IBA Newsletter

Fall 2004

Indigenous Bar Association

FALL 2004 NEWSLETTER

Combating Hate & Racism

By Charles Smith, Charles C. Smith Consulting

From March 20 – 23, 2004, the Indigenous Bar Association (IBA) and the Quebec Native Women's Association (QNWA) hosted a national conference addressing **Hate and Racism In Canada**.

With funding from the Department of Canadian Heritage, the City of Montreal and support provided by the Law Commission of Canada, the IBA and QNWA established an advisory committee with non-aboriginal partners to develop the conference program, identify speakers, and promote and assist in conference proceedings. These organizations included representatives from the National Anti-Racism Council, the Canadian Race Relations Foundation, the Chinese Canadian National Congress, the Canadian Arab Federation, the Council for Research and Action on Race Relations, B'nai Brith Canada League for Human Rights, and the Canadian Jewish Congress.

The conference brought together a wide spectrum of plenary speakers and workshop presenters and addressed a broad range of historical and contemporary issues related to the conference theme. The proceedings have also been documented for future promotion by Aboriginal Peoples Television Network (APTN).

In the fall, 2002, the issues of hate and racism were brought to the attention of the IBA Board after the widely publicized anti-Semitic comments by David Ahenakew, former National Chief, Assembly of First Nations, and Federation of Saskatchewan Indian Nation Senator. Moreover, Member of Parliament, Jim Pankiw, has made similarly incendiary public comments and publications in the wake of Ahenakew's comments, condemning Ahenakew and the FSIN leadership as racists and

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President's Message

By Dianne G. Corbiere, IBA President

Dear Members:
I am writing to update you on your Board members activities since the Fall of 2004.

Generally, the Board has been pursuing the mandate of the past Boards to ensure that this positive work continues. Many of the Committees that were established over the years continue to be constituted and working for the growth of our organization. We have also established a new Committee: The Students Assistance Committee. The Students are an intrinsic part of the IBA and we will continue to do our part to address

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President's Message

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their issues. Committee Reports will be provided at the AGM in October 2004.

As President, I have been focusing specifically on promoting our Association to other groups, organizations and governments. I attend speaking engagements when possible and continue to work with our partners in the promotion of work for Aboriginal peoples. For example, the IBA was represented at "Canada Aboriginal Peoples Roundtable: Strengthening the Relationship" on April 19, 2004. At this meeting, I was able to speak with the Prime Minister and Minister of Justice briefly on the Appointment of an Aboriginal person to the Supreme Court of Canada.

Aboriginal Appointments to the SCC

I have been working very closely with the Communications Committee (Past Presidents, Don Worme, Mark Stevenson, David Nahwegahbow and Board Member, Linda Locke) on raising the profile of our organization, while advocating for Aboriginal people. We have specifically focused on promoting the inclusion of an Aboriginal person on the Supreme Court of Canada. We have been very active on this front. Some of the efforts to date include:

Commissioned a paper providing the justification for the inclusion of Aboriginal peoples at the Supreme Court of Canada – If you do not have a copy of this paper, please contact Germaine Langan;

Preparing a Submission to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness;

Letter writing campaign to the Prime Minister, Minister of Justice et. al.

Participating in the media to promote this idea;

Working with other Aboriginal governments and organizations to promote this idea. etc.,

We have not received resounding support for our pursuit, but we will not be deterred. I will continue to pursue this advocacy work during my tenure as President.

I will now specifically, report on some of our public education events. You will be able to access more detailed information from these events on our website once we post the information.

Justice Symposium, Banff Alberta, February 27-28, 2004

The IBA convened a symposium to discuss adjudication of disputes in First Nations communities which was sponsored by the Department of Indian and Northern Affairs. This symposium had the Board of Directors in attendance and IBA Judges. The rest of the participants were presenters. This symposium was a huge success. In fact, the IBA will be asked to continue working with other partners in developing concrete solutions in this area.

Hate and Racism: Seeking Solutions, Montreal Quebec, March 20-23, 2004

The IBA and the Native Women's Association of Quebec held a foundational conference. The quality and profile of the presenters was impressive to say the least. The effect of this conference led to the IBA being requested to take the lead in establishing an ongoing secretariat to be established with the partners of this event, which we gladly accepted. The IBA has received funding from Canada's Multi-Culturalism Program to continue this work. Our members will have an opportunity to meet some of our partners at the Fall Conference. We have also hired consultants to facilitate this work, as it is too detailed and specialized for the Board to undertake alone. We have hired Charles S. Smith who received resounding approval from our partners. You will receive a report on his work at the AGM.

There are many other initiatives that I have not commented on because I was certain that others would. This year has proved to be successful , and like our Past President, I am impressed with all of the efforts of our members.

Respectfully,

Dianne G. Corbiere

Please join us for the IBA's 16th Annual Fall Conference

Developing Indigenous Resources- Building Indigenous Economies

Student Day: October 14, 2004
IBA Conference: October 15 – 16, 2004

Fairmont Palliser Hotel, 133 – 9 Avenue S.W. Calgary, Alberta

For information visit our website at www.indigenousbar.ca or contact:

Germaine Langan, IBA Conference Coordinator
Telephone: (604) 951-8807 / Fax: (604-951-8806
E-mail: germainelangan@shaw.ca

INDIGENOUS LAW STUDENTS

MY FIRST YEAR AT LAW SCHOOL

By Nicole Richmond

My first year law school experience at U of T was much like that of all my classmates: exciting, inundating and even slightly glamorous. However my experience was framed by my identity as an Anishinabe-quay. To me, law school is not insurmountable when I remind myself that a legal education equips me with tools that can help my community and others in advancing their goals, such as self-determination and legally re-acquiring traditional territory.

