INDIGENOUS BAR ASSOCIATION NEWSLETTER

Fall 2007 Edition **October 2007**

Inside this issue:

First Indigenous Appointment to the Federal Court	2
IBA President's Address to the Federal Court	3
UN Declaration Rights of Indigenous Peoples	5
Case Note: McIvor v. Canada (Bill C31)	6
Ipperwash Inquiry Report	7
Member Profile: Nicole Richmond	8
Matters of Health	9

PRESIDENT'S MESSAGE

Dear Members and Friends,

The IBA is pleased to be hosting the 19th Annual IBA Fall Conference in Victoria, BC, in partnership with the University of Victoria Faculty of Law (October 26-27, 2007).

In 2006 the IBA Board held a retreat with the Indigenous Peoples' Counsel (I.P.C.'s) and developed a new Vision Statement which was adopted by the IBA membership at last year's Annual General Meeting. The IBA's Vision -- "To Enrich Canada through Indigenous Laws and Teachings".

This vision has been reflected throughout the work of the IBA over the last year, and is the focus of our Fall Conference which will explore Indigenous Laws and how they might be applied in resolving disputes within and between Indigenous communities.

Our annual fall conferences are a time for renewal of the IBA family -- a time to reconnect with old friends and colleagues, and to begin new relationships.

I'd like to offer a special welcome to our student members, some of whom will have just begun their legal studies. We wish you well and hope that you will go on to become active members of the IBA. Some of the greatest resources that you will have as you pursue your legal career are your fellow students and the dynamic and vastly talented Indigenous Bar membership.

The IBA has made great advances over the past several years, and there is much more work to be done. We have an important and ambitious vision. As a volunteer non-profit organization we are completely reliant on the energy and creativity of our member volunteers. We invite you to join us as we strive to realize our goals; become involved in the IBA as a volunteer, serve on one of our various committees, contribute to the newsletter, assist with organizing events and conferences, etc.

We hope you enjoy the Fall Newsletter and we look forward to hearing from you.

Hai-Hai,

Jeffery Hewitt, President

IBA BOARD OF DIRECTORS 2006-2007

Left to Right: *Betty Recollet (Conference Coordinator), Koren Lightning-Earle (Student Rep.), Angela Cousins (Director), Kathleen Lickers (Treasurer), Jeffery Hewitt (President), Lee Schmidt (Director), Tania Monaghan (Student Rep.), Germaine Langan (IBA Administrator).* Missing: *Candice Metallic (Vice-President), Jodie-Lynn Waddilove (Secretary)*

THE HONOURABLE JUDGE L. S. TONY MANDAMIN: THE FIRST ANISHNAWBE JUDGE TO BE APPOINTED TO THE FEDERAL COURT

By Dianne G. Corbiere

On June 28, 2007, the President of the IBA, Jeffery Hewitt and other IBA members and judges attended the swearing-in ceremony for Justice L. S. Tony Mandamin.

It was a historic day for Canada and Aboriginal peoples alike as this appointment marked the first appointment of an Aboriginal person to the Federal Court of Canada. The ceremony took place at the Supreme Court of Canada and was well attended and well received. It was likely the first time our medicines and ceremonies were allowed in the court.

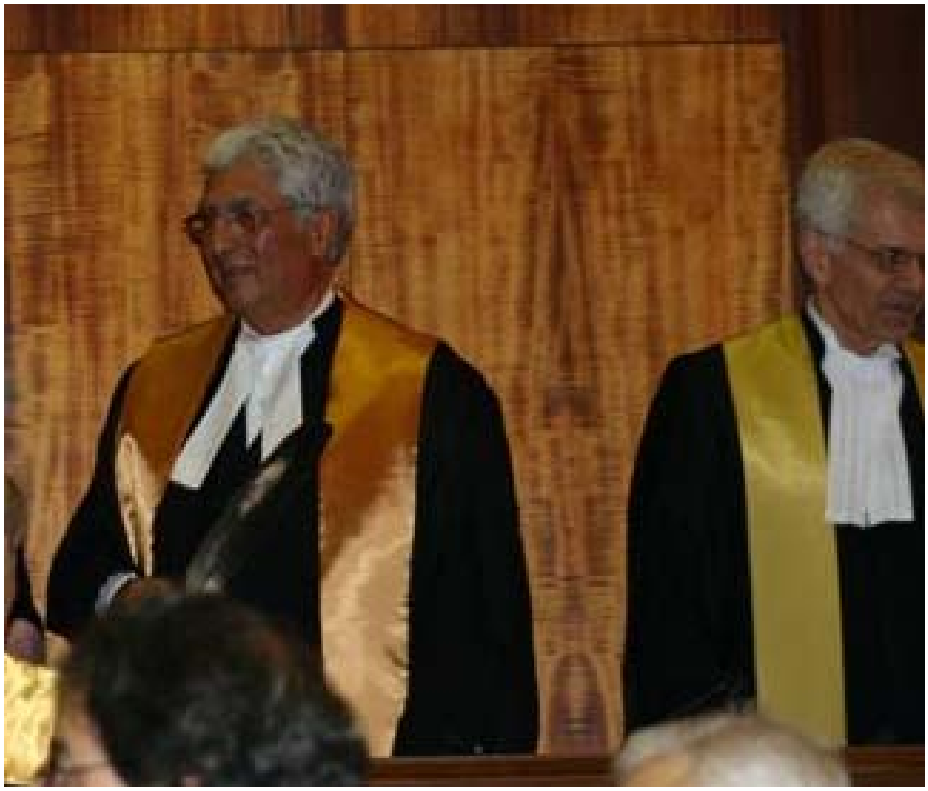
There were encouraging speeches provided by the Attorney General of Canada, the Honourable Robert Douglas Nicholson, P.C., Q.C., M.P. for Niagara Falls, Ontario, The Honourable Chief Justice A. F. Lutfy, Federal Court T.D., National Chief, Phil Fontaine, the Honourable Justice C. Murray Sinclair, Court of Queen's Bench, MB our President Jeffery Hewitt *et. al.* The substance and the theme of the speeches of our President, Jeffery Hewitt and Chief Justice A. J. Lutfy focused on the need to embrace Indigenous legal traditions in Canada and in the courts. For the benefit of those who were not able to attend this historic ceremony, we have included below a copy of the speaking notes of Jeffery Hewitt.

