



FALL EDITION

## IBA NEWSLETTER

OCTOBER 2006

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## PRESIDENT'S MESSAGE

Dear Members,

Welcome to the Fall Newsletter of the IBA.

With the change of seasons comes the IBA Annual Fall Conference. This year's fall conference is presented in partnership with the University of Saskatchewan Faculty of Law and will mark the 10-year anniversary of the Final Report of the Royal Commission on Aboriginal Peoples.

"Making Aboriginal Policy: A Conference Ten Years after the Final Report of the Royal Commission on Aboriginal Peoples" is scheduled for October 19-21, 2006, in Saskatoon.

What impact has RCAP had on law and policy development in Canada over the past ten years?

What have we, as Indigenous people done to implement RCAP? What tools does it provide to further the interests of Indigenous Peoples in Canada?

Join us for what promises to be an interesting and very practical exploration of the factors that contribute to government's response to Aboriginal interests and rights in Canada; and to how commissions, inquiries, tribunals can

influence law and policy development.

The IBA Annual General Meeting will take place on Sunday, October 22, 2006 at the Bessborough Hotel in Saskatoon, where we will be discussing, among other things, a five-year work plan for the IBA.

Yours Truly,  
Jeffery Hewitt  
President



Jeffery Hewitt  
President  
Indigenous Bar Association

### MEMBERSHIP SURVEY

Congratulations to Arlene Dodge and Valerie Bisschops—winners of the IBA Membership Survey Draw!

COMPLETE SURVEY AND ENTER TO WIN!!!

See page 4 for details.

## BOARD OF DIRECTORS 2006-2007

Jeffery Hewitt, President	Denise Lightning, Member-At-Large
Judy Daniels, Vice-President	Lee Schmidt, Member-At-Large
Kathleen Lickers, Treasurer	Koren Lightning-Earle, Western Student Rep
Margaret Froh, Secretary	Emma Taylor, Eastern Student Rep
Brian Calliou, Member-At-Large	Germaine Langan—IBA Administrator

The IBA Board of Directors met with Indigenous Peoples' Counsel (IPC) members over the course of two days in March 2006, to discuss the current and future direction of the IBA. The first ever IBA Board/IPC Retreat was a great success, generating critical discussion regarding the vision of the IBA, and our relationships both within and external to the IBA. A report has been prepared from the Retreat which will be presented to IBA membership at the upcoming Fall Conference in Saskatoon, SK.

A new and concise Vision Statement was created by the IBA Board and IPC at the Retreat which reflects the core values and purpose of the IBA. *"Enriching Canada with Indigenous Laws and Teachings"*.

Further to the long established IBA Objectives, an IBA Mission Statement was also developed at the Retreat, identifying essentially why the IBA exists and setting out our tasks. The IBA Mission is to:

STRONGER AND REVITALIZED COLLECTIVES AND COMMUNITIES THROUGH THE PROMO-

## "Enriching Canada with Indigenous Laws and Teachings"

TION OF INDIGENOUS LAWS AND TEACHINGS

CODIFY, RECORD AND MAKE AVAILABLE INDIGENOUS LAWS

PROMOTE RESPECT FOR INDIGENOUS

RIGHTS INCLUDING TREATY AND ABORIGINAL TITLE

PROMOTE RECOGNITION, RESPECT AND PROTECTION FOR THE INTERESTS AND RIGHTS OF INDIGENOUS PEOPLE

SPEAK OUT TO EFFECT LAW AND POLICY REFORM TO ENSURE MORE ROOM FOR INDIGENOUS LAWS AND TRADITIONS IN CANADA

SUPPORT THE INDIGENOUS BAR THROUGH INDIGENOUS LAWS AND TEACHINGS

INCREASED REPRESENTATION THROUGHOUT

STITUTIONS IN ORDER TO PROMOTE INDIGENOUS LAWS AND TEACHINGS INCLUDING: LAW SCHOOLS (STUDENTS AND FACULTY); PRACTITIONERS; GOVERNING BODIES (LAW SOCIETIES, TRIBUNALS, COURTS, ETC.); POLITICAL AGENCIES AND ENTITIES.

The Board and IPC reflected further on the Vision and Mission to develop a work plan, identifying key priorities for the IBA in the coming years; which will be continuously reflected and expanded upon through the work of the IBA's Board and various committees, guiding the IBA over the years to come. Together the IPC, the Board and the Membership will give life to the Vision established at the Retreat through implementation of the work plan.

A detailed report, including specifics of the proposed work plan will be presented to the IBA membership at the Annual Fall Conference in Saskatoon, on October 19-21, 2006; and will be discussed in detail at the IBA AGM on October 22, 2006.