I was fortunate to meet David Nahwegahbow and Dianne Corbiere at last fall's annual IBA conference. I knew their firm had a strong reputation and was committed to working on Aboriginal Title issues, as well as other land claim and treaty-related claims. I was hired by them as a summer student.

Working in a First Nation community at an Aboriginal law firm has been very exciting for me. Often, I look at the work I am doing or the material I am reading and think to myself: "How unbelievable it is to be working on something that is so meaningful to me (and to be paid for it too)". It is also remarkable how much I've learned this past year and how much I have begun to think like the budding lawyer that I am. Considering legal concepts such as "promissory estoppel" or "unconscionability" within the context of different community's land claims makes Contract law seem a thousand times more fascinating. As well, I was lucky enough to have Property law with Darlene Johnson and her insistence in incorporating Aboriginal Title issues into the first-year curriculum has been tremendously helpful.

As many practitioners already know, the practice of Aboriginal law is not all about the big issues. It is primarily about building infrastructure and the day-to-day administration of our communities. However, I am beginning to understand that Aboriginal lawyers seek solutions to even small issues with a view of what is best in the big picture. It is that degree of personal, cultural understanding that sets Aboriginal lawyers apart and I am grateful for my exposure to this unique way of practicing law.

ABORIGINAL PERSPECTIVES OF LAW SCHOOL SURVEY **By Blake Wright**

The student representatives of the IBA are in the process of collecting information from current and former law students about their experience in law school. This information is being compiled for information purposes. The survey seeks to explore the Aboriginal law school experience. Topics include a law school's approach to Aboriginal students as viewed by Aboriginal students and perspectives after leaving law school. Your input is requested and needed in order to make this a more representational survey.

Please contact Blake Wright at bwright2@dal.ca to express your interest and receive a questionnaire.

INDIGENOUS BAR ASSOCIATION LAW STUDENT SCHOLARSHIP

Established in Memory of Ronald Peigan

The IBA Law Student Scholarship Foundation was established in support of scholarships supporting Indigenous law students in Canada. The Foundation will administer an annual scholarship award of $1,000 to be presented to an Indigenous law students that best demonstrates financial need, academic merit and commitment to Indigenous legal matters.

To be eligible, candidates must be an Aboriginal/Indigenous law students currently enrolled in 2 nd or 3 rd year of their legal studies, having demonstrated an interest in serving the Indigenous community and the Creator with honour and integrity.

For more information visit the IBA website at: www.indigenousbar.ca

THE IBA LAW STUDENT SCHOLARSHIP NEEDS YOUR SUPPORT—

DONATE TO THE IBA LAW STUDENT SCHOLARSHIP FOUNDATION AND SUPPORT INDIGENOUS LAW STUDENTS

Combating Hate & Racism

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criminals, and condemning all "race-based policies" that differentiate "Indians" from the rest of Canadian society.

Racism is a root cause of the discrimination suffered by Indigenous Peoples in Canada. Furthermore, the issues of racism and hate in Canada are not confined to Indigenous Peoples – many communities and individuals in Canada have become victims of these vitriolic acts. Racism and hate in Canada have been discussed and studied through various institutions and commissions, including the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System and the Royal Commission on Aboriginal Peoples. For these reasons, this conference was conceived to bring together Indigenous and non-Indigenous leaders, academics, lawyers, policy makers, educators and community activists to dialogue on existing and future strategies to address racism and hate in Canada.

For the IBA, this conference was a fundamental starting point to address hate and racism in Canada and was designed to develop numerous measures to be taken to ensure continued long-lasting progress. Some of these measures include:

- Compiling all academic and research papers produced for this conference to be made available on the IBA's website, as well as being published on CD-ROM and/or book form.

"The IBA is fully aware that eliminating hate and racial intolerance will not occur in a two-day conference...it will require a long-term commitment and a continued working relationship with our partners and other organizations"

- Establishing a Joint Communication Strategy Network to ensure that long-term public education and community working group policies are focused upon with certain conference material being consolidated. Relevant material will be made accessible nationally, then distributed to the general public and key leaders at the provincial, territorial, and municipal levels, as well as key organizations.

- Setting up a Secretariat involving the IBA and representatives from several of the organizations actively engaged in the conference.

The IBA is fully aware that eliminating hate and racial intolerance will not occur in a two-day conference. It will require a long-term commitment and a continued working relationship with our partners and other organizations. The remainder of this report addresses actions needed to achieve this goal.

To assist in pursuing these goals, several recommendations were put forward as a follow-up to the conference. These recommendations concerned:

- establishing a secretariat to provide input and advice on follow-up activities;

- adopting terms of reference to guide conference follow-up actions;

- responding to recommendations for education/training, information sharing, networking and advocacy raised at the conference; and

- convening future conferences.