Most importantly, the ceremony was the celebration of Judge Mandamin, an Anishnawbe man and member of the Wikwemikong Unceded Indian Reserve in Ontario. All agreed that he would be an asset to the Federal Court of Canada and Canadians generally.

For those of you that do not know him, he has a Bachelor's Degree in Electrical Engineering from the University of Waterloo (1971) and a Bachelors of Law from the University of Alberta (1982). He worked in both the aboriginal and federal government sectors prior to attending law school in 1979. In 1985, he established the law firm of Mandamin and Associates at Enoch, Alberta. He represented First Nations, aboriginal organisations and individuals on a wide variety of matters and appeared on aboriginal issues in the Supreme Court of Canada, the Alberta Court of Appeal, the Saskatchewan Court of Appeal and the Indian Claims Commission of Canada.

He served as Faculty Co-ordinator for Aboriginal Justice Seminars at the Banff School of Management and taught as an Adjunct Professor at the University of Alberta's School of Native Studies. He also served as Chairperson of the Edmonton Police Commission and President of the Canadian Native Friendship Centre in Edmonton, Alberta.

Prior to being appointed to the Federal Court of Canada, Judge Mandamin was appointed as a Judge of the Provincial Court of Alberta and was publicly sworn in on October 15, 1999 in a special ceremony held on the Tsuu T'ina Reserve near Calgary, Alberta. He was a judge in the Criminal Division of the Provincial Court of Alberta and sat in the Tsuu T'ina Court which involves a Tsuu T'ina Nation peacemaker justice initiative and in the Siksika Court on the Siksika Reserve east of Calgary. ▪



Left to Right: The Honourable Justice Tony Mandamin, Federal Court of Canada; The Honourable Allan Lutfy, Chief Justice of the Federal Court of Canada

Dianne Corbiere is a partner in the law firm Nahwegahbow Corbiere at Rama Mnjikaning First Nation in Ontario, and the former President of the Indigenous Bar Association.

IBA PRESIDENT JEFFERY HEWITT'S COMMENTS ON JUSTICE MANDAMIN'S APPOINTMENT

Chief justice, honourable members of the Court, Minister, National Chief, distinguished guests, ladies and gentlemen…

Having completed Court protocol and before I commence, I must address Indigenous protocol, I also wish to thank the Algonquin Nation for having us as guests in their traditional territory today, the Elder for his opening and prayer, and I acknowledge the drummers for their work to bring the drum to us today, I also acknowledge the Drum. I bring greetings from the Indigenous Bar Association and Rama Mnjikaning First Nation.

I must confess having first thought today was a day of firsts for having Justice Mandamin sworn in, I believe it also a day of firsts for the having so many Aboriginal people in the Court without having to defend ourselves.

I must also say, that I practice on-reserve in Rama Mnjikaning First Nation every day so my children are not used to seeing me gowned. When I took my robes out of the closet this morning after breakfast, my daughter asked "Daddy, where are you going today?" Before I could answer, my eldest son of twelve said that I was going to 'Hogwarts School of Witchcraft and Wizardry'. Being a father, I could not afford to lose any of the 'hero points' that I could get with this and simply replied to them that "yes, Daddy is going to a place where magic happens".

Today, on this occasion, indeed magic is happening.

I have chosen, unlike my colleagues, to direct my remarks at the Court as a whole knowing that others would ensure that you would all come to know more about the person Justice Mandamin is.

Jeffery Hewitt, IBA President (far right) and others attending Judge Mandamin's Appointment to the Federal Court of Canada

Archimedes said, "give me a place to stand on, and I will move the earth."

The Greek mathematician first understood not only the law of buoyancy but also the law of levers. He understood that even someone with moderate strength, using a lever long enough, could move much more than their own weight.

Archimedes said, "give me a place to stand on, and I will move the earth"

…

Through rendering sound and thoughtful decisions, judges work to ensure that we all have a "good place to stand on" as Archimedes said.

There has been a growing debate in the public in recent times about judicial activism. Turning to Archimedes, perhaps the debate can be more informed.

In Canada, as in all free and democratic societies, we rely on our citizens' voluntary compliance of our laws and beliefs. We rely on lawyers to stand as sentinels, constantly on guard and arguing for the protection of our fundamental yet fragile rights. We charge the elected representatives in the house of commons with the responsibility of drafting the laws of our country. And the Courts are left to interpret challenges to laws and to our democracy in the bright light cast by our Constitution.

