

Kawartha Nishnawbe First Nation
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August 20, 2009

Simcoe County Council
1110 Highway 26
Midhurst, Ontario L0L 1X0

Attention: County Councilors

Re: Dump Site 41

I am writing to you as the Chief of the Kawartha Nishnawbe First Nation. Kawartha Nishnawbe First Nation community is a Mississauga community centred in and around Burleigh Falls, Ontario. Our community holds Treaty and Aboriginal rights, including hunting and fishing rights, over a territory extending from Kingston to Georgian Bay. Since the decision in the Ontario Court of Justice in the case of *R. v. Johnson*¹ the government of Ontario has recognized our harvesting rights in the area shown on the map attached to this letter.

I recently became aware the proposal by Simcoe County to dump garbage in the area known as Dump Site 41 in Tiny Township.

The proposed dump has the potential to affect water and land over a large part of our traditional territory, affecting the natural habitat and environment of species which are subject to our Treaty and Aboriginal rights. Despite this, the Kawartha Nishnawbe First Nation was not even notified of the proposed dump, much less consulted regarding the impacts of the proposed development on our harvesting rights, sacred sites, burials and cultural heritage.

Background on Kawartha Nishnawbe First Nation

The lands around Lake Simcoe and Georgian Bay were among the traditional hunting grounds of the Mississauga (sometimes called Chippewa) Nation, ancestors of Kawartha Nishnawbe. The Mississaugas moved into what is now Southern and Central Ontario after driving out the Iroquois who had taken possession of the area by warfare during the mid-1600's. The Mississaugas were in firm control of the area by the beginning of the eighteenth century. The area provided a rich source of fish, plants, such as wild rice, and wildlife upon which the people depended.

Traditionally, Mississauga bands have, from time to time, merged into larger bands or sub-divided into smaller bands in response to changing social, economic and political conditions. The imposition of the *Indian Act* in the late 1800s further divided First Nation communities by classifying some First Nations persons and communities as "status" and some as "non-status".

At one time the Beausoleil band, the Chippewas of Mnjikaning (Rama) and the Chippewas of Georgina Island were one large community. During the early 1800s they gradually separated into three distinct bands. Some members of Kawartha Nishnawbe trace their ancestry to the band which later became the three communities of Beausoleil, Mnjikaning and Georgina Island. In fact, the first recognized chief of Kawartha Nishnawbe, Jack Jacobs, was originally from Rama. I am a descendant of Jack Jacobs.

¹ Decided January 29, 2002 at Peterborough, Ont.; The Crown filed a notice of appeal but later abandoned the appeal.

Kawartha Nishnawbe did not exist as a distinct band until the late 1800s. Prior to that time the families which comprise Kawartha Nishnawbe were members of several Mississauga / Chippewa bands in the southern and central Ontario. They lived at Burleigh Falls from April to November every year, particularly on Island 15 and Island 31, located in the juncture of Stony Lake and Lovesick Lake, in Harvey Township. They spent the winter months on reserves, or on their family trap lines.

During the late 1800s a distinct community began to emerge at Burleigh Falls as certain families took up guiding and logging to augment their incomes from trapping, hunting and fishing. The economy of the Burleigh Falls community diverged from the economies of the other bands during this period as the members of the Burleigh Falls community continued to follow a more traditional lifestyle, primarily based on traditional trapping, hunting and fishing and other harvesting. At the same time, some “status” bands began to abandon these traditional economic pursuits and develop economies based more on farming and labouring in the wage economy.

At the same time as these economic changes were occurring, the federal government began imposing the *Indian Act* on First Nation communities in southern and central Ontario. Members of these communities were classified as either “status Indians” or “non-status Indians”. Only status Indians had the right to live on the reserve, vote in band council elections, and receive certain benefits from the federal government. Non-status Indians, including most of the ancestors of today’s members of Kawartha Nishnawbe, were excluded.