Specific actions on each of these addressed the importance of collaboration and networking with representatives who attended the conference on such matters as: communications and information sharing; education and training; advocacy and coalition building; identifying current issues and best practices. In addition, it was strongly recommended that future conferences like the March 20-23, 2004 be convened, perhaps annually, to enable this dialogue to continue and to support the growth of a movement to collectively address hate and racist activities in Canada.

At the final session on Tuesday, March 23, 2004, it was agreed that the conference follow-up would be facilitated by the IBA and the QNWA and that this be done at a pace that would recognize the diverse interests of individuals and organizations in this initiative and enable inclusive participation.

Keep tuned. You will be hearing more about this work in the future.

"The Economic Impacts of Racism"

Friday, October 15, 2004
Indigenous Bar Association Annual Fall Conference—Calgary

Chair: Mark Stevenson, LCC

Presenters:
Professor Michelle Williams, Director, Indigenous Black & Mi'kmaq Programme, Dalhousie Law School

Jeff Hewitt, General Counsel, Chippewas of Mnjikaning First Nation

Charles Smith, Charles C. Smith Consulting

IPPERWASH INQUIRY

EVENTS LEADING TO THE ESTABLISHMENT OF THE IPPERWASH INQUIRY

By Delia Opekokew, June 22, 2004

Being in the forefront of a case may not always be the best of times.

I started the Dudley George/Ipperwash case when I was retained on January 18, 1996 to represent the family of Anthony O'Brien "Dudley" George, who had been shot on September 6, 1995. It was, in hindsight, one of the best – and worst – things I ever did.

The lawyer who had originally been retained by the family had resigned due to conflicts of interest. When he advised the family of his resignation, he also advised the family that they had a six-month limitation period to commence an action to recover damages for the wrongful death of their brother. That time was almost up. Needless to say, they came to me with a certain amount of concern. I had been approached by Veronica's brother Gary George, on behalf of the family, prior to my decision to take on the case, but had refused because of my concerns that the case would be too large and complicated. Veronica is the wife of Sam George, the lead spokesperson for the family. I was told they could not find another lawyer and in the end I reluctantly accepted the case because it seemed to me that the family had no other recourse. Sam told me they wanted to know who had shot their brother, the cause of his death, and the surrounding circumstances of the shooting.

What followed was a real roller coaster ride for me as a lawyer, and for me as a person. In the end, the financial pressure of the case forced me to relocate from my beloved Toronto, Ontario to my original home in Saskatchewan, where other work was available.

The good news became that the Government of Ontario established the Ipperwash Inquiry on November 12, 2003, under the Public Inquiries Act. Its mandate is, among other things, to inquire and report on events surrounding the death of Dudley George. This is exactly what the family wanted from the start.

Immediately upon my being retained, the George case swamped the rest of my caseload. All the literature indicated that in a wrongful death case lawyers are usually able to obtain facts for the Statement of Claim from the report of an inquest, but that it is otherwise often difficult to obtain the necessary facts. I quickly started to negotiate with the Chief Coroner in Toronto and the Regional Coroner for Southwestern Ontario to attempt to have an inquest called. I was told that the Coroner was not in a position to call an inquest while the Special Investigation Unit (S.I.U.) investigation continued, and further, if criminal charges against various Police Officers were laid, that the Coroner had no jurisdiction to call an inquest until after the prosecutions are completed. And the SIU report had not been released.

As there was no record to work from, I had to attend at Ipperwash and Kettle Point to interview witnesses—many of whom were so frightened and angry I could barely get them to speak to me. I called numerous experts and other lawyers for background. One lawyer, who had been involved in a wrongful death suit against the police, told me that the best advice he could give me was for me to resign from the case because it would change my life as it had for him. He had suffered a heart attack. However, I persevered. I had only two months to figure out as best I could what had happened on that dark and crazy night, and to prepare a Statement of Claim. Eventually, the family and I convinced Murray Klippenstein and Andrew Orkin to join as co-counsel. We didn't tell them about the heart attack.

The drafting of the Statement of Claim involved a lot of dark and crazy nights on its own. I remember observing to Murray one morning, while we were driving down University Avenue in Toronto at 4:30 in the morning after a drafting session, that the traffic lights

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OPPORTUNITIES AT THE UNIVERSITY OF OTTAWA

uOttawa

Faculté de droit
Faculty of Law

Section de common law
Common Law Section

The Common Law Section of the University of Ottawa invites applications to fill one or more tenure-track positions in the English language program, ordinarily at the level of Assistant Professor. Prior to appointment, candidates must hold an undergraduate degree in common law and an LL.M degree or doctorate degree in a related discipline.

In accordance with its Employment Equity Policy, the University of Ottawa encourages applications from qualified women or men, members of visible minorities, Aboriginal peoples and persons with disabilities.

Interested persons should respond to the detailed call for applications on the Common Law Section's website at:

http://www.uottawa.ca/services/hr/newweb/en/positions_for_profs.html

BOOK NOOK

By Brian Calliou

Two relatively new books have been published which reflect some of the new Aboriginal legal scholars publishing, along with the more established scholars' new work.