If we fundamentally believe in a democracy where government power is checked, then we too must respect that our judges are required to give voice to that check; for the rule of law, it has been said, is a cornerstone of democracy.

Through rendering sound and thoughtful decisions, judges work to ensure that we all have a "good place to stand on" as Archimedes said.

Let's move across time and space for a

(Continued on page 4)

PRESIDENT'S COMMENTS ON JUSTICE MANDAMIN'S APPOINTMENT

(Continued from page 3)
moment…from ancient Greece to the plains of the turtle's back: Canada.

Many of you have witnessed our traditional pow-wows. You may have noticed that we always send in our traditional dancers first. As with everything that Indigenous people do, there are reasons for this.

Our cultures are rich with tradition, custom and practices; some of which the Courts have even opined on.

It is within the richness of our traditions and customs, and in keeping with our role as one of the three founding partners of Confederation, that Indigenous people have a significant contribution to make in relation to legal pluralism – another cornerstone of our country.

We send in the traditional dancers first because of the role that they play. They dress in regalia representing our four legged and winged relations. They mimic the movements of our four-legged cousins with their light but sure footedness, and with their circling motion, move like our winged cousins hovering in the sky world.

What we ask of the dancers is to bend the tall grasses over in a way that does not break them, and to make room for the rest of us to follow.

Today, we see the first Indigenous appointment to the Federal Court of Canada.

The good news is that after June 28th, 2007, we will no longer have to hold our breath and wait to be the ones to say "today is the first" -- more Indigenous judges will no doubt follow.

Today, I would ask that all of the representatives of the Court hold the imagery of our traditional dancers in your minds while you deliberate on the decisions that will be set out before you in your judicial careers. Whether the cases directly relate to Indigenous Peoples or not. I ask that you deliberate in a manner that is light but sure footed and that creates room for us all to follow.

Today, I am fortunate to be attending this swearing-in ceremony for Judge Mandamin, embarking on another touchstone of his legal career and indeed further along the circle of life. But in this Court also lies the future of Indigenous Peoples and indeed Canada.

It is time now for the Courts to make more room for Indigenous customs and traditions within the laws of Canada.

In as much as we contribute lands and resources to Confederation, we too are able to contribute our ways to deeply enrich legal pluralism and indeed the country. Doing so, I am absolutely convinced, as Archimedes said, we "can move the earth".

On behalf of the Indigenous Bar Association felicitation! Congratulations justice Mandamin on your appointment!

Thank you to the Court of the opportunity to speak today. Hai-Hai. Merci. Thank you. ▪

CREATING A DIALOGUE ON INDIGENOUS LEGAL ETHICS

What are Indigenous legal ethics? The IBA Ethics Committee seeks to engage the IBA membership on a dialogue on Indigenous legal ethics. The Committee will be contributing a regular column to the IBA Newsletter to promote an exchange within the membership on ethics. This first contribution is from Committee Member Jean Teillet. We invite readers to respond with their thoughts and comments. Email your comments to: mfroh@indigenousbar.ca

Some Thoughts on Beginning a Discussion on Ethics By Jean Teillet

Ethics is a discussion of morals. There are three ways to begin the discussion. First, one can discuss the roots of ethics and what they mean. Are ethics social constructs? Do morals come from God (the great spirit)? Is there a place for reason or change in ethics? A second means of discussing ethics is more pragmatic and involves a discussion of moral standards that regulate right and wrong conduct. Finally, one can look at applied ethics, which usually involves a discussion of how morals apply to a particular issue such as abortion or capital punishment.

How do we then begin to discuss whether there are any ethical standards that can be applied to Aboriginal lawyers. It seems to me that we need to begin with a common understanding. In other words before we can discuss whether Aboriginal lawyers should be subject to any particular moral standards of conduct over and above those we already conform to as lawyers, we must first discuss the roots of what might be called Aboriginal ethics.

Do we as Aboriginal lawyers from many different peoples share any roots that might allow us to establish a common understanding of a single, however complex, ethic?

Beginning at the root then - does any Aboriginal ethic exist independent of humanity? Does any Aboriginal ethic come from God or spirit? Is there an objective divine morality that would ground an Aboriginal ethic that would apply to all Aboriginal peoples? If so, how do we know what that is? Does it change? What is our relationship to that divine morality? These are the first questions that we need to discuss. ▪

Jean Teillet is a partner with the firm Pape Salter Teillet with offices in both Vancouver and Toronto; she is a former Director of the IBA and a current member of the IBA Ethics Committee.

U.N. VICTORY BITTERSWEET FOR RIGHTS ADVOCATE (Reprinted with permission from the Wetaskiwin Times)

Anthony Kovats; Special to the Wetaskiwin Times
Monday October 15, 2007

To finally be identified -- ultimately, to be recognized by the world as Peoples.

That is what makes this U.N. victory so bittersweet for a man who has dedicated nearly a quarter of a century toward the recognition of these peoples who have never had an official voice of their own. Hobbema's Willie Littlechild is ecstatic that the declaration he helped pen and lobby for on the international stage has now been adopted by 143 nations. But the bitterness stems from the realization that his own nation was one of four globally who voted against the United Nations Declaration on the Rights of Indigenous Peoples.