By 1912, a distinct community or “band” had fully emerged, with its base at Burleigh Falls. Some members of this new band continued to spend winters on the Curve Lake reserve, or on their family trap lines, but it is clear that a separate band now existed; by the mid-1920s, the last remaining members of the Burleigh Falls community had ceased spending the winter months at Curve Lake. The new Burleigh Falls band had its own leadership (Jack Jacobs was the acknowledged leader of the community) and a distinct political, social and economic life from other Mississauga / Chippewa communities. The members of the new band – our ancestors - were primarily “non-status” Indians whose ancestors had been members of the Curve Lake band and other Mississauga / Chippewa bands.

The new community was comprised of the members of five extended families. All of these families had at one time been members of other First Nation communities, but they were not registered as “status” Indians under the *Indian Act*. They had established close ties to each other and to the Burleigh Falls area during the late 1800s and early 20th century. During this time and in the years since our members have continued to exercise our harvesting rights in the area around Lake Simcoe and Georgian Bay, including the area which is the subject of this proceeding.

In 1923 several Mississauga bands in Ontario signed the Williams Treaties. According to Ontario, the bands which signed the Williams Treaties surrendered their harvesting rights off reserve in exchange for cash payments.² Kawartha Nishnawbe was not a party to the Williams Treaty.

Kawartha Nishnawbe First Nation has Constitutionally protected hunting and fishing rights which would be impacted by Dump Site 41, we and must be Consulted

On April 8, 1988, Joseph Johnson, a member of Kawartha Nishnawbe, was charged with a breach of s. 25 of the *Ontario Fishing Regulations* when he attempted to fish in an area known as Perry’s Creek in the County of Peterborough. The area was closed for angling at the time. The Crown argued that the Kawartha Nishnawbe First Nation was bound by the contents of the Williams Treaty of 1923, which they

² The Williams Treaties were signed by the First Nation communities of Christian Island, Georgina Island, Rama, Rice Lake, Curve Lake, Scugog Lake and Alderville.

say extinguished the rights of hunting and fishing outside of reserve lands for the bands which signed that treaty, even though our community never participated in the Treaty.

In the *Johnson* case the Ontario Court of Justice held that the Kawartha Nishnawbe First Nation was an independent First Nation community, separate and distinct from the Williams Treaty bands:

“An Indian community certainly does exist at Burleigh Falls and is now known as the Kawartha Nishnawbe. Despite the name, whether it is the Burleigh Falls community or the Kawartha Nishnawbe, in my opinion it is representative of the original group who settled in the Burleigh Falls area..”

The Court went on to find that the Kawartha Nishnawbe were not signatories to Williams Treaties of 1923. As such, the Aboriginal and Treaty hunting and fishing rights of the Kawartha Nishnawbe had never been extinguished.

“It would also follow that while the Fishery Regulations are very appropriate and proper, the ministry has taken no effort to consult the affected parties, in this case, the Burleigh Falls community, before restricting their right to fish.”

In *R. v. Van der Peet*³ the Supreme Court articulated the test to identify whether a community has an Aboriginal right protected by s. 35 (1) of the *Constitution Act, 1982*. At paragraph [46] the Court said, “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” Certainly the traditional hunting, fishing and other harvesting practices of Kawartha Nishnawbe members would be protected by s. 35.

Following the *Johnson* decision the Government of Ontario negotiated an agreement with Kawartha Nishnawbe which recognizes that our members continue to hold constitutionally protected harvesting rights throughout the traditional territory of the Mississauga Nation. The boundaries of this area are shown in the attached map by a broken line. The map also shows the boundaries of Treaty No. 20 of 1818, which our ancestors were a party to.

It is my understanding that the Supreme Court has held in several cases that governments must consult with First Nations communities before approving any activity or undertaking which could impact on our rights. We have never been consulted concerning the Dump Site 41 project and I am very concerned that it has the potential to significantly impact on our Treaty and Aboriginal rights.