The first book, **Box of Treasures or Empty Box? Twenty Years of Section 35,** was published in 2003 by Theytus Books Ltd. It is a collection of articles edited by two new Aboriginal scholars, Ardith Walkem, a lawyer and member of the Nlaka'pamux Nation, and Halie Bruce, a psychology student, political activist, and member of the Namgis Kwakwaka'wakw Nation. The collection presents diverse perspectives to Section 35 rights, although there is a very strong representation of British Columbia scholars and issues.

The collection of articles is set in the historical context of the negotiations leading up to the repatriation of the Constitution in 1982 and the recognition and affirmation of Aboriginal and treaty rights expressed in s.35. Former Member of Parliament, Ian Waddell sets out his recollection of some of the negotiations between his Liberal government under Trudeau and the Aboriginal and Provincial leaders. Waddell gives us an insider's perspective to the lobbying and negotiating between the political parties and the role these "White" advocates played in building the box that is s.35. Mildred C. Poplar, a member of the Vuntut Gwichin Nation and political activist, also sets out her recollections of the negotiations leading up to the entrenchment of s.35 and the First Ministers conferences set out in s.37 and argues that they were fighting for Aboriginal sovereignty. Thomas Sampson, a member of the Tsartlip Nation and former Chair of the South Island Tribal Council shares his thoughts and recollections of the events and issues leading up to the patriation of the Constitution and how they lobbied for the protection of treaty rights.

The articles in this collection by both Aboriginal and non-Aboriginal contributors are grouped into what the editors describe as three "divergent" areas: (1) those who believe that s.35's protective potential is yet to be realized through the expansion of the definition of s.35; (2) those who believe s.35 offers little hope for Aboriginal rights protection, unless the interpretation of s.35 undergoes a "fundamental transformation" which will acknowledge and respect Aboriginal peoples as nations; and (3) those who see no solution in the Canadian Constitution that can give justice to Aboriginal Peoples and prefer nation-to-nation relationships be entered into. Some of the authors view s.35 as a "Box of Treasures" while others view it as an "Empty Box" offering little of no protection for Aboriginal rights and instead protecting Canadian sovereignty and interests.

Cheryl Knockwood, a Mi'kmaq lawyer, examines the treaty relationship between the Mi'kmaq and the Crown and how the treaties have generally been abrogated by the Crown. Metis lawyer, and past IBA President, Mark Stevenson, examines Metis Aboriginal rights under s.35 and the recent Powley decision, which Stevenson argues put some content into the "empty box" facing Metis people. Ardith Walkem examines the Supreme Court of Canada's reasoning and interpretation of s.35 rights and argues that the box constructed has limited and contained Aboriginal Peoples' aspirations for sovereignty and self-determination, while protecting third party and Canadian interests. John Borrows, Anishinabe Professor of Law explores the concept of First Nations' citizenship within the Canadian state and argues that we cannot place all our efforts into s.35 advocacy and must use other political means to assert our rights within a shared framework with Canadians.

Aboriginal literary scholar, Lee Maracle, a member of the Sto:lo Nation, gives a searing non-lawyer's perspective that Aboriginal use of s.35 serves the Canadian state, entrenches colonial authority, and results in "the death of the hopes of Self-Determination." Arthur Manuel, a member and former Chief of Neskonlith Indian Band of the Secwepemc Nation, provides another non-lawyer, Aboriginal perspective to s.35 arguing that Aboriginal Peoples must work hard to change Canada and its past and current treatment of Aboriginals, their traditional lands and their rights. Bruce and Walkem also contribute an article and argue that reliance on s.35 means we accept the power of Canadian courts and governments to define our rights and that to "survive as unique Peoples", we must go beyond the courts to "reinvigorate Our Laws" and repatriate our own constitutions to live by. June McCue, a member of the Ned'u'ten First Nation, professor of law, and Director of the First Nations Legal Studies Program at UBC, provides a recap of the articles in the book and argues that s.35 must not be narrowly viewed as a shield to protect Aboriginal rights, and instead must be used as a sword to transform the relationship between Aboriginal Peoples and the Canadian state, by incorporating a "Decolonization Principle."

Non-Aboriginal scholars, Catherine Bell and Robert K. Paterson, Louise Mandell, Douglas Harris, and James Tully also make valuable contributions regarding the impact and effect of s.35 in recognizing and affirming Aboriginal and treaty rights. This book makes a valuable contribution to the literature on Aboriginal rights. It is 383 pages in length, contains endnotes for most articles, some black and white historic photographs of the "Constitution Express", and other documents. For those interested in ordering it, it is reasonably priced and the ISBN is 1-894778-13-8.

The second book, published in 2002 by University Toronto Press, entitled **Recovering Canada: The Resurgence of Indigenous Law**, is authored by one of

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E.A.G.L.E.

By Terri-Lynn Williams-Davidson , Executive Director—EAGLE

EAGLE (Environmental-Aboriginal Guardianship through Law and Education) is a not-for-profit, registered charity whose goal is to use Aboriginal and environmental law to assist Aboriginal Peoples in protecting and restoring the natural environment. EAGLE provides low-cost legal and educational services to Aboriginal Peoples. EAGLE is primarily staffed and governed by Aboriginal Peoples.

