only legal means can be used to protest wrongs or assert rights:

> "It is clear from the evidence that the accused was involved in a protest. Furthermore, even using a subjective test, while he felt he and his people owned the land it is clear he also knew that by fences, signs, a barricade, etc., that he was not authorized or permitted to go inside the fence and to do so would likely mean he was committing a breach of the law. I do not feel the accused honestly believed he was not doing something unlawful when he went onto the base……
>
> If the acts of the accused amounted to a defence in this case this would basically mean that if one believes in a cause, no matter what surrounding circumstances exist, illegal means can be used to promote that cause. There are obviously lawful methods to reacquire property that has been improperly possessed including civil proceedings….
>
> Certainly no one can breach the criminal law even to protest a civil wrong committed against them. Only legal means can be used to protest such acts."

> ***R v. Penashue*** **(1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.) at pars. 27, 28, 38**

Facts Relevant to Colour of Right

59. Ipperwash Provincial Park had existed for approximately 57 years prior to the takeover by the Aazhoodena. During that time, no legal challenge had been brought to the Province's title to the Park.

60. The Kettle and Stony Point First Nation had requested permission to access the Park in order to use certain lands for ceremonial purposes, and permission had been granted.

61. The Band agreed with the MNR to terms and conditions for access by the Kettle and Stony Point First Nation for ceremonial purposes.

62. In 1993, the Province wrote to Maynard Travis George, a member of the Aazhoodena, and informed him of its position that the Province had title to the Park and was in lawful possession of the Park. According to Ms Jai's notes of a September 5th Interministerial Committee meeting, the Province had invited the Aazhoodena to submit a land claim if they believed they had a valid claim to the Park, but they did not produce anything.

> **Exh. P-215, Inquiry Doc. No. 1007820, Letter to Maynard T. George from MNR District Manager dated June 14/93**
> **Jai, Transcript of Evidence, Aug. 30/95, p. 258**

63. An action had been brought by the Chippewas of Kettle and Stony Point against the Government of Canada claiming that the 1927 surrender of the West Ipperwash Beach land was invalid. The defendant brought a motion for summary judgment. The Reasons for Judgment of Killeen, J. were released on August 18, 1995, granting the motion for summary judgment

and dismissing the claim that the surrender was invalid. Although this case did not include Ipperwash Provincial Park, the circumstances of the surrender were arguably similar to the surrender at issue in Justice Killeen's decision.

Exh. P-648, Inquiry Doc. No. 1004263, Chippewas of Kettle & Stony Point v. Attorney General of Canada et al: Reasons for Judgment – "Chippewas of Kettle and Stony Point & litigation involving Federal Government" Aug. 18/95
Inquiry Doc. No. 1010777, Reasons for Judgment of Killeen J. Aug. 18/95

64. The Park was clearly marked and fenced. It was protected by gates, which were at times closed and locked by MNR staff. When the occupation occurred, the gates were locked and signs were posted that clearly stated the Park was closed.

Consideration of Colour of Right by IMC

65. It was clear that the attendees of the Sept. 6th IMC meeting were aware of the issue of colour of right and that they may have discussed it, but they did not believe that it was a realistic claim.

Hutchison, Transcript of Evidence, Aug. 29/05, pp.194-195

66. Scott Hutchison, who provided legal advice to the IMC on September 6th, explained his understanding of the concept of colour of right:

> Ms. Perschy Q: [A] belief in a moral claim isn't sufficient, it has to be a belief in the state of affairs which, if it existed, would constitute a legal justification or excuse?
> A: Sure. It's got to -- I mean, the -- the person who seeks to rely on the defence has to be able to honestly say, I actually thought I had a legal right to do this. Not -- it's not enough for people to say, I honestly thought that I should have a legal right to do this, or that, In a more properly ordered legal system I would have a right to do this.

Hutchison, Transcript of Evidence, Aug. 29/05, p. 42

67. Lawyers involved at the IMC meetings were of the opinion that the existence of a burial site in the Park did not create a colour of right issue or affect the availability of legal remedies, particularly an injunction.

Hutchison, Transcript of Evidence, Aug. 29/05, pp. 74-76
Jai, Transcript of Evidence, Aug. 30/05, pp. 205-206
McCabe, Transcript of Evidence, Sept. 29/05, p. 231
Christie, Transcript of Evidence, Sept. 26/05, p. 75

68. Mr. McCabe, in his submissions to the Honourable Justice Daudlin, nevertheless raised the possibility that the Aazhoodena may want to make an argument about colour of right to the court. His cautious approach on the issue of colour of right reflected the emerging trend that there be a greater flexibility on the consideration of what might be an "honest belief".

Exh. P- 467, Inquiry Doc. No. 1011152, Transcript of proceedings before Daudlin, J.

Effect of Recent Cases

69. It is possible that in some cases outside the criminal law sphere, a bare assertion of a right may, depending on the nature and strength of the assertion, give rise to an obligation on the part of governments to consult before taking away land over which an aboriginal claim is asserted.

70. The law in this area is continuing to evolve. The colour of right issue might be given greater weight today, in some circumstances, in light of a series of decisions including those of the Supreme Court in *Haida Nation*, *Taku River* and *Mikisew.*

***Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73**
***Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69**
***Taku RIver Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74**

71. *Haida Nation and Taku River* stand for the proposition that aboriginal assertions must be considered if there is the potential for the government to infringe s. 35 rights under the *Constitution Act*, 1982. Similarly in *Mikisew*, the government is to consult with a treaty signatory on the management of a treaty interest to ensure that it is not compromised. According to these cases, the Crown may be required to take steps to accommodate an established or asserted right in cases where the following conditions occur:

- A proposed government action or decision will adversely impact an established right

  or

- A strong case exists for an asserted right, and a proposed government action or decision may adversely affect this right in a significant way.

72. *Haida Nation*, *Taku River* and *Mikisew* do not stand for the proposition that a colour of right assertion gives ownership or possessory rights over land.

Conclusion – Colour of Right

73. It is submitted that the Province was aware of the issue of colour of right when the Interministerial Committee met in September of 1995, and that

counsel fairly raised the possibility that the Aazhoodena might wish to argue they had colour of right when he appeared in court to seek an injunction.

74. There is no jurisprudence, even as it has evolved to date, that supports the view that the concept of “colour of right” entitled the Aazhoodena to act as they did in occupying Ipperwash Provincial Park in September, 1995.