Representing about 370 million peoples, the declaration's non-binding intent sets out the individual and collective rights of indigenous peoples as well as their rights to their languages, identities, and ultimately, their cultures. Littlechild, the second indigenous MP elected in Canada, the first indigenous lawyer in Alberta, now a Queen's Counsel and member of the Order of Canada, felt betrayed when the current Tories joined the US, New Zealand and Australia in voting against Article 46 Sept. 13 .

"In a way I do feel betrayed by it. I've worked with these delegations all along and yes, we argued very bitterly sometimes, but on the other hand we came up with some wording that was very acceptable to both parties."

"At the end of all that to vote against it?"

Recognized as the regional Chief for Alberta and International Chief for Treaty 6, this is Littlechild's last year serving on the 16-member United Nations Permanent Forum on Indigenous Peoples, a forum he helped strike and one that has continually promoted the rights of indigenous peoples.

"I was really hoping (Canada) would champion our cause," mused Littlechild.

Although delegates were aware Canada may oppose the vote, there was the hope a series of last minute meetings would sway Canada in favour of the declaration. "If Canada insists on maintaining its opposition, it will be a very black day for the country," said Grand Chief Edward John, speaking for the Assembly of First Nations in New York prior to the vote. "It cannot present itself as a promoter of human rights internationally when in its own backyard it votes against the human rights of indigenous people."

Willie Littlechild; United Nations

But Canada officially maintains it didn't support the declaration because it didn't go far enough.

Wetaskiwin MP Blaine Calkins, parliamentary member for Littlechild's riding, said Canada did not support the U.N. declaration because it was inconsistent with the country's constitution. He said aspects of it were inconsistent with the constitution and Canada felt obligated to oppose it. "We have constitutionally entrenched rights for Indigenous Canadians. There are some articles in the declaration that are just not good for Canada," said Calkins.

Four to be exact. During negotiations, Littlechild said the Canadian delegation was concerned with 13 key points they saw as problems within the declaration. After revising the document, nine of the amendments were addressed and accepted; yet Canada would not budge on the remaining four. Littlechild said he had to give the Canadian delegation credit in that it weighed its options very carefully, but he maintains some of the interpretations by the current Canadian government of the declaration are not accurate.

Canada's Conservative government holds the position that key parts of the text remain ambiguous and open to competing definitions that could allow native groups to reopen already settled land claims. Preposterous said Littlechild, adding his intent while drafting the declaration was to further national unity "with the inclusion of indigenous peoples."

"This is really stretching the interpretation of the declaration. In fact, it's the opposite. Article 46 recognizes the balance of both sides and the Supreme Court of Canada called on us to try and resolve such situations. The declaration cannot be used against non-indigenous peoples," said Littlechild.

Initially, several African nations were opposed to the declaration, but after several months to review it, they handedly came on side with their support. Littlechild hoped his own country would follow suit since several aspects of the international declaration are already in place within Canada's own framework.

"I feel really bad about it. I didn't go out with a pen in hand for this many years to try and break up countries, but to go forward together with this international framework."

Regardless of the current Canadian government's position, the overwhelming approval of the declaration was an amazing accomplishment Littlechild was able to witness while still serving on the U.N. forum. It is the pinnacle of his career on the international stage, but he admitted the real work is still ahead with the declaration's eventual implementation. ▪

CASE NOTE: McIVOR V. CANADA (REGISTRAR OF INDIAN & NORTHERN AFFAIRS), 2007 BCSC 827

By Angela Cousins

Registration Provisions of the Indian Act Found to Violate ss. 15 and 28 of the Charter

Introduction

Recently, the British Columbia Supreme Court held section 6 of the *Indian Act* violates sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* by discriminating against Indian women who married non-Indian men, and their children. The plaintiffs challenged the constitutionality of ss. 6(1) and 6(2) of the *Indian Act* on the basis that the provisions dealing with the entitlement to register as an Indian were discriminatory and violated ss. 15 and 28 of the *Charter*. Under certain versions of the *Indian Act*, when an Indian woman married a non-Indian man, she lost her status as an Indian. Similarly, her children would not be entitled to register as Indians. However, when an Indian man married a non-Indian woman, his wife and children would be entitled to register as Indians. The plaintiffs argued that attempts to remedy this situation through amendments to the *Indian Act* had failed, and that the registration provisions continued to prefer descendents who traced their Indian ancestry along the paternal line over those who traced their ancestry along the maternal line. The plaintiffs specifically did not challenge the *Indian Act* provisions relating to entitlement to membership in a band.

With respect to the *Charter* action, the Court found that although the concept of "Indian" is a creation of government, it has developed into a powerful source of cultural identity for the individual and the Aboriginal community. The Court analogized the concept of Indian status to that of citizenship, in which both parents and children have an interest, stating that parents have a particular interest in the transmission of this cultural identity to their children. The Court held the registration provisions contained in s. 6 of the 1985 *Indian Act* did not eliminate discrimination as they continue to prefer male Indians who married non-Indians and their descendents, over female Indians who married non-Indians and their descendents contrary to sections 15 and 28 of the *Charter*. The Court held this discrimination was not justified pursuant to s. 1 of the *Charter*, as status is a matter between the individual and the state, not between individuals and bands. The 1985 amendments to the *Indian Act* severed the link between status and band membership with the rules governing registration being set out in s. 6 and the rules governing band membership contained in sections 10 and 11.