The Haida TFL 39 Case
On March 24 and 25, 2004, EAGLE appeared before the Supreme Court of Canada on behalf of the Haida Nation in an effort to uphold the ground-breaking decision of the British Columbia Court of Appeal in *Haida Nation* v. *B.C. and Weyerhaeu*ser, [2002] BCCA 147 and [2002] BCCA 462.

The Haida Nation's home is Haida Gwaii, also known as the Queen Charlotte Islands, a group of islands off the mid-coast of British Columbia. The case concerns the replacement and transfer of Tree Farm Licence No. 39 (TFL 39) held by Weyerhaeuser on Haida Gwaii, and addresses the issue of whether the Crown has a legally enforceable, constitutional obligation to consult and accommodate Aboriginal Peoples who assert Aboriginal Title and Rights.

TFL 39 is a long term, area based forest tenure that is in the form of a negotiated agreement between the company and British Columbia. TFL 39 is divided into blocks, and block 6 of the TFL encompasses about a quarter of Haida Gwaii's landbase. The tenure holder, in this case Weyerhaeuser, is given the exclusive right to harvest timber in the area of the TFL, and is also given the right to manage the area. Timber harvesting takes precedence over other uses, and the Haida are concerned about the rate and methods of logging. Monumental cedar, essential to the Haida for building houses, totem poles, masks, canoes and other objects, is now rare on Haida Gwaii.
TFLs have a term of 25 years, and are periodically replaced (every five years under the legislation in place when the litigation was commenced). Because TFLs are replaced, not renewed, there is an opportunity to change the terms with each replacement. The province refused to consult with the Haida about the replacement in 2000, maintaining that it was entitled to replace the TFL without consultation because the Haida had not proven Aboriginal Title or Rights in court. Weyerhaeuser agreed with the Province and insisted that it should be able to rely on the validity of Crown tenures.

The Haida commenced a judicial review of the decision to replace TFL 39. The Supreme Court of British Columbia, though finding that there is a substantial probability that the Haida will be able to prove Aboriginal Rights to at least part of the TFL area, and a reasonable probability that the Haida will be able to establish Aboriginal Title to at least part of the TFL area, held that there can be no legally enforceable obligation to consult prior to proof.

The Court of Appeal of British Columbia overturned the decision of the BC Supreme Court, and held that the Province had, and breached, a legally enforceable, constitutional and fiduciary duty to consult with the Haida about their asserted rights and to seek an accommodation between the cultural and economic interests of the Haida, on the one hand, and the "short-term and long-term objectives of the Crown and Weyerhaeuser to manage TFL 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand."

Justice Lambert, speaking for the court, said the following about the importance of this issue in the context of the Crown's conduct:

> *The issue is an important one. If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the tile or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed aboriginal title or rights, even on an interim basis.*

Indeed, the arguments of British Columbia and most of the intervening Attorneys General argued that the provinces should be allowed to take a risk management approach to consultation and accommodation prior to proof. In other words, the Crown should be entitled to consider assertions of Aboriginal Title or Rights and determine whether it has to consult and accommodate. The Crown would bear the risk of having its decisions overturned later, if it cannot justify the infringement in proceedings brought by Aboriginal Peoples to prove their rights. One of the considerations of the Crown in its risk analysis would surely be whether the Aboriginal Peoples asserting rights or title have the capacity to litigate to prove their rights.

The other ground-breaking aspect of the Court of Appeal's decision is related to the remedy. British Columbia's *Judicial Review Procedure Act* gives the courts the discretion to refuse to grant relief. In this case, the Court of Appeal held that the Crown breached a legally enforceable duty to consult that was a prerequisite to granting the replacement. Therefore, the decision could have been overturned. However, Weyerhaeuser urged the court to refuse to quash the replacement, because of the potential economic consequences. The court agreed to not quash the licence, but also did not want to leave the Haida without a

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E.A.G.L.E.

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remedy. The court therefore left the TFL in place, but acknowledged that the tenure suffers from a "fundamental legal defect". In order to provide an effective remedy, the court declared that the Crown and Weyerhaeuser have ongoing obligations to consult and accommodate. This is the first case imposing a duty on a third party, or Crown licensee. The court also ordered that the parties are at liberty to go before the Supreme Court of British Columbia at any time to seek orders related to consultation and accommodation, and that the Haida could renew their request to quash the TFL. In 2002, the Haida applied for a Case Management judge, and has appeared before the BC Supreme Court to keep the court apprised of ongoing consultation and accommodation.

A decision from the Supreme Court of Canada is expected later this year.

The Title Case

EAGLE is also representing the Haida Nation as they seek Aboriginal Title to the land, waters and surrounding ocean of Haida Gwaii.

For further information about EAGLE, our work, please see: www.eaglelaw.org.

We welcome donations from all those who want to be a part of our work; all donations are tax-deductible.

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IBA CONFERENCE REPORTS

Indigenous Rights, Globalization and Federalism

15th Annual Fall Conference
Vancouver, October 2003

The Indigenous Bar Association's 15th Annual Fall Conference ***Indigenous Rights, Globalization and Federalism*** was held October 15-17, 2003 in Vancouver, British Columbia. This annual conference once again brought together Indigenous lawyers, judges, academics, law students, community leaders, community members, members of the non-Aboriginal bar, and governmental officials from various jurisdictions, to discuss the position of Indigenous rights in both the federal and global context.

