SYMPOSIUM ON SPECIALIZED TRIBUNALS AND FIRST NATIONS LEGAL INSTITUTIONS

FINAL REPORT

The Indigenous Bar Association's ***Symposium on Specialized Tribunals and First Nations Legal Institutions*** was held May 29th to 31st, 2002 in Saskatoon, Saskatchewan. The Symposium successfully brought together Indigenous lawyers, judges, academics, law students, pre-law students, community leaders, community members and government officials from various jurisdictions, to discuss and explore existing specialized tribunals as well as the creation of new legal institutions.

EXECUTIVE SUMMARY

The Symposium consisted of a one-day Practitioners' Session on employment and labour law matters, followed by two days with six plenary sessions on specialized tribunals and legal institutions. The Practitioners' Session explored: issues arising in federal labour arbitration including a discussion of remedies available; labour law statutory frameworks and whether they are appropriate in the context of Indigenous Peoples; employment law progressive discipline and Saskatchewan's Courts Summary Procedures; and the various programs offered by Aboriginal Business Canada (ABC) which are available to Indigenous practitioners.

Symposium speakers and delegates explored in detail various specialized tribunals and administrative bodies that address Indigenous issues, identifying both strengths and weaknesses. All speakers acknowledged the shortfalls of the existing legal structures in Canada in meeting the needs of Indigenous Peoples, and identified important considerations for the creation of new institutions.

Presenters stressed that we must work to create institutions that challenge the impact of colonization. Administrative tribunals are appealing given the many benefits, including offering a less formal and adversarial process and more flexibility for resolution than the Courts. Creating other more formal institutions, such as Courts that have final binding decision-making authority, is also essential. Creating specialized administrative tribunals and courts that are equipped to serve the needs of Indigenous Peoples and foster a healthy fiduciary relationship between Indigenous Peoples and Canada is within reach.

Particular emphasis was placed on the need for Indigenous Peoples to develop frameworks for building institutions that are supported by government. Given the constitutional realities of Indigenous Peoples in Canada, Indigenous Peoples and government must work together to create institutions that are appropriate and responsive to Indigenous Peoples needs. We must also work together to educate Canadians on Indigenous Peoples and their issues. Public support for Indigenous Peoples and the creation of these new institutions is vital to our success.

A succinct and profound statement was offered by presenter, James Youngblood Sa'ke'j Henderson who said, "we must speak the language of our own dream." He encouraged us to work toward this dream, as "a disorganized Aboriginal Peoples cannot create an alternative future."

The future of Indigenous Peoples in Canada, including the creation of new legal institutions capable of creating and fostering healthy relationships between Indigenous Peoples and the rest of Canada, lies in the hearts and minds of Indigenous Peoples. It is through dialogue and visioning that we will move forward in developing functioning institutions that will serve all future generations in this land we call Canada.

Two specific recommendations came forward from the Symposium:

1) That the IBA organize to promote the creation of an Ombudsperson for Aboriginal Peoples in Canada;
2) That the IBA organize to promote the creation of an Aboriginal Court to address fiduciary relationships and Aboriginal and Treaty Rights in Canada.

The Indigenous Bar Association has an important role to play in this creative process, as does government who must support these exciting and vital new initiatives.

DETAILED SYMPOSIUM REPORT

A) THE USE OF SPECIALIZED TRIBUNALS AND ADMINISTRATIVE BODIES

Presenters explored existing legal institutional structures and concluded that the status quo is not satisfactory. There is a great need to create new institutions and adapt existing ones to ensure these are respectful and responsive to Indigenous Peoples. In creating specialized tribunals and administrative bodies, effectiveness will depend on whether the tribunal is matched to the results sought. We must create new institutions that are culturally relevant, responsive to cultural needs, and empowering for Aboriginal Peoples --such as the Cree Court in Saskatchewan and tribal courts in various communities. In addition to creating new institutions, we must also adapt existing institutions. The National Parole Board has adapted its process to offer CIRCLE HEARINGS for national parole. Offenders work with Elders and the community to address the issues that contribute to the crime, in an effort to promote "healing".

Presenters acknowledged that the adversarial system, and the role of trials courts, is almost at a level of collapse. The existing system is expensive, slow, and non-responsive to the social, political and economic needs of Indigenous Peoples. Government must find new ways of supporting tribunals that work. Existing bodies such as the Registrar under the Indian Act and the BC Benefits Appeal Tribunal were discussed as examples of administrative bodies and tribunals that do not address the needs of Aboriginal Peoples. Support for and creation of alternative forums to resolve disputes that allow for flexibility and creativity will ultimately serve the needs of all citizens. There is a great need to create a better understanding in the broader Canadian community regarding Aboriginal Peoples that will ensure that all Canadians appreciate the nature of disputes and the need for creation of legal institutions to address them.

Presenters agreed that we must work together to find opportunities to resolve disputes without going to the courts. Invitations were extended to have government and the Indigenous legal community work together to these ends, including undertaking joint research projects.

