FINAL REPORT
BUILDING TREATIES AND RESTORING RELATIONSHIPS

The 13th Annual Conference of the Indigenous Bar Association, held October 19-20, 2001, in Vancouver, B.C. brought together Indigenous lawyers, judges, professors, law students, consultants, community leaders, community members and government officials. The focus of the Conference was the important work of building treaties and restoring relationships between Indigenous Peoples and the Crown.

The **Building Treaties and Restoring Relationships** Conference examined the problems, identified the issues and presented solutions. Respected Speakers addressed Conference delegates and shared their thoughtful insights and views on the current issues challenging Indigenous Peoples. Four Plenary Sessions were held and accomplished practitioners addressed such topics as: Building Treaties; Comprehensive Claims Policy; Treaty Interpretation and Renewal; and Visions for the Future. After each Plenary Session, delegates were invited to participate in various Workshops designed to focus on a specific topic related to each Plenary address.

The following is a brief summary of the Conference highlights:

Speakers acknowledged the emergence of an Indigenous professional sector in Canadian society and the significant impact these people have in shaping the future, in such areas as: justice, education, social services, health, housing, economic development, and politics. It was also recognized that the 21st century presents important challenges in the relationship between Indigenous Peoples and the Crown. The work of Commissions, decisions in court cases and land claims agreements, all speak to this relationship. The existing political, economic, social and legal situation facing Indigenous Peoples, domestically and internationally, was viewed as a critical transitional period and a time of opportunity. Speakers emphasized the importance of being strategic in our work today to ensure it provides a secure blueprint for change in the future. Lasting and meaningful treaties are achievable. The work of building treaties and restoring relationships must provide for new institutions and structures (both Indigenous and non-Indigenous). Such institutions and structures must allow for Indigenous world views. Consideration must also be given to the creation of new jurisdictions, capable to resolve the conflicts of the past as well as to look forward to address the new relationship. Conference delegates and the Indigenous Bar Association were invited to contribute to this important work.

A. Building Treaties

The Champagne and Aishihik, Nisga'a, Dogrib, and South Slave Métis experiences were examined. The Champagne and Aishihik, and the Nisga'a concluded agreements in 1993 and 1998, respectively. The Dogrib and the South Slave Métis are

currently in negotiations. Delegates were reminded that treaty-making is as much about process as it is about the substantive issues. Speakers emphasized the importance of being strategic in the negotiations to ensure the resulting agreement meets the needs of the Indigenous Peoples and provides for the certainty, the lands, and the law-making authorities capable of withstanding the scrutiny of the courts.

Conference delegates were invited to participate in the following Workshops related to **Building Treaties**:

1. Building Community Consensus: Participants examined the definition of **consensus** and shared views of the community experience of **consensus** initiatives. No definite conclusions resulted from these discussions; however, participants raised numerous issues that need to be addressed: methods must be conclusive to the specific community; and approaches must respect community priorities, capacity, knowledge and community values.

2. Interim Measures: Participants focused on Interim Measures Agreements (IMA's) as a stepping-stone in building long-term relationships between governments. IMA's were viewed as political agreements that demonstrate a willingness of governments to respect each other's claim and create a basis for further negotiations. IMA's assist in developing a foundation for treaty negotiations.

3. Self-government: Participants addressed self-government by examining the Nisga'a Final Agreement in the context of the *Campbell* (B.C.S.C.) (2001) case. *Campbell* establishes that the inherent right to self-government exists within s. 35 and as such, it is a precedent for Aboriginal Peoples in Canada. In B.C. in particular, the provincial government has indicated it will respect the ruling of the court and live up to their obligations in the Nisga'a Final Agreement. For participants, this raised the question of the validity of a provincial (B.C.) government referendum regarding treaty negotiations and self-government.

4. A Nation of Rivers… A River of Nations: The Workshop facilitator viewed Canada as a nation of rivers and that Canada is made up of a confederacy of Aboriginal Nations. From this perspective, the facilitator emphasized the opportunity for Aboriginal Peoples to develop their own institutions; i.e., an Aboriginal Parliament and a House of First Peoples, rooted in Aboriginal customs and values, respecting Aboriginal sovereignty.

5. Impact of the Referendum: Participants focused their discussion on whether Aboriginal Peoples should participate in the **consultation** process for the provincial (B.C.) referendum on treaty-making. Participants expressed the concern of a double-edged sword. The question then becomes: **What is the most effective way for Aboriginal Peoples to communicate objection to the**

referendum? The dominant views promoted public education from an Aboriginal perspective to inform the citizens of the province what treaty-making is about. Another view questioned the government objectives.