Looking at the battles fought, decisions won and roads to the future, we managed to bring together many of the key players on the national and international front to provide new insight and strategies.

Hate and Racism: Seeking Solutions

Spring Conference
IBA & Quebec Native Women's Association
Montreal , March 2004

On March 20 – 23, 2004, in Montreal, Quebec, the Indigenous Bar Association and Quebec Native Women successfully hosted the Hate and Racism: Seeking Solutions Conference. Conference speakers, presenters and delegates represented many multi-racial backgrounds from Canada and around the world. They explored the causes and consequences of hate and racism as well as strategies for the elimination of hate and racism.

The IBA continues to be actively involved in the follow-up to this very successful conference. For more information regarding ongoing *Combating Racism* activities see the article on page 1 or visit the IBA website.

INDIGENOUS BAR ASSOCIATION

FOR MORE INFORMATION ABOUT THESE AND OTHER IBA CONFERENCE ACTIVITIES, VISIT THE WEBSITE AT:

http://www.indigenousbar.ca/

L'nuwey Tplutaqan

By Tuma Young

When the IBA sent me an email asking me to contact them, my first thought was did I pay my IBA fees. A quick check revealed that I had not. Germaine: a check is on its way to you. Good thing, the Executive was not contacting me about the fees but about writing something for the IBA newsletter (one idea for the IBA is to send invoices to members about membership fees, at least send one to me).

I want to tell you about one of my projects: my column called "Pro Bono" which is carried in Windspeaker newspaper. Windspeaker is a national monthly newspaper that covers Indian news across Canada plus some news from our cousins in the south and around the world. Two years ago, the editor contacted me to see if I would become a columnist for Windspeaker on legal matters.

I could write about aboriginal title, land claims, taxation, treaty processes and other major legal issues that affect us in our communities but I wondered if this format would work. Whenever an issue confronts me, I like to go to my community and just listen to what folks are saying. This is what I did.

Like many of you, whenever I go home, I would be asked questions about the law from my family, friends, elders, aunties, cousins, chiefs, councilors, ex's, strangers and enemies. A simple trip to the local store takes couple hours-5 minutes to purchase what I need and 2 hours answering questions from folks. Not all of them would and could not pay a retainer fee to me! I will be sitting at the Eskasoni pow wow eating some fried bread and a single mom would ask me how I could help her obtain child support for her children because the welfare cheque does not cover all the bills.

No one asked me about Aboriginal or Treaty rights, land claims or how the law is structured as a colonizing tool. Some wanted to know how to deal with child custody issues, get a divorce, how to present an argument to the band council, settle a fight with the neighbour or just wanted to tell me what happened to them in the legal system. Many folks were no longer eligible for Legal Aid because of the cutbacks. One theme came through loud and clear, that was people realized that the law as it was applied to them was different, and that non-Indigenous lawyers may not understand or know about these differences.

I realized that for many community folks, access to the legal system was difficult, if not impossible without spending a huge amount of money. I struggled with how to help but my law firm had an hourly billable target that I had to make. This is when I decided on a "Dear Abby" column would be a perfect solution, allowing me to answer questions for free and at the same time market my services to those who can pay. A win-win situation!

Some of the questions are serious in nature while others are just looking for information. Often, people will ask me to keep their names confidential, fearing reprisals from others in authority. This drove home the saying that information is power. What is important is that community people without any money or easy access to the legal process now have some place (albeit a small place) where they can come and find out some information on how the law is used and applied against them. Often it is the first step for many individuals and requests for to follow up with a referral are quite common.

Today, I continue with the column, while I am attending UBC (for my PhD in Law). On average, I receive about five to ten questions each month and select two or three for the column. This is a small contribution on my part to help Indigenous folks obtain meaningful access to the law.

If you wish to help out, I would love you to get involved. Can you write a guest column about a particular topic, or a brief case comment? Would you be willing to provide free initial consultations for folks in your province or take referrals from me (some are paying clients)? Can you help make the Law easier to understand and more accessible to Indian folks? If so, contact me at puoin@telus.net. We-la'li'oq Msit Nokmaq.

INTERNATIONAL HUMAN RIGHTS & CANADIAN CONSTITUTIONAL LAW RELATING TO ABORIGINAL PEOPLES

Laws Confluence: The Effect of International Human Rights Law on Canadian Constitutional Law Relating to Aboriginal Peoples

By Lisa Weber

Last winter I had an opportunity to attend a training session in Greenland on international law and indigenous peoples. Had I not had this opportunity, I would not have realized the significance of Rodolfo Stavenhagen's visit to Canada in June 2004. As the UN's Special Rapporteur on Indigenous Peoples, Mr. Stavenhagen was here for the purpose of assessing Canada's performance in promoting and protecting indigenous rights, obligations that it has undertaken to fulfill as a member of the United Nations. The reports that he may receive from indigenous peoples and organizations in Canada will play a key part in his findings, which will be presented to the UN Human Rights Commission.

The Special Rapporteur's report is but one element of a distinct body of law and policy developing at the international level in relation to indigenous peoples' rights. This and other formal commitments undertaken by nation states in relation to indigenous issues and indigenous peoples might logically be expected to increase general public awareness and understanding of the importance of these issues to all peoples. *If this expectation is achieved*, promotion and protection of the rights of indigenous peoples would likely, for example, impact world trade and resource development. In addition, it would affect political relations within and between nation states, and between nation states and indigenous peoples.