The law is clear that all government agents, employees and officials have a duty to engage in consultations with Kawartha Nishnawbe whenever they contemplate permitting activities which could impact on the rights of our members, including our right to protect our burial sites. The law is equally clear that these consultations must be in good faith, and with a view to addressing our concerns and providing appropriate accommodation for our concerns. It is important to note also that the law requires that consultations occur before any approval of any project which could impact on our rights, and that consultations must occur at *every phase* of the project, from planning to implementation and monitoring.

With respect to Dump Site 41, we have not been consulted at all, at any stage.

³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

Archaeological Concerns

In addition to being the Chief of my community I am a licensed professional archaeologist specializing in the identification, protection and recovery of First Nations burial sites. I have been advised by Mr. Jamie Hunter that he was retained to conduct an assessment of Site 41 in 1987. Mr. Hunter's assessment did not reveal any significant heritage sites or burial sites, however the lands immediately adjacent to the dump site have never been assessed. Mr. Hunter has expressed concern that these areas, which are now undergoing excavation and other modifications in connection with the dump, could contain burial sites or other significant heritage resources.

Mr. Hunter is a competent archaeologist and I am familiar with his work in this matter. I share his concern that this project might proceed without a complete archaeological assessment of the area. This is certainly contrary to current best practices and could result in the desecration of burial sites.

In my culture burial sites are sacred and deserving of the highest possible respect and protection. We do not view ourselves as separate from our ancestors. Our ancestors who have departed for the spirit world remain intimately connected to us and to our land. The desecration of a burial site is deeply traumatic to our people in a way that is very difficult for non-Aboriginal persons to understand. The harm that we suffer in such cases is incalculable and irreparable.

In 2007 the Ontario Superior Court of Justice (Divisional Court) decided the case of *Hiawatha First Nation v. Ontario (Minister of the Environment)*⁴. This case, also known as the *Seaton Lands* case, confirmed that the care and protection of burial sites is an Aboriginal right protected by section 35(1) of the *Constitution Act, 1982*. In *Hiawatha* the Court found that "There is general agreement that the Anishnaabeg practice of honouring the burial sites of their ancestors (also) meets this test..." and is protected by s. 35(1).

It is clear that the government has a constitutional duty to consult with Kawartha Nishnawbe if there is a possibility that our ancestors' remains may be disturbed by this dump site project.

In addition to the government's duty to address our treaty and Aboriginal rights through consultation and accommodation, the County has legal obligations with respect to the preservation of heritage sites. As a licensed archaeologist I am concerned that the provisions of the *Planning Act* and the *Heritage Act* are not being adequately considered. It is my understanding that Ontario's laws require that archaeological assessments occur before any new development occurs which could disturb or damage burial sites or heritage resources.

In addition, I understand that the County of Simcoe's Official Plan requires archaeological assessments to be carried out before any new developments occur. Yet I understand that no assessments have been conducted for the lands immediately adjacent to Site 41, although these lands have been excavated for drainage ditches and storm water runoff facilities.

Our industry's current best practices call for archaeological assessment of any lands subject to new developments. Jamie Hunter, the archaeologist who conducted the partial assessment in 1987, has shared with me his concern that lands which will be impacted by this project have not been assessed. As an archaeologist specializing in the protection of Aboriginal heritage sites and burial sites, I am concerned whenever I see potentially destructive developments proceeding without adequate study and without consultation with affected First Nation communities.

⁴ *Hiawatha First Nation v. Ontario (Minister of the Environment)*, 2007 CanLII 3485 (ON S.C.D.C.)

Conclusion

Kawartha Nishnawbe must be consulted before any further work is done on Dump Site 41. This is not merely desirable – it is a legal requirement. We are prepared to begin good faith consultations immediately, but good faith requires that Simcoe County immediately suspend construction on this project and begin a process of consultations in which our concerns are heard and addressed.

We would appreciate the opportunity to make a presentation to your Council before any further work is done on Dump Site 41.

We look forward to hearing from you.

Respectfully,

Chief Kris Nahrgang