B. Comprehensive Claims Policy

A legal and an interests analysis of the federal Comprehensive Claims Policy were presented that concluded the Policy is inconsistent with Canadian law, rooted in colonial assumptions and designed to uphold Canada's economic and political interests. All Speakers stated that the Policy must be changed, especially with respect to **extinguishments** and **compensation**.

Conference delegates were invited to participate in the following Workshops related to the **Comprehensive Claims Policy**:

1. Certainty: Participants agree that **certainty** is not a difficult concept; however, it becomes a complex political term when applied to treaty-making. Aboriginal perspectives of certainty provide for an ongoing relationship; whereas the Crown views certainty to provide for closure and finality.

2. Claims Policy and the Fiduciary Obligation: Participants raised discussion on the scope of the Crown's fiduciary obligation owed to Aboriginal Peoples in the treaty-making process to include such matters as: loans to finance negotiations; own source revenues (from lands and resources) to finance negotiations; the inherent conflict of interest of the Crown to promote the public interest at the same time as its duty to protect the Aboriginal interest; and bargaining in good faith.

3. Litigation Strategy: The following recommendations were developed by the participants: coordinate both a legal and a political strategy; take a national approach and factor in a public relations and media strategy; develop professional guidelines for lawyers to follow regarding collective rights; and develop creative remedies for the court to consider. There was also discussion on the role of the Indigenous Bar Association: to develop guidelines for Indigenous lawyers; develop a continuing legal education program for Indigenous lawyers and judges; establish an administrative office; create a national litigation fund and take on cases; and establish various communication networks and linkages with its members.

4. Asserting the Inherent Right: A necessary element to a strategy for the recognition of Aboriginal rights is to assert Aboriginal inherent rights. Where Aboriginal Peoples assert their inherent rights: identify a framework; set priorities; consult with rightsholders; and consult with other governments. The

participants addressed the "pros" and challenges of asserting the inherent rights. Some "pros" include: Aboriginal rightsholders define for themselves their inherent rights; opportunity to codify rights from an Aboriginal perspective; and the ability to rely on this Code in future litigation or negotiation. Some of the challenges include: other governments may interpret and change the Code; there will be information that cannot or will not be shared; i.e., sacred laws; difficult to codify Aboriginal laws; other governments may continue to infringe Aboriginal laws and justify their infringements; and courts may narrowly interpret Aboriginal laws.

C. Treaty Interpretation and Renewal

Supreme Court of Canada decisions on the interpretation of treaties were reviewed and Panel Speakers provided delegates with their thoughtful analysis of the limitations of treaty rights in these judgments.

Conference delegates were invited to participate in the following Workshops related to **Treaty Interpretation and Renewal**:

1. Incorporating First Nation Values: **Respect**, **relationships**, **roles** and **responsibilities** reflect an Aboriginal perspective of **rights** thinking. Such values reflect Aboriginal cultures and identities. Aboriginal values will be the foundation for the implementation of Aboriginal and Treaty rights.

2. Litigation as a Strategy: Why litigate? It is a very expensive decision to litigate ($30,000 to $50,000 minimum for court fees per case). Where you do litigate: choose the case; structure the case; choose the method; choose the experts wisely and define their role; anticipate difficulties to arise; and be cautious of the argument to be made to meet the legal tests.

3. Treaty Renewal in the Prairies: Participants focused on Treaty 6, signed in 1876. A Bilateral Table is established to discuss the common understandings of Treaty 6. Phase I: a process of understanding of both sides (non-binding). It is about a relationship between the Treaty parties. Phase II: the process of exploration and discussion continues on the examination of the objectives as well as a public education mandate on the Treaty. There remains a wide range of issues (from land to governance) to be addressed. In Alberta, the Treaty Commission is just starting up; it is about a relationship, not about rights.

4. Treaty Land Entitlement on the Prairies: Twenty-six settled cases: nine in Alberta; seven in Manitoba; and 19 with a framework agreement. Treaty Land Entitlement (TLE) is about fulfilling an existing agreement and the implementation of the Treaty land provisions. Some issues raised in the discussion include: TLE

should be an independent process (not part of specific claims); the process should not be adversarial; be prepared to address the complex issues that arise; and anticipate implementation issues in advance to ensure there are no gaps/vacuums in policy.

D. Visions for the Future

Panel Speakers shared personal stories with delegates and reminded delegates to implement their visions internally, within families, communities, clans, and with Indigenous neighbours. Such work will provide the necessary skills and knowledge to achieve results that will strengthen our external efforts. Relying on Indigenous traditions to resolve disputes will benefit our futures as Indigenous Peoples. Visions are created. It is time a new vision is created, one based on the successes of Indigenous Peoples, so that our children are encouraged to share this vision.