Koren Lightning-Earle (Western Student Rep) and James Youngblood Sakej Henderson, I.P.C.



Brian Calliou, Director and Willie Littlechild, I.P.C.

## Lawyers' Roles & Responsibilities in light of Residential School Settlement Agreement

By Margaret Froh

The IBA presented to the AFN Indian Residential School Settlement Agreement Conference for Frontline Workers in Vancouver, BC on September 12<sup>th</sup>, 2006. The IBA presentation addressed Lawyers' Roles & Responsibilities in light of the May 8, 2006 Indian Residential Schools Settlement Agreement.

The Settlement Agreement is subject to review and approval by the courts; it will be implemented should sufficient numbers of former students choose to accept the Agreement. It provides for advance payments to the elderly, common experience payments to all former students and an independent assessment process where claims of abuse are made. Applications for advance payments are being made at this time. Common experience payments and the independent assessment process will

be implemented upon confirmation by the courts and a successful ratification by former students.

With these anticipated changes in the process for resolution of residential school claims, the presentation to the conference addressed the resulting roles and responsibilities of lawyers.

While lawyers may not be required for applications for advance payments or common experience payments, there is certainly a need for legal advocates in the independent assessment process. In addition, those former students who opt out of the Settlement Agreement will presumably continue to advance their claims through the Courts

The presentation had a particular focus on the issues of professional responsibility, the role of law societies in governing the legal profession, and the Guidelines adopted by some law societies to address issues arising out of IRS litigation. Particular focus was given to the guidelines adopted by the Law Society of Upper Canada, as the most comprehensive guidelines established.

Unfortunately, few in Indigenous communities are aware of the existence of law societies in governing the legal profession. Conference delegates, i.e. frontline workers providing services within Indigenous communities across Canada, were encouraged to ensure that community members are aware of the role of law societies to govern the legal profession, the professional conduct requirements of lawyers, and the complaints mechanisms available should a lawyer breach their professional responsibilities.

Other matters discussed include contingency fee agreements; wills & estates issues; and issues arising when retaining a lawyer. ■

To view the presentation and the guidelines discussed, visit the IBA website at: [www.indigenousbar.ca](http://www.indigenousbar.ca)

## VOLUNTEER OPPORTUNITIES AND JOB POSTINGS ON THE IBA WEBSITE!

Whether you are an Indigenous lawyer or student looking for opportunities, or an employer seeking Indigenous lawyers or law students, we encourage you to consider the IBA website as an important source of information on current volunteer opportunities and job postings.

Visit our site often for updated postings:

[www.indigenousbar.ca](http://www.indigenousbar.ca)

By Judy Daniels

Thank goodness Summer is finally here. Let the golfing begin! This column is intended to provide a venue to keep tabs on each other and share our news. Please send your information for the column to: [jdaniels@indigenousbar.ca](mailto:jdaniels@indigenousbar.ca)

Congratulations to **Apryl Babcock**, a U of Alberta grad, on her recent engagement to Lorne Gladue.

Congratulations to **Lisa Chartrand**, (nee Weber) a U of A grad and her husband lawyer **Lionel Chartrand** of Winnipeg on their impending baby arrival.

Where are our friends?

**Merle Alexander** - Boughton Law, Vancouver, BC

**Michelle Brass** - Justice Canada, Ottawa, ON

**Justice Rose Boyko** - Superior

Court of Justice, Central East Region, - ON

**Brian Calliou** - Program Director, Aboriginal Leadership and Management, Banff Centre - Banff, AB

**Judge Marion Buller Bennett** - Provincial Court, Port Coquitlam, BC

**Professor Larry Chartrand** - Director, Aboriginal Governance Program, U of Winnipeg- Winnipeg, MN

**Eugene Creighton** - Senior Partner, Walsh Wilkins Creighton- Calgary, AB

**Brad Enge** - Private Practice - Edmonton, AB

**Christine Goodwin** - Seventh Generation Law Group - Tsuu'Tina First Nation, AB

**Deborah Hanly** - Hanly Law Offices - Sylvan Lake, AB

**Roger Jones** - Assembly of First Nations - Ottawa, ON

**Denise Lightning** - Lightning Law Office - Samson Cree Nation, AB

**Judge Tony Mandamin** - Provincial Court - Calgary, AB

**Richard Mirasty** - Director, Indigenous Law Program, U of A - Edmonton, AB

**Lee Schmidt**- Hutchins Grant & Associates - Vancouver, BC

**Professor Renee Taylor**- UBC First Nations Legal Clinic - Vancouver, BC

**Kimberly Thomas** - Kimberly Thomas Professional Corporation - Ohsweken, ON

**Tom Vincent** - Justice Canada, Ottawa, ON

Until next time. JD ■

## MEMBERSHIP SURVEY

The IBA is seeking feedback from Indigenous law graduates and law students on how we can improve our programs and services.