B) EXPERIENCES WITH CLAIMS COMMISSIONS

Presenters explored the current experiences of Indigenous Peoples in dealing with claims commissions. It was concluded that tribunals with sufficient authority and powers to determine liability and compensation without limits on that authority are essential to break the current impasse on Aboriginal and Treaty rights. Only where there are fair and independent institutions will there be effective resolutions.

Speakers addressed the experiences with the Indian Commission of Ontario, the Indian Claims Commission and the British Columbia Treaty Commission. The structures of these commission models were examined, and several important elements were identified as necessary to ensure effective commissions. These include:

< FLEXIBILITY to deal with different types of claims
< MEDIATION as an important tool of process
< IMPASSE BREAKING MECHANISM with decision making authority vested in a designated decision maker, after negotiations fail; this authority would either rest in the commission which is structured as neutral and vested with those powers, or the authority would rest with a third party neutral
< ABILITY TO ENFORCE and GOVERNMENT INVOVLEMENT & SUPPORT FOR THE PROCESS which includes ensuring the necessary resources and authority are provided to make the commission function
< ACCESSIBILITY for all Indigenous Peoples who bring a prima facie case for a claim under the law

Presenters concluded that establishing a process is just that - a process. Without the political will to breathe life into that process, it is useless to address the needs of Indigenous Peoples.

C) BUILDING A NEW SPECIFIC CLAIMS TRIBUNAL

Presenters engaged in a discussion on the following issues: background to the new proposal coming forward from the Federal Government to create a new specific claims tribunal; recommendations on specific claims from the Royal Commission on Aboriginal Peoples; exploring what changes are need to improve the existing specific claims process; the revised mandate of a new specific claims tribunal; feasibility; and the likelihood of success should the Federal proposal be implemented.

Presenters noted the significant problem with the existing Indian Claims Commission is the unfairness of the process, where the Federal Government ultimately holds the purse. This causes significant frustration. Barriers to the claims process are created due to fiscal constraints within which the government operates. There should be transparency in the process and access to an alternative dispute resolution process.

Concerns were raised and caution urged about any new claims tribunal in which Government has the authority to dictate the mechanics of the board, including appointments to the board. Indigenous Peoples must have input into appointments to any such board. As well, discussion included how to ensure that Elders and traditional leaders are included in the process of a new board. Presenters stressed the best way to effect change is to ensure that Indigenous Peoples voices are heard in the political and legislative process.

D) ABORIGINAL TRIBUNALS / *INDIAN ACT* BY-LAWS

Presenters explored various instruments of law making. One instrument of governance and law-making available to First Nations in Canada are by-laws enacted by the First Nation pursuant to s.81 of the Indian Act. While the Courts have upheld taxation powers as inherent or essential element of self-government, by-laws are still subject to governmental approval. There are many challenges to First Nations seeking to have by-laws recognized and enforced within existing legal institutions.

Existing Courts and tribunals are often intimidated in taking on Indigenous issues. Specialized tribunals dealing with Indigenous Peoples must be created with strong foundation in concepts such as Aboriginal title, and an appreciation for Indigenous ways and traditions. A major stumbling block for progress in having Indigenous issues appropriately dealt with in existing courts and tribunals is those institutions' lack of understanding of Indigenous Peoples.

A more basic question was explored regarding the ability of administrative tribunals to rule on Aboriginal rights issues – this is the question of jurisdiction.

E) CREATION OF AN ABORIGINAL COURT

The creation of an Aboriginal Court was explored, including the source of authority for such a court and its powers. Existing Courts present numerous problems for Indigenous Peoples seeking justice, including:

- The inability of the Courts to deal constructively and appropriately with Indigenous oral history
- An adversarial process at odds with the Supreme Court of Canada's articulation of the trust-like relationship between the Crown and Aboriginal Peoples
- The limitations of *res judicata* in light of the relative infancy of anthropological knowledge
- The existing tests for finding Aboriginal and Treaty Rights, particularly determining what is integral to the distinctive culture of Aboriginal Peoples
- Courts difficulty in dealing with issues identified as "political" – deference to politicians
- Lack of legitimacy of the Courts to deal with Indigenous issues given the lack of participation, approval and consent of Indigenous Peoples

Many questions arise when exploring the creation of an Aboriginal Court. How would an Aboriginal Court be created? Would it be grounded in the judicature section of the *Constitution Act*, 1867, or rather under s.35 of the *Constitution Act*, 1982? The creation of an Aboriginal Court as a function of governance is arguably a right of self-government. In some cases, self-government agreements have included the right to create courts. The scope and mandate of the Court must be clearly defined. No Aboriginal Court can remain completely separate. Parameters must be clearly set. Questions before the Courts are rarely pure questions of Aboriginal and Treaty rights, and are often very complex. What questions would go to an Aboriginal Court? Should not questions relating to Aboriginal and Treaty rights also be dealt with in regular courts? The relationship between an Aboriginal Court to other Courts was explored, including the amount of deference other Courts should have to an Aboriginal Court, whether there should be a right of appeal from an Aboriginal Court, and if so, what Court would have legitimacy to determine appeals.