Facts of the Case

Sharon McIvor's maternal grandmother was an Indian pursuant to the *Indian Act* in force when she was born in 1888. Ms. McIvor's maternal grandfather was not an Indian and had no First Nations ancestors. They were never married, but lived in a common law relationship and were the parents of Susan Blankinship, Ms. McIvor's mother, born in 1925. The Registrar did not make a decision prior to April 17, 1985, that Ms. Blankinship was not entitled to be registered as an Indian because of non-Indian paternity, nor was Ms. Blankinship ever registered as an Indian.

Ms. McIvor's father was Ernest McIvor and of First Nations descent, but not registered as an Indian. His mother was Cecilia McIvor who was entitled to have been a member of a band and therefore would have been entitled to be registered as an Indian pursuant to s. 11(b) of the *Indian Act*, S.C. 1951, c. 29. His father was Alexander McIvor who was not of First Nations ancestry. Cecilia McIvor and Alexander McIvor were never married. Ernest McIvor was therefore the illegitimate child of a female band member.

Sharon McIvor was born in 1948, and prior to 1985, was not registered as an Indian. She married Charles Grismer in 1979, a person not of First Nations ancestry. Upon her marriage to a non-Indian, Ms. McIvor lost her entitlement to registration pursuant to the 1951 *Indian Act*.

The second plaintiff, Charles Jacob Grismer, is the son of Sharon McIvor and Charles Grismer, born in 1971. He was not registered as an Indian pursuant to the *Indian Act* then in force.

In September 1985, Sharon McIvor applied on her own behalf and on behalf of her children to the Registrar to be registered as Indians pursuant to s. 6(1) of the 1985 *Indian Act*. The Registrar stated that as Sharon McIvor had one parent who was entitled to be registered under subsection 6(1) of the *Indian Act*, she was entitled to be registered under subsection 6(2) of the *Indian Act*. However, the Registrar found her children were not eligible for registration. Ms. McIvor protested the decision on the basis that she was the illegitimate daughter, born before 1951, of and Indian woman eligible for status and thus eligible for registration under section 6(1)(c). The Registrar confirmed his decision on the basis that Ms. McIvor's mother was not entitled to be registered at the time of her birth because of non-Indian paternity and only became deemed to be entitled to be registered as a result of the amendments to the *Indian Act* on April 17, 1985. The plaintiffs then brought a statutory appeal and a *Charter* action.

However, later the defendant conceded that Ms. McIvor was entitled to be registered under s. 6(1)(c) of the 1985 *Indian Act* and that Charles Jacob Grismer was entitled to be registered under s. 6(2) of the 1985 *Indian Act*. The statutory appeal was allowed and the Registrar's decision varied to register Ms. McIvor as an Indian pursuant to s. 6(1)(c) and Charles Jacob Grismer as an Indian pursuant to s. 6(2) of

(Continued on page 10)

IPPERWASH INQUIRY REPORT: A Brief Summary

On May 31, 2007, the Report of the Ipperwash Inquiry was released in Forest, Ontario, where the evidentiary hearings had taken place. The Government of Ontario established the Ipperwash Inquiry on November 12, 2003, under the *Public Inquiries Act*, and appointed the Honourable Sidney B. Linden as Commissioner.

The Commission was directed to "(a) inquire into and report on events surrounding the death of Dudley George; and (b) make recommendations directed to the avoidance of violence in similar circumstances." In light of this mandate, Commissioner Linden separated the Inquiry into two phases that ran concurrently: "Evidentiary Hearings (Part 1)" that dealt with the events surrounding the death of Dudley George; and "Policy and Research (Part 2)" that dealt with the issues directed to the avoidance of violence in similar circumstances.

The Inquiry commenced in April 2004 when applications for standing from interested parties were heard. Seventeen parties were granted standing to participate in both Parts 1 and 2 of Inquiry, six of which were identified as representing Aboriginal interests: The Estate of Dudley George and George Family Group; Aazhoodena and George Family Group; Residents of Aazhoodena; Chippewas of Kettle and Stony Point First Nation; Chiefs of Ontario; and Aboriginal Legal Services of Toronto ("ALST"). Other parties representing Aboriginal interests in Part 2 of the Inquiry included: Union of Ontario Indians; Chippewas of Nawash Unceded First Nation; Anishnabek Police Services; Nishnawbe-Aski Police Services Board; and Aboriginal Peoples Council of Toronto.

The Part 1 evidentiary hearings began on July 13, 2004, and 140 witnesses were called over 229 days. Final submissions were completed in August 2006. The Inquiry's final Report consists of four volumes: Volume 1 contains the findings of the investigation; Volume 2 is an analysis of the policy issues; Volume 3 describes the Inquiry process; and Volume 4 is the Executive Summary.

Commissioner Linden, in his statement upon releasing the Report, explained that Dudley George and other First Nations men, women, and children occupied Ipperwash Provincial Park on Labour Day, September 4, 1995, primarily to protest the Federal Government's refusal to return the Stoney Point Reserve which it had appropriated as a military training site in 1942, under the *War Measures Act*. Although the Federal Government had promised to return Stoney Point after World War II, over fifty years had passed since the end of the War and the Federal Government had still not returned the land. The Commissioner explained that, despite persistent attempts by the Aboriginal people to persuade the Government to return the land, it had not done so and frustration steadily increased over the decades.