**Speak up and share your opinions!**

Complete a survey and enter your name to win a \$300 credit against your 2007 IBA conference fees.

For more information visit our website at:

[www.indigenousbar.ca](http://www.indigenousbar.ca)

**COMPLETE  
SURVEY  
AND ENTER  
TO WIN!!!**



### By Koren Lightning-Earle

Along with many other students across Canada, I had the opportunity to participate in the Kawaskimhon moot this past March. I was a part of the University of Alberta Team representing Big Mountain First Nation. The Kawaskimhon moot was one of the best experiences of my law school study.

The Kawaskimhon moot was set up as a negotiation in order to settle a current dispute. The issue facing the moot partici-

pants was an issue that is at the forefront of many First Nations communities in Canada. The fact pattern addressed whether First Nations have the right to regulate labour on their reserves?

The Kawaskimhon Moot was hosted by Osgoode Hall, York University and was held at the Ontario Federation of Indian Friendship Centres from March 2 to March 4, 2006. Osgoode did a tremendous job organizing the moot. There were 11 schools that participated.

“The Kawaskimhon moot was one of the best experiences of my law school study.”



Members of the Planning Committee and Osgoode Team A and B (Front row, left to right): Chantel Kondracki, Lori Mishibinjima, Kamil Umar and Leora Wise. Back row, left to right, Osgoode Hall Law School Professors Benjamin Richardson, Stepan Wood, Shin Imai and Kent McNeil.

**Participating Schools:** McGill University represented the Provincial Government of Quebec.

Osgoode Hall A represented Aboriginal casino workers who live off the reserve. Team B represented Human Resource and Development Canada

University of Calgary represented International Labour Organization.

University of Alberta represented the Big Mountain Indian Band Council.

University of British Columbia represented Big Mountain First Nation community rights groups.

University of Manitoba represented Beaver Lake First Nation.

University of Ottawa represented Department of Indian Affairs & Northern Development.

University of Saskatchewan represented Aboriginal casino workers who live on the reserve.

University of Victoria represented High Stakes Casino.

University of Western Ontario represented Provincial Government of Ontario.

University of Windsor represented Canadian United Employees and non-Aboriginal casino employees

Each submission brought something new and different to the table. All of the participants arrived with enthusiasm and a little nervousness.

**The Problem:** In comparison to a typical moot, like the Jessop Moot, the content and subject matter of the Kawaskimhon Moot had a more personal connection. The substance of the moot dealt with issues that I would face on a day-to-day basis in the Aboriginal Community. The situation could happen on any reserve in Canada.

The situation presented a great challenge for students since it was similar to a case contested in Canadian courts and was decided unfavourably for the First Nation. The fact pattern was based on CAW-Canada, Local 444 v. Great Blue Heron Gaming Co. The teams were forced to look beyond the court system, because it was expected we would not find a favourable precedent. It required us to bring something new and dynamic to the table. New ideas are required to solve disputes without having to rely on costly and time-consuming court proceedings. This is an important issue in Canada and made our work more meaningful. It was interesting because we were involved in a real situation and were given the opportunity to

provide the stakeholders with an innovative perspective.

In order to prepare, my team reviewed the relevant case law and came up with possible arguments for and against the Big Mountain First Nation (BMFN). After reading the case law and reading the fact pattern, we realized that in a courtroom it would be almost impossible to prove that BMFN had the right to regulate labour on their reserve. My team decided that we would have to shift our focus to the bigger picture.



University of Calgary team (left to right): Koren Lightning, Val Napoleon, Tara Rout, Melissa Gorrie.





At Ontario Federation of Indian Friendship Centres, the Iroquois Room.  
Facilitators (Left to Right): Kathleen Lickers, Jeffery Hewitt, Kim Murray, and Ward LaForme.

## THE FACILITATORS:

The Facilitators of the Moot were Kim Murray, Executive Director of Aboriginal Legal Services Toronto and Ward LaForme, formerly a facilitator with the Indian Commission of Ontario. The facilitators also included Kathleen Lickers, a lawyer at the Six Nations Reserve, and former counsel with the Indian Claims Commission. And Jeffery Hewitt, in-house counsel for Mnjikaning First Nation and President of the Indigenous Bar Association.

The facilitators provided important guidance which helped students move in a cooperative direction. Rather than a lot of small discussion groups and bargaining, they encouraged us to analyze our own arguments and positions and further justify them. They challenged our submissions with many thought provoking questions pushing us to take our arguments to the next level.