Increased involvement by Indigenous peoples in international legal fora can and will contribute to their strength and political movement towards greater self-determination and recognition of rights. At the same time, it is important to acknowledge that this participation will not guarantee recognition or fulfillment of indigenous rights. While nation states are obligated to fulfill and respect the principles set out in the various international conventions to which they ascribe (which arguably includes state recognition of indigenous peoples' rights), they have the freedom to determine how these obligations will be met domestically. Quite often it is the chosen means of recognition which does not accord with indigenous peoples' expectations or aspirations.

The most obvious example of this is s. 35 of the *Constitution Act, 1982*, which recognizes and affirms Aboriginal and treaty rights. Typically, Canada (and the Provinces) will not recognize Aboriginal rights until a distinct Aboriginal group proves through the courts that it continues to have these rights. In many instances, the practice in question is contemporaneously considered illegal. Notwithstanding such illegality, in order to receive constitutional protection, the claimant group must prove amongst other matters, its historic and continuing existence as a group, as well as continuity of the practice in question. And even where the group meets the court's "test for proof", infringement of these rights is often justified according to domestic common law.

Given this legal (and political) reality, can the argument be made that Canadian law respecting Aboriginal rights is inconsistent with Canada's obligations in international law? Do existing means of dealing with Aboriginal rights claims uphold the collective and pre-existing rights of Indigenous peoples? Deliberations on these questions, when considered in the context of the collective rights of "peoples" or "nations", as interpreted in international law, can or will raise tenuous conclusions, at best.

The right of indigenous peoples *as peoples* is a fundamental premise of the Indigenous Bar Association's October conference, "Developing Indigenous Resources - Building Indigenous Economies". Pursuant to the human right of self-determination accorded to all peoples of the world, indigenous peoples have the right and ability to participate in and develop economies in accordance with our self-determined values, beliefs and practices.

INDIGENOUS LAWYERS DIRECTORY

The Indigenous Bar Association, with the support of Aboriginal Business Canada, is developing a national Indigenous Lawyers Directory and encourages all Indigenous people with legal training to participate in this exciting development.

The Indigenous Lawyers Directory will no doubt prove to be a vital tool for Indigenous lawyers, academics and law students, and help the Indigenous legal community stay connected. It will also be an essential resource for Indigenous community members, leaders, advisors, communities and organizations who seek legal services.

If you are a legally trained Indigenous person, your basic registration in the Directory is free of charge; opportunities for advertisements in the Directory for your law practice or business will also be available at reasonable rates. For more information contact Germaine Langan at germainelangan@shaw.ca, or phone (250) 383-3902. *REGISTER NOW!!*

BOOK NOOK

(Continued from page 6)
the pre-eminent Aboriginal scholars, Dr. John Borrows, an Anishnabe lawyer and professor of law. This collection of previously published works is written in a way that is easily accessible to a wider, general audience than just lawyers. Borrows is known as a great story teller and here he does not disappoint. He begins the book by telling the story of the Aboriginal presence that underlies the University of Toronto, Faculty of Law, especially a winding trail in an ancient ravine known as Philosopher's Walk. After evoking a picture in the reader of the university grounds and the grand architecture, he tells us that the two houses of the U of T law school are built on a ravine "that was once the headwater and home to spawning salmon and trout" and buried beneath them "is a stream, known to the Anishinabek as Ziibiing", where his people the Anishinabek would gather in late spring to engage in fishing. Borrows also reflects on how, while he was at law school as a student, he discovered that "law school has the power to hide many things" and that "Aboriginal laws were concealed and submerged by system that privileges Western legal narratives." Borrows argues that Canadian common law on Aboriginal rights has built over Aboriginal law much the same as Philosopher's Walk "covers and conceals an ancient past." He argues that despite this obscuring and concealment of Aboriginal law, it still exists and its power "can still be discerned despite the pervasiveness of imported law." Borrows employs a unique approach to compare and evaluate the common law of Aboriginal rights against Anishinabek stories.

In his first chapter, "With or Without You: First Nations Law in Canada", Borrows makes a convincing argument that Aboriginal laws found in traditional stories be used in Aboriginal law cases since they are "analogous to precedent because they attempt to provide reasons for, and reinforce consensus about, broad principles and to justify or criticize certain deviations from generally accepted standards." Borrows provides strong scholarly support for his arguments throughout with very detailed endnotes. In his second chapter, "Living Between Water and Rocks: The Environment, First Nations, and Democracy", Borrows illustrates that the so called democratic process relating to development and environmental planning in effect systemically excludes First Nations from participating. He argues that traditional Aboriginal knowledge of the fauna and flora, along with traditional Anishinabek stories could enhance the process and assist in providing strong principles to be used in conjunction with contemporary land use and environmental planning techniques to ensure sustainability of the environment.