Commissioner Linden explained that, two days after the occupation of the Park began, a confrontation occurred between the OPP and the occupiers just outside the Park in an adjacent sandy parking lot, and it was during that confrontation that Dudley George was shot by OPP Acting Sergeant Kenneth Deane and subsequently died.

The Commissioner stated that questions about the death of Mr. George were raised almost immediately: "How could an apparently peaceful occupation and protest turn violent? What was the urgency in taking action? What was the role of the Provincial and of the Federal Government? Was racism or cultural insensitivity a factor?"

One of the issues that a number of the Aboriginal parties focused on during the evidence and emphasized in their submissions was the presence of racist attitudes, as expressed in comments and memorabilia. For example, ALST submitted that "internal racism exhibited by the OPP was exacerbated by an entirely inadequate investigation into the production of the racist memorabilia and the informal punishment used to discipline officers" and that any recommendation the Commission made with respect to the OPP "should include a focus on ensuring that incidents of racism are investigated in a competent, open and fair manner."

With respect to his findings, Commissioner Linden explained that the Aboriginal people who decided to occupy the Park believed that the Park was part of Aazhoodena, their traditional territory, that the Stoney Point people had a right to this land, and that historically the Indian agent had not adequately represented the interests of residents on the original Stoney Point Reserve. Their grievances were directed at both the Provincial and Federal Governments. Another reason for assuming control of the Park was to protect the sacred burial sites, which the occupiers had learned from their respective grandparents, were located in the Park.

The Commissioner explained, however, that the Premier, Michael Harris, and his political staff believed that the occupation was "a law enforcement issue, not a First Nation's matter" and "the Premier's position was that the Park belonged to the Province and that the occupiers were trespassing." The Commissioner found that "the Premier and his Executive Assistant had a different perspective than the OPP on how the occupation should be handled by the police." He explained that "the OPP's wish to pursue a 'go-slow' approach contrasted with the Government's desire for a quick end to the occupation." According to Commissioner Linden, "the Provincial Government's imperative for a speedy conclusion to the occupation was difficult to justify by events on the ground" considering that the Park was closed for the season, there were no campers in the Park, "nor was there any proven substantial risk to public safety that would justify this urgency."

Although the Commissioner found that the evidence did not support the claim that the Premier interfered with the OPP's operations, he found that both the former Premier and Minister of Natural Resources, Chris Hodgson, "made racist comments". In the Report, Commissioner Linden stated that, after carefully

(Continued on page 9)

MEMBER PROFILE: NICOLE RICHMOND

As a student who chose to article on Bay Street, I decided to return to the community to practice law after my June 2007 Call to the Bar. Just a few months ago, I worked in an oak-paneled office on the top floor of a downtown Toronto building, with a spiral stair case running between floors lined with law books. Today, here I am on the reserve in our make-shift, temporary office with birds singing just outside our windows. What compels the choice to come back?

I studied at U of T Law, which places a strong emphasis on recruiting and accommodating Aboriginal law students. I shared the same kinds of altruistic ideals about legal and political reform with my left-wing class-mates, but my fellow First Nation classmates and I knew that our legal training solidified our commitment and obligation to the betterment of our communities. When the Honourable Paul Martin came to meet with the Aboriginal Law Students last fall, I admired the conviction of every one of my colleagues – at least 30 students attended – who stated that they planned to work for their communities. Perhaps those students are just looking for the appropriate forum.

Finding your forum is not always easy. The courts are always emphasizing reconciliation and we all know that First Nation lawyers are mediators between competing value-systems. In addition, we are confronted with the pressure to make it in the main stream – to demonstrate that despite some "affirmative action" admission policy, we are perfectly proficient law students. Finally, many law firms have or seek significant First Nations clientele and they actively recruit Aboriginal law students – to diversify their roster or to improve their professional relations. Having interviewed with big firms in that blitz-krieg OCI (on campus interview) process, my friends and I have seen that firms perceive our unyielding ideals about "land claims" or "self-government" as a business risk. It is not always easy to be honest about yourself when interviewing or working with a Bay Street firm.

Nicole Richmond with her mom, Diane Richmond of Pic River First Nation on the happy occasion of Nicole's Call to the Ontario Bar.

I articled with a downtown litigation boutique that had carriage of a significant First Nations file, but very early it became clear that my involvement on that particular file would be limited to my *profitable* contribution. Because the file was not gainful during the time of my articles, my time ought to be allocated to other ventures. I ended up drafting pleadings, arguing motions, attending client meetings, and helping settle million dollar lawsuits. Articling is a stressful but rewarding time and I was pleased with the exposure to litigation that I received. I knew my articling firm wasn't for me and in early spring, I sent myself into a small flurry looking for a law firm to take me on and let me do what I really wanted to do.

Fast forward to two weeks into my career as a lawyer at an Anishinabek firm. I'm back on the rez and adjusting to a different pace and attitude towards the practice of law. The word *pro bono* is back in my vocabulary and the partners continue to refer to our firm as a family. The complexity of the files are overwhelming and mentally exhausting, but I am happily putting to use the legal principles (and critiques) that Professor Darlene Johnston taught me. Although it is early, the signs are good. ▪

Nicole Richmond is an Anishinabek lawyer who has recently joined the law firm of Nahwegahbow Corbiere at Rama First Nation in Ontario.