The facilitators set the tone of the moot to be non-threatening. This allowed the students to feel that each party had an equal stake in the negotiations. Although the group did not come to a complete resolution, we did accomplish some important requirements for a negotiation. I left the moot feeling satisfied and fulfilled rather than anxiety about whether I compromised important issues for the party I represented. In the larger context, building relationships and trust are the most vital factors in a successful negotiation. The participants of Kawaskimhon 2006 achieved this goal and gained so much more beyond an academic credit.

“They challenged our submissions with many thought provoking questions...”

**The Moot:** Overall the moot was a great experience; it was an uplifting and empowering. It was wonderful to interact with a diversity of students from across Canada. It was interesting to see how dynamics formed between schools based on the roles they were playing. For example, the schools that were chosen to represent the government parties frequently spent their break times together discussing strategies.

It was interesting to see how open-minded many of the teams were. A few of the schools did not have any Aboriginal people represented on their teams. However, this did not hinder their teams' skills in the sense that there are many non-Aboriginal people who are important allies for Aboriginal legal issues. Not all parties in a real negotiation involving Aboriginal issues are going to have Aboriginal people representing the various interests. Therefore it becomes important to involve non-Aboriginal people in the learning process. Another situation that may arise is a person may have to represent interests that conflicted with their own values.

The University of Windsor had a difficult time getting into the mindset of the party they were delegated to

represent. One of the team members from Windsor was of Aboriginal descent and they were representing the interests of the non-Aboriginal employees. This presented a personal dilemma for the Aboriginal student. Essentially, she had to craft arguments against her own people. It frightens me to think that I may have to represent someone that goes against what is in my heart or is going against my people. Those are the choices we make in this profession and we have to be confident in our ability to separate ourselves from our work. In many instances our cases become our lives. This is especially the case when it involves our home communities.

Participating in the moot provided me with an important experience. It provided me with a chance to see old friends and make new ones. Students commented on how much easier it was to be at the negotiating table with friendly face across the table. Having my friends participate in different capacities made the process less intimidating.

The moot also broadened my perspective of interesting and challenging career opportunities. I am now exploring the field of negotiation and mediation as a possibility. My moot experience illustrated that negotiations are a more effective way for Aboriginal people to ad-

vance their claims. Through interactions with the facilitators, participants, and coaches, it has become apparent that the trend is moving toward negotiations and mediations. I have enrolled in classes that will help me facilitate such events and also to be able to understand the negotiation process.

The Kawaskimhon Moot was rejuvenating in the sense that it reaffirmed why I was in law school. It helped to bring me back to center. It is easy to get caught up in law school, and this experienced helped to direct my focus and reenergize my spirit to finish out the year. I promote the moot to all I meet and all that are willing to listen. Since I began law school, the moot has been one of the best and most rewarding experiences to date.

Next year, the Kawaskimhon Moot will be hosted by the University of Manitoba in Winnipeg and the following year it will be hosted by the University of Alberta in Edmonton. If you would like more information about the Kawaskimhon Moot 2006 please visit the Osgoode Hall website at <http://www.yorku.ca/osgoode/kawaskimhon/index.htm>. ■



University of Victoria team member Johnny Mack and coach Maxine Matilpi



By Candice Metallic

In the fall of 2005, the Indigenous Bar Association was invited to become a member of the Federal Court Liaison Committee, along with the Aboriginal Law Section of the Canadian Bar Association, the Department of Justice and justices of the Federal Court of Canada. The Committee was established at the initiation of the Honorable Chief Justice Allan Lutfy to examine ways in which the aboriginal litigation process can be improved.

Two meetings have been held to date: the inaugural meeting occurred in Ottawa, Ontario on September 30, 2005 and a second meeting occurred in Calgary, Alberta on March 11, 2006. A third meeting will be held this fall, concurrently with the IBA's fall conference (October 19-21, 2006 in Saskatoon). IBA member Candice Metallic was requested to attend the inaugural meeting and has been participating since, along with IPC Delia Opekokew.

Numerous matters have been raised ranging from litigation management, practice issues and deficiencies in the Federal Court Rules. The Committee has expressed keen interest on the use and treatment of expert witnesses and elders in the litigation process and has decided to examine this matter in more detail at the fall meeting. The IBA, CBA and DOJ will be submitting discussion papers relating to the designation of elders as experts and concurrent considerations, the challenges and procedural deficiencies in regard to expert witnesses, and a comparative analysis of the use of experts on indigenous issues in other judicial jurisdictions. The Committee will consider and discuss these papers at the fall meeting.