There are some existing examples of Indigenous communities creating by-laws as well as courts to enforce those by-laws, as an expression of Indigenous law-making. While such courts have the same authority as courts of provincial jurisdiction, additional responsibilities to play a peacemaking

role have been added. These courts have proven successful in addressing offences occurring within the community.

There are various kinds of courts envisioned, including courts that deal with adjudication of internal community issues, or by-laws, or community based peacemaker tribunals, or matrimonial property issues, etc. Regardless of the nature of the Court, there are still issues of judicial independence and proper separation of powers to be considered including strong fire- walls between ranches of government.

The creation of a broader court dealing with s.35 constitutional guarantees of Aboriginal and Treaty rights requires the development of inter-societal law. Leading Indigenous scholars have explored this notion, focusing on how to understand the intersection between two different societies. This scholarship is vital in the creation of new institutions. The challenge before us is how to create an institution that can adjudicate inter societal law? To move forward on these issues, we must consider these questions and work towards scooping out notions of inter-societal law and Indigenous tribunals at all levels.

The creation of an Aboriginal Court would also entail developing entirely new rules of evidence and procedure, arising not from the Common Law but from Indigenous Peoples Law. Developing a non-adversarial process in keeping with Indigenous cultures would enhance the ability and legitimacy of the Court to deal with Indigenous Peoples.

F) NEW INDIGENOUS LEGAL INSTITUTIONS

Key factors in the successful creation of new Indigenous legal institutions include: Vision; Resources; Accountability; and Public Education.

Presenters focused on the creation of new institutions to move us forward and away from colonization, and to foster a healthy relationship between Indigenous Peoples and Canadian society. Accountability is key in these new institutions – that is, holding the Government of Canada accountable for its actions in relation to Indigenous Peoples and its fiduciary duty. We must create mechanisms to keep Canada to its fiduciary duty through the development of new institutions, and through public protest/education. We must also create our own mechanisms within Indigenous communities to enhance accountability.

The creation of a Court to hear matters that constitute violations of fiduciary responsibilities, as well as resolve land issues has been recommended by the Royal Commission on Aboriginal Peoples and the Senate Standing Committee (the Penner Committee). Such a court must be jointly appointed and have the capacity to look back to resolve outstanding disputes, as well as look forward to ensure a positive relationship for the future. In order to do this, there needs to be confidence of both Indigenous communities and governments to jointly create the new institutions that will be responsible to both. There must also be public accountability, allowing both Indigenous and non-Indigenous peoples to hold their governments accountable to have a healthy fiduciary relationship.

The scope and mandate of these institutions must be mindful of the many kinds of violations that exist, including violations that are not clearly identified as Aboriginal or Treaty rights violations. Who are the intended beneficiaries of the institutions – will they be inclusive of all Aboriginal Peoples including Métis and Inuit? Currently the Indian Claims Commission is not accessible for Métis who have no avenue to address their claims.

The authority of such institutions requires consideration, since often where an institution has binding authority, there is often the risk of increasing formality and reducing flexibility. One model explored was the creation of institutions that provide authority but are separate and apart from a commission; such institutions would provide easy access with low costs to resolve a wide range of potential disputes. Where the commission fails to resolve a dispute, then the process would allow an appeal to this specialized tribunal that would have the power to make binding decisions. This structure would ensure accessibility for Indigenous Peoples.

One such commission explored was a monitoring agency, such as a First Nations Ombudsman, to review and report to Parliament and First Nations governments on the development of a healthy fiduciary relationship and treaty implementation. Creating such a body would require significant resources; however, if successful in its mandate, an Ombudsman would prove a very good case for financial savings. The First Nations Ombudsman would play the role of a willing listener, be independent and flexible in process, flexible in language, a vigorous investigator, be accessible to Indigenous communities – that is go to the people, review files, interview witnesses, take evidence on the road, and facilitate creative resolution of issues at hand.

The creation of a separate Aboriginal Attorney General was also explored in some detail. All Attorney Generals across Canada have in some way acknowledged that the justice system is failing Indigenous Peoples in Canada. Solutions have not been forthcoming from the Federal Government, and the vision to create an Aboriginal Attorney General must come from Aboriginal Peoples. Indigenous Peoples have responsibilities to organize themselves and create a vision of such new institutions.

Speakers explored the possible motivations for the Federal Government to act with regard to the creation of these new institutions including media and public demands for such institutions, and embarrassment that Indigenous Peoples are increasingly relying on international institutions.

Regardless of the nature of the institutions being created, public education of Canadians on Indigenous issues is essential. Ultimately, governments act and negotiate solutions where there is public interest and pressure to do so.

A succinct and profound statement was offered by presenter, James Youngblood Sa'ke'j Henderson who said, "we must speak the language of our own dream." He encouraged us to work toward this dream, as "a disorganized Aboriginal Peoples cannot create an alternative future."

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