MATTERS OF HEALTH Health Column by Yvonne Boyer

In response to the needs of the membership of the Indigenous Bar Association, the IBA has enlisted me to write a column dealing with issues of balance, health and wellness in our busy lives as students, lawyers, judges, teachers, spouses/partners, fathers, mothers, and children, etc. It is intended that this column will help promote healthy lifestyles and practices while we face the pressures of our professional and personal lives. It does not provide medical or legal advice and I urge you to seek the advice of a qualified professional for that purpose. Ideally, each column that I write I will attempt to give you some ideas for creating a little more balance in your life.

Why did the IBA ask me to volunteer to do this? Well, I was a nurse for 16 years before law school. I spent 8 years as an operating room nurse in various operating rooms throughout Canada. In my legal life I have taken a keen interest in Aboriginal health law and have published a Discussion Paper Series on this important topic. I am Métis and a mother of four children, and had my fourth child while in law school. I know what it is like to try and balance life on my tip toes. I currently practice law in Ontario and Saskatchewan and am pursuing a PhD in law at the University of Ottawa.

Some of the topics that members have expressed interested in are: Family, immediate and extended, Elder care, childcare, work and school, articling choices, friends/relationships, hobbies, exercise, volunteer and community service, spirituality, me-time, addictions, anger, when/how to ask for help, stress, burnout, physical health, food choices, mental health, spiritual health, emotional health, managing workload, time management, legal/law firm culture issues, women's issues, men's issues, domestic violence, taking care of yourself, nurturing yourself, and many more. Any other topics you would like to see covered please email me at yboyer@indigenousbar.ca.

I will do my best to bring you as much information as I can in this little column. I may use case studies as examples if it is appropriate for the topic. If you would like certain specific questions answered please email me and I will try and address them in the newsletter. If you have knowledge or tips you would like to share please send them to me, I will share them.

Ultimately, the issues that we will address in the newsletter column speak to the very purpose of our lives. We all have had various reasons for choosing the profession of law; to help address the inequities in life, the rule of law and the resolution of disputes, adversarial or peaceful, individual or collective. We want to see our Nations flourish, but to do this, we as individuals must be healthy; we must take care of our families and our neighbors at times and through these actions we care for our Nations. We must help the ones who cannot speak or help themselves. We must care for our children and our spouses/partners, and we must care for **ourselves**. Our lives must be balanced with each of the obligations attended to. Sometimes we just have to take a deep breath and say what we need to say to help change our own lives and to try and make a marked changed in the way the legal profession operates, especially within our Indigenous ways of knowing and through our own Indigenous laws. It is okay to sometimes set aside our preconceived attitudes and comfort levels. Health is about balance. We can't do it all at once, but we can achieve balance if we do it a step at a time. ▪

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IPPERWASH INQUIRY REPORT: A Brief Summary

(Continued from page 7)

assessing the evidence, it was his view that Michael Harris made the statement "I want the fucking Indians out of the Park." He also found that Chris Hodgson made the comment "Get the fucking Indians out of my park."

Commissioner Linden also found that "cultural insensitivity and racism on the part of some of the OPP officers involved were evident both before and after Dudley George's death and created a barrier to establishing effective communication and to developing a level of trust with the occupiers which, in turn, made a timely, peaceful resolution of the occupation more difficult."

The Commissioner found that "racist comments were made by OPP intelligence officers against the Aboriginal people who were under surveillance at the time" and that "these comments were also racist against persons of colour."

The Commissioner found that "the racist comments of the intelligence officers were not an isolated incident as there were a number of other tape-recorded conversations of various officers making derogatory remarks about Aboriginal people at the time of the occupation." The Commissioner explained that "the Inquiry also learned of several inappropriate activities after the occupation, including the production and distribution of offensive coffee mugs and t-shirts containing racist imagery to commemorate the OPP's actions at Ipperwash." Commissioner Linden found that "the OPP's response to these incidents was insufficient." The Commissioner recommended, in Volume 1 of the Report, that "whenever there are allegations of racism (including a failure by other officers to report), they should be dealt with by way of formal discipline". The Commissioner recommended further, in Volume 2, that Ontario's new "Independent Police Review Director should determine the most appropriate policy to be followed by his or her office and police services in

(Continued on page 12)

CASE NOTE: McIVOR V. CANADA

(Continued from page 6)
the 1985 *Indian Act*. See *McIvor v. Canada (Registrar, Indian & Northern Affairs)*, 2007 BCSC 26.

III. Section 15 Analysis

The plaintiffs argued that Bill C-31, *An Act to Amend the Indian Act*, S.C. 1985, c. 27 continued to discriminate by preferring male Indians who married non-Indians and their descendents over female Indians who married non-Indians and their descendents, contrary to sections 15 and 28 of the *Charter*. The Court found that s. 6 of the *Indian Act* withholds full s. 6(1)(a) registration status from women who married non-Indian men and their direct descendents. In doing so, s. 6 draws distinctions that are based on personal characteristics, namely, sex and or a combination of sex, and marital status.