IBA members are welcome to attend the Committee meetings and are encouraged to submit any practice issues of concern to Candice Metallic at [cmetallic@afn.ca](mailto:cmetallic@afn.ca). ■

**INDIGENOUS BAR ASSOCIATION LAW STUDENT SCHOLARSHIP**

**Established in Memory of Ronald Peigan**

The IBA Law Student Scholarship Foundation is a non-profit charitable foundation established by the IBA in support of scholarships for Indigenous law students in Canada. The Foundation administers an annual scholarship award of \$2,000 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 an accredited law school, having demonstrated an interest in serving the Indigenous community and the Creator with honour and integrity.

The Foundation welcomes donations and invites IBA members and Friends of the IBA to make donations in support of the Scholarship and Indigenous Law Students. Tax receipts are available.

For more information visit the IBA website at: [www.indigenousbar.ca](http://www.indigenousbar.ca)

**Indigenous Bar Association**  
**2006 Fall Newsletter**

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**Next issue:**  
Winter (January) 2007  
  
To submit an article for  
consideration for publica-  
tion please contact:  
[mfroh@indigenousbar.ca](mailto:mfroh@indigenousbar.ca)



Hello, my name is Sheryl A. Meguinis, (maiden name Manychief), my Blackfoot name is *Ito-mowahkaki* ("Woman Who Walks In Front").

My heritage consists of Pueblo Indian from Taos Pueblo, New Mexico, U.S.A. and Blackfoot from the Blood Tribe, in southern Alberta, belonging to the Many Children and Small Robe clans. I am now a member of the Tsuu T'ina Nation by marriage to Travis Meguinis, the youngest member of Council for the Nation.

Since graduating from law school, and now practicing law as a First Nations person, I have been asked on several occasions to share my experience thus far.

When asked to share my experiences, I always begin by acknowledging the important people in my journey through life, namely, my parents, Santanita Manychief and the late John Manychief Jr., who have provided me with the tools, the guidance and support such that I knew it was possible, through hard work, to achieve the goals I set for myself. They have also served as excellent role models in each and every aspect of my life: spiritually, by participating and having faith in the spiritual aspects of our culture; mentally, they both have post-secondary education; emotionally, by raising and guiding me with both kindness and sternness, as required; physically, during his lifetime, my Father participated in rodeo, basketball, golf, track and field, and the odd sky dive.

In addition, I wish to acknowledge people, who are also lawyers and members of the Blood Tribe, who have led by example that it is possible for First Nations people to become successful lawyers: Leroy Little Bear, who is my close relation, Eugene Creighton, Melanie Wells and James Gladstone.

These acknowledgements are absolutely required because, whether some of them knew it or not, they each played a part in where I am at today. Therefore, First Nations people who earn certain achievements must know that they are contributing to the achievements of First Nations people who come after them. As a First Nations lawyer, it is also important to me to acknowledge my heritage because this is a crucial aspect to my practice as a lawyer. My parents passed on to me the belief that if a First Nations person has the ability to be successful in formal education, in any field, it is important for them to bring that knowledge back to their community because then they will have the advantage of seeing things from two different perspectives. As a result, they will have the ability to greatly assist their people. Therefore, as a First Nations person, I feel that it is important to be able to communicate and apply



"...the inherent difficulty I face...is attempting to reconcile the divergent world views..."

it is important to be able to communicate and apply the knowledge I continue to acquire in the practice of law, in a way that will allow me to effectively assist First Nations. In that regard, I consider myself to be fortunate that my First Nations background is as diverse as it is, i.e. Blackfoot, Pueblo and Tsuu T'ina. My First Nations background, coupled with the knowledge and skills I have acquired, are what compelled me to direct my practice to assist First Nations. Although I know that it is important to be able to bring back the legal knowledge to my community, the inherent difficulty I face (and which many First Nations lawyers who have come before me have faced and the many of whom will follow may face) is attempting to reconcile the divergent world views: the legal perspective and the First Nations perspective or what is often referred to as the "traditional ways of knowing". I have come to realize that although it may not be possible to achieve a full reconciliation, there may be ways to manage the perspectives together. There are many books and articles written by First Nations lawyers and legal scholars on this subject. Indeed, attempts at reconciliation have proven to be a critical task for lawyers practicing in the area of First Nations law because they face important issues such as Aboriginal and Treaty rights that involve the integration of the two perspectives.

Despite the inherent difficulties associated with the practice of First Nations law, I will continue to practice in this area by advancing the interests of First Nations people knowing that I am adequately equipped for this lifelong endeavour. ■

*(Sheryl Meguinis was called to the Alberta Bar in 2004, combining both Native traditional ceremony and court ceremony, and is an Associate with the firm of Walsh Wilkins Creighton LLP, located on the Blood Reserve and Calgary, Alberta.)*



Indigenous Bar Association's 18<sup>th</sup> Annual Fall Conference  
The IBA and the College of Law University of Saskatchewan present:

**“Making Aboriginal Policy: A Conference Ten Years After the Final Report of  
the Royal Commission on Aboriginal Peoples”**

October 19-21, 2006 at the Bessborough Hotel, Saskatoon, SK

Co-Chaired by Tom Molloy, Chancellor, University of Saskatchewan, and Donald E. Worme, Q.C.