In chapter three, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster", Borrows uses the "Indigenous intellectual tradition" of the Trickster to deconstruct the common law of Aboriginal rights. He argues that the "Trickster's unique position generates a language bridging Western and Aboriginal accounts of law and incorporating intersecting and oppositional cultural perspectives." He argues that Trickster "stands inside and outside of the court, both a member and a critic." In his narrative, Borrows analogizes Chief Justice Lamer as the Trickster who pulled the sticks from the stream when he defined Aboriginal rights of s.35 in the Sparrow case and had to replace sticks to restrain the deluge and thus limits the flow of Aboriginal rights to only those rights that are frozen in time. In chapter four, "Nanabush Goes West: Title, Treaties, and the Trickster in British Columbia", Borrows utilizes Raven, who is really the Trickster transformed and visiting the west, to critically exp lore the legal history of Aboriginal and treaty rights in the Province of British Columbia. Here, Borrows argues that the concept of Crown sovereignty is taken as a given by the courts and "perpetuates historical injustices and fails to respect the distinctive legal systems of pre-existing Aboriginal societies in contemporary Canadian society."

Borrows argues in chapter five, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism", that when the assertion of sovereignty by the Canadian Crown over Aboriginal Peoples, their lands, and governance structures is evaluated against the rule of law and other constitutional principles, such assertions are "factually untrue and lack legal cohesion." The result is that the Crown's treatment of Aboriginal Peoples might be regarded as "'colonial rule' that leads to their 'subjugation, domination and exploitation' and blocks their 'meaningful exercise of self-determination." In chapter six, "'Landed' Citizenship: An Indigenous Declaration of Interdependence", Borrows argues for Aboriginal control of Canadian affairs, that is, to be involved in and influencing Canadian institutions and policy, thereby protecting Aboriginal participation with the land. He argues for a "fuller citizenship" where the responsibilities of Aboriginal Peoples be undertaken in concert with other Canadians in order to raise the consciousness of Canadians to the importance of "Aboriginal citizenship with the land." Borrows calls for an "interchange" so as to lead to true pluralism in Canadian legal and political institutions and argues that Aboriginal citizenship must reflect our "interdependence" with other groups beyond our own – in our regions, our country, and internationally.

Borrows closes the book with, "Afterword: Philosopher's Walk – The Return", where he reflects on his return to U of T law school, now as a professor and how the ancient spirits of the ravine underlying Philosopher's Walk seemed to be returning. Aboriginal

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BOOK NOOK

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presence was returning to this modern institution and place – Aboriginal drums and songs; Wampum belts hanging on the law school walls; and Aboriginal students from across the country, which in turn saw increasing numbers of non-Aboriginal law students and faculty take increasing interest in Aboriginal legal issues. This book is a great addition to the literature and is an excellent example of an Aboriginal voice in the legal community who is a rigorous scholar, yet still a great story teller. The book is 312 pages in length, contains extensive endnotes and a bibliography, an index, and is reasonably priced. For those interested in ordering it, and I highly recommend this one, the ISBN for the paper back edition is 0-8020-8501-6.

IPPERWASH INQUIRY

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seemed to stay green longer at that time. That particular day we had worked on the Statement of Claim for nineteen hours straight. Another night, I finally went home at 12:30 a.m. while Murray continued working all night. He faxed me a revision at my home at about 6:00 a.m. Rather than going home, he took a nap in his office while I read the revision he had faxed, and then he resumed work, without having gone home for a few days.

Eventually, we filed our Notice of Action on February 28th, 1996, which, I believe, was the same day that Murray and Sherry had their first child. We filed a 34 page Statement of Claim on March 26, 1996. The Statement of Claim was profiled on the front page of the Globe and Mail, and that was the first time that the Indian version of the events at Ipperwash had received a real airing.

We continued the work in attempting to obtain the truth not only through the court case, but also with the building of alliances with various groups such as the unions and churches. Andrew Orkin and Gary George did a fantastic job of building relations with them and with the media. Andrew was able to convince Amnesty International and the New York Times to examine and report on the case, thus adding to the pressure on the government for an inquiry. We cooperated extensively with the Special Investigation Unit and eventually with the Crown in the prosecution and conviction of Kenneth Deane, the officer who had shot Dudley.

Sam George was indefatigable in his quest for the truth, and it was always the family's position that if there were an inquiry, the family would drop the civil suit. The civil suit was kept alive only as a last resort to get at the truth.

The family and the lawyers suffered great hardship, emotionally and financially, as a result of the long battle. In my case, by 1998 I had to move to Saskatchewan because of the financial pressure, and Murray Klippenstein became the lead lawyer. I know Murray has his own story to tell about his own hardship in maintaining the case.

It took 8 years. But maybe something good will now come in the end from that original dark and crazy night.

INDIGENOUS BAR ASSOCIATION

FALL 2004 NEWSLETTER

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What is the IBA?

The Indigenous Bar Association (IBA) is a non-profit professional organization for Indian, Inuit and Métis persons trained in the field of law.

Its membership consist of Indigenous lawyers (practicing and non-practicing), judges, law professors, legal consultants and law students.

As the field of Indigenous law develops, the public is becoming more aware and interested in Indigenous legal issues. The IBA plays an active role in promoting the development of Indigenous law and supporting Indigenous legal practitioners.

The IBA offers excellent conferences at least twice per year on a diverse range of legal topics. All are welcome to attend conferences—for more information visit the IBA website.

THIS ISSUE...

Many thanks to the following contributors to this issue of the IBA Newsletter:

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