The Court noted that before s. 6 of the 1985 *Indian Act* came into force, if an Indian man married a woman not entitled to registration, his wife would have become entitled to registration as an Indian. If the couple had children, the children would have been entitled to registration. Once the 1985 *Act* came into force, pursuant to s. 6(1)(a), the husband, wife and children would be entitled to registration. If the couple did not have children prior to the 1985 *Act* coming into force, but had children after, the children would be entitled to be registered under s. 6(1)(f). If any of the children married persons not entitled to registration, their children would be entitled to registration under s. 6(2) of the 1985 *Act*.

However, if before s. 6 of the 1985 *Act* came into force, an Indian woman married a man not entitled to registration, she lost her entitlement to registration. The children of the marriage were not entitled to registration. After the 1985 *Act* came into force, she became entitled to registration pursuant to s. 6(1)(c). Her children were entitled to registration pursuant to s. 6(2). If any of the children married persons not entitled to registration, their children would not be entitled to registration.

The Court found that status under the *Indian Act* is a concept that can be analogized to the concepts of nationality and citizenship with the eligibility of a child in both cases being related to the circumstances of his or her parents. Therefore, the eligibility of a child to registration as an Indian based upon the circumstances of the parent, is a benefit of the law in which both the parent and the child have a legitimate interest.

The Court held that the appropriate comparator group with respect to Sharon McIvor are males who as at April 17, 1985 were registered or entitled to be registered as Indians, who were married to persons who were not Indian and who had children. With respect to Charles Jacob Grismer, the Court found the appropriate comparator group is children of males who as at April 17, 1985 were registered or entitled to be registered as Indians, and who were married to persons who were not Indian.

The Court found that the law makes a distinction or results in differential treatment on the basis of a personal characteristic, the enumerated ground of sex and the analogous ground of marital status, and the plaintiffs were denied a benefit granted to the comparator group. The Court further held that the facts in this case supported the conclusion that registration as an Indian reinforces a sense of identity, cultural heritage, and belonging. The Court noted the evidence of the plaintiffs is that the inability to be registered with full s. 6(1)(a) status because of the sex of one's parent or grandparents is insulting and hurtful and implies that one's female ancestors are deficient or less Indian than their male contemporaries. Thus the dignity of the plaintiffs has suffered.

IV. Section 1 Analysis – Justification Test

The Court noted that the defendants did not identify any group or individual that has an interest that conflicts with, or that must be balanced with, the goal of adopting non-discriminatory criteria for eligibility for registration as an Indian. The Court rejected the defendants' argument that a desire to avoid inequality between generations is a pressing and substantial objective and agreed with the plaintiffs that the defendants failed to advance any pressing or substantial purpose for the discriminatory registration scheme that was adopted.

The Court held that the entitlement to registration is no longer related to band membership and therefore is unconnected to the goal of providing greater band autonomy and, accordingly, the impugned provisions are not rationally connected to the objective of providing greater band autonomy. The Court also held that a system could have been established that would have treated matrilineal descent on an equal basis with patrilineal descent and therefore did not impair the right no more than reasonably necessary. The Court went on to find that the impact was disproportionate as neither the collective identity of Aboriginal communities nor the collective interests of band communities are affected by the registration provisions at issue which relate only to Indian status and thus only to the relationship between the individual and the state. The Court also found that the damaging effects of the continuing discrimination against Aboriginal women ad their children are significant. The only salutary effect of the impugned provisions was cost and the Court found that the harm associated with the provisions was not proportional to the salutary measure and therefore the violation of the plaintiffs' rights was not justified under s.1.

Remedy

The Court declared that s. 6 of the 1985 *Indian Act* is of no force and effect insofar as it authorizes the differential treatment of Indian men and Indian women born prior to April 17, 1985 and matrilineal and patrilineal children born prior to April 17, 1985 in the conferring of Indian status.

Note: the Department of Justice filed its appeal of the decision on July 6, 2007. ■

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IPPERWASH INQUIRY REPORT: A Brief Summary

(Continued from page 9)

Ontario in handling complaints of misconduct involving racism and other culturally insensitive conduct" and "should consult with community and Aboriginal organizations when developing this policy."

Significantly, with respect to the land, Commissioner Linden noted that, as a provincially constituted Commission of Inquiry, he had neither the jurisdiction nor the mandate to resolve the issues of the army camp or the surrender of the land comprising Ipperwash Provincial Park. Nevertheless, the Commissioner expressed his view that "the most urgent priority is for the Federal Government or return the former army camp to the Kettle and Stony Point First Nation immediately, with an apology and appropriate compensation" which he included as a recommendation in Volume 1 of the Report.

There are a total of 20 recommendations in Volume 1 and 78 recommendations in Volume 2 of the Report. Some of the key recommendations for the Government set out in Volume 2 include: the establishment of an independent Treaty Commission of Ontario to facilitate and oversee the settling of land and treaty claims; working with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness of Aboriginal burial and heritage sites; the development of a comprehensive plan to promote general public education about treaties in Ontario; the creation of a Ministry of Aboriginal Affairs with a dedicated minister and its own deputy minister; and numerous recommendations concerning the policing of Aboriginal protests and occupations.

The Inquiry's four volume Report is available in print and on CD, as well as on the Inquiry's website:
www.ipperwashinquiry.ca ▪

This brief overview of the Ipperwash Report was contributed by Aboriginal Legal Services of Toronto (ALST).