This conference will examine the factors, processes, and institutions that determine how the state responds to the interests and rights of Aboriginal Peoples. A primary focus will be on the influence of public commissions on legal and policy development, particularly that of the Royal Commission on Aboriginal Peoples (RCAP).

Held over three days, the conference will include:

- A pre-conference day of workshops involving students and practitioners;
- A public keynote opening address from the RCAP Co-Chairs on October 19<sup>th</sup>;
- Keynote addresses throughout the conference by eminent politicians and scholars;
- Presentations by panels of experts, scholarly papers, and workshops addressing specific policy issues and fields;
- Several professional development workshops designed for members of the legal profession; and
- Participation by First Nation and Métis Elders.

**Invited Speakers include:**

Elders Maria Campbell and Danny Musqua

Leading government representatives and national Aboriginal leaders

Mr. Justice René Dussault and George Erasmus, former Co-Chairs of RCAP

Brent Cotter, Dean, College of Law University of Saskatchewan

Mick Dodson, leading Aboriginal Jurist and former Social Justice Commissioner (Australia)

Bev Jacobs, President, Native Women's Association of Canada

Chief Justice Allan Lutfy, Federal Court of Canada

Judge Mary Ellen Turpel-Lafond, Provincial Court Saskatchewan

Sylvia Maracle, Ontario Federal of Indian Friendship Centres

Willie Littlechild, I.P.C., Saskatchewan Aboriginal Policy Commission (2004)

David Nahwegahbow, I.P.C., Nahwegahbow Corbiere

Judge Gerald Morin, Provincial Court Saskatchewan (Cree Court)

Judge L. (Tony) Mandamin, Provincial Court Alberta

Judge Graydon Nicholas, Provincial Court New Brunswick

Madam Justice Rose Boyko, Ontario Superior Court

Paul Chartrand, I.P.C., College of Law University of Saskatchewan and

Wendy Whitecloud, Faculty of Law University of Manitoba; former Co-Commissioners of the Manitoba Aboriginal Justice Implementation Commission (2001)

For more information please visit the IBA website at <http://www.indigenousbar.ca>



## By Brian Calliou

University of Minnesota Press has published a new book by the Indigenous legal scholar, Robert A. Williams Jr. entitled *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*. Williams is a professor of law at the University of Arizona, a member of the Lumbee Tribe and the author of two previous well-known texts, *The American Indian in Western Legal Thought: The Discourses of Conquest*, and *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*.

In his new book, *Like a Loaded Weapon*, Williams explores the racist narrative of law and court decisions regarding Native Americans. Williams argues that this racist legal narrative works “like a loaded weapon” in the court decisions to deny Native Americans their rights. The racist language employed by the American courts in their Indian Law decisions results in legalizing control and dispossession of Native American Tribes.

The book is structured into four parts: Part I entitled “Discovering a Language of Racism in America” explores the languages of racism in the United States and how the Supreme Court’s legal history embraced this racist language. Part II entitled “‘Signs Taken for Wonder’: The Nineteenth-Century Supreme Court and Indian Rights” explores how the founders of America established a language of Indians as savages and how the Supreme Court of United States under Chief Justice Marshall embraced these racist notions into its legal narratives to override Native American sovereignty and deny the

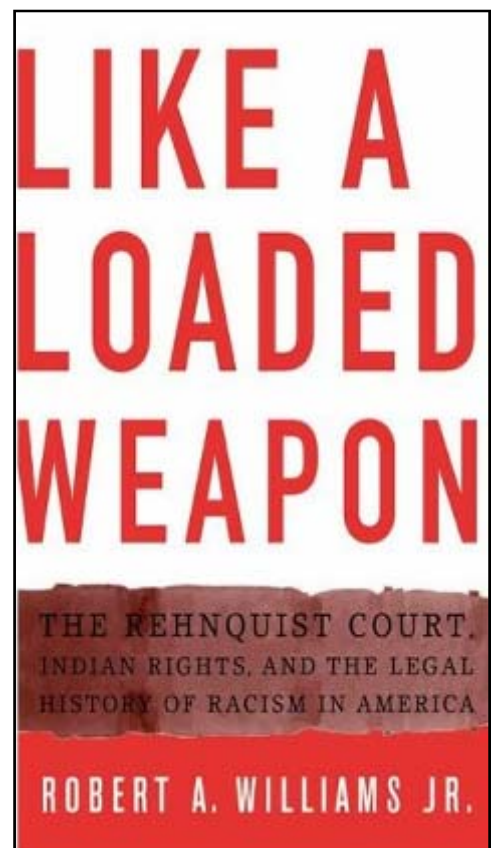
protection of Native American rights. Part III entitled “The Twentieth-Century Post-Brown Supreme Court and Indian Rights” explores how the Supreme Court of the United States continued with its racist language of Indian savagery after the *Brown v. Board of Education* case where racism against African Americans was rejected by the court. Williams highlights the fact that one year after the *Brown* decision, the Supreme Court “issued one of the most racist Indian rights decisions of all time, *Tee-Hit-Ton v. United States*, which “un-embarrassedly embraced the same basic racist language of Indians as culturally and racially inferior wandering, ignorant savages that the justice of the nineteenth-century Supreme Court routinely used in their decisions on Indian rights.” Part IV entitled “The Rehnquist Court’s Perpetuation of Racism Against Indians” explores how the racist language and ideas of an earlier time were carried into modern Native American rights cases. Williams shows how the Rehnquist court carries on this sad part of the racist history of the United States by citing and relying upon “cases and legal precedents replete with hostile racist stereotypes of Indians as inferior savages with lesser rights than other Americans.”

Williams argues that an important lesson of America’s racial imagination is that “there are innumerable points of subversive entry into a broad narrative terrain of negative stereotypes, apocryphal tales, and other well-known forms of racial imagery in American history.” What Williams is able to do in this legal history of Native American rights and racism is show that there was a persistent and pervasive effort by the settler population in the United States of negative

racial stereotypes and hostile racist imagery in shaping American history. He also shows how the Supreme Court of the United States reflected those racist notions in their decisions, relating to Blacks, other minorities, and especially with respect to Native Americans.

Despite highlighting the racist narrative of the Supreme Court of the United States, Williams makes it clear that he is not advocating an approach where Native Americans ought to ignore the Supreme Court, because he does not believe that the Court is a hopelessly racist institution incapable of fairly adjudicating Native American cases. Rather, he believes that “Indian rights lawyers and scholars must engage these entrenched racist attitudes and stereotypes ‘on all fronts by whatever means necessary.’”

*(Continued on page 13)*



*(Continued from page 12)*

Indeed, he advocates “adoption of a strategy of direct confrontation that challenges the continuing use of racial stereotypes, racial profiling techniques, and spurious racist imagery and apocrypha in thinking and talking about Indian rights by the Court.” What he is arguing is that a Court cannot ever provide justice and fairness in a legal system that continues to use a narrative of Native Americans “as if they are uncivilized, unsophisticated, and lawless savages” and that the “first step on the hard trail of decolonizing the present-day U.S. Supreme Court’s Indian law is changing

the way the justices themselves talk about Indians in their decisions on Indian rights.”

Although this book deals with the legal history of Native American rights in the United States of America, it is very relevant in Canada and other former British colonies, since our own Supreme Court of Canada, following the Judicial Committee of the Privy Council, has cited the Marshall trilogy as the basis of our common law of Aboriginal rights. This underlying foundation of our Aboriginal rights law was and is informed by the very racist language and related thinking that Robert Williams highlights in

this book.

This is a significant contribution to the legal literature on Aboriginal rights and legal history. It is a strong, scholarly effort that is well argued, well documented, and well written by an Indigenous legal scholar. It is 270 pages in length, has extensive endnotes filled with sources, and includes an index that is useful for researchers. The book is reasonably priced and for those interested in ordering it the ISBN number for the paperback edition is 0-8166-4710-0.

## JUSTICE PELLETIER APPOINTED JUSTICE OF THE ONTARIO COURT

By Etienne Esquega

On Wednesday, February 15, 2006, at the District Courthouse, in Thunder Bay, Ontario, Madame Justice Joyce Lynn Pelletier was sworn in as the only First Nation Judge to be appointed to the Thunder Bay bench.

Madame Justice Pelletier is an Anishinaabeque from the Fort William First Nation. Madame Justice Pelletier graduated from the Queens Law Program with her Bachelor of Laws in 1990 and was called to the Bar of Ontario in 1992. Prior to taking the Executive Director position of Dilico Ojibway Child and Family Services in Thunder Bay in 1997, Justice Pelletier ran a very successful and busy private law practice that emphasized First Nation issues.

As the Executive Director of Dilico Ojibway Child and Family Services, Justice Pelletier oversaw more than 300 staff in the delivery of child welfare protection, children’s mental health, adult addictions, long-term care and health services for the First Nation communities of the Robinson Superior Treaty area. This experience, coupled with her experience as a private practicing lawyer, gave her exposure and experience to all areas of child protection law, employment law and corporate law. In addition to maintaining a very busy career all these years, Justice Pelletier also led a very active extracurricular life, wherein she taught courses at Lakehead University and Confederation College, presided as a board member for Legal Aid Ontario, and fulfilled the position of Vice-President for the Association of Native Child and Family Services of Ontario.

The time and experiences that Madame Justice Pelletier shared with the Robinson Superior communities has been noted on numerous occasions. The Chiefs who attended Justice Pelletier’s swearing in Ceremony certainly revealed their appreciation to her with their kind words and gifts, wishing her well in her future endeavors on the bench. Madame Justice Pelletier has not only successfully challenged the status quo as a practicing lawyer, but, she has also shown us fellow members of the Indigenous Bar Association that those who mix private practice and then move on to positions such as Executive Directors can also be appointed to the bench. The Indigenous Bar Association sincerely congratulates Madame Justice Pelletier on her appointment, her mentorship and guidance, and we know that she will make further important contributions to the First Nations community with her new role as a member of the Ontario Judiciary. ■

PRO BONO LAW  
ONTARIO

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Doing the public good

NISHNAWBE-ASKI LEGAL SERVICES



### Access to Justice in Northern Ontario: The Telejustice Project

Nishnawbe-Aski Legal Services Corporation (NALSC) and Pro Bono Law Ontario (PBLO) recently announced a new development known as the Telejustice Project. The project enables pro bono lawyers throughout Ontario to improve access to justice for the Nishnawbe Aski Nation (NAN) communities in Northwestern Ontario.

NALSC provide a wide range of legal, paralegal and law-related services throughout the 49 NAN communities. The NAN communities extend from the Manitoba Border on the West, to the James Bay Coast in the East. Nishnawbe Aski Nation members struggle with challenges ranging from the effects of isolation, minimal employment opportunities, inadequate housing, lack of community services, education and more. NALSC maintains a presence in the communities through our Community Legal Workers (CLWs).

Most of the NAN communities are accessible by air and about a third by road. The CLWs make community visits as frequently as possible to help with court and legal issues and to hold public legal education clinics. They are often the first point of contact for clients within the legal system; they assist the person from first contact to the final resolution of their problem. Often, they may require the help and guidance from lawyers who are not widely available within the northern communities.

Evelyn Baxter, Executive Director of NALSC, says, "Anything that we can do to support CLWs and community groups will have a wide impact. It's not just the legal services being provided pro bono that is so great; this sends the message that government lawyers and the legal profession as a whole care about our community. There is tremendous value in that."

"this sends the message that government lawyers and the legal profession as a whole care about our community. There is tremendous value in that."

*(Continued on page 15)*



*(Continued from page 12)*

The first phase of the Telejustice Project involves a web-based interface called the "Ask-a-Lawyer" website. This interactive question and answer online system allows NALSC's Community Legal Workers to submit legal questions from their clients to volunteer lawyers, who then respond to those questions anonymously. Answered questions are archived in a "Frequently Asked Questions" page that is available to them for reference purposes. The CLWs can pose questions in areas such as consumer, employment and administrative law, wills and estates, landlord/tenant issues and senior's legal issues. However, we are looking for more volunteers to help us expand the program by answering questions dealing with criminal law, youth justice, aboriginal and treaty rights and family law. Eventually, we are hoping to make this on-line service available to the general public.

In the upcoming months, the Telejustice project is moving into phase two which features an advice column in the Wawatay newspaper, the writing of legal pamphlets and information sheets, and expanded legal education for the CLWs through webcasts and video conferencing. Again, we are in need of more volunteers in order to do so and we are always on the lookout for interested lawyers who are willing to donate a couple hours of their time every month and who are interested in working with First Nations peoples.

Additionally, NALSC, Pro Bono Law Ontario and the Law Society of Upper Canada held a free CLE event on September 21, 2006 in Toronto, entitled, "Telejustice Project: First Nations Issues in Family and Criminal Law". This CLE event gave practitioners an idea of the problems facing First Nations in the North.

If you are interested in finding out more about this project or becoming involved in it, or if you just want to find out more about the CLE event, please feel free to contact Claudia C. Belda at 1-807-622-1413 or at [cbelda@nanlegal.on.ca](mailto:cbelda@nanlegal.on.ca) or Heather Hogan at 1-416-977-4448 ext.231 or at [Heather@pblo.org](mailto:Heather@pblo.org) . ■

*The Telejustice Project  
is funded in part by the  
Ontario Trillium  
Foundation*

## IBA MEMBERSHIP SURVEY DRAW WINNERS!

Congratulations to **Arlene Dodge** of Windsor, and **Valerie Bisschops** of Kanata, who have each won a \$300 credit towards their 2006 IBA Fall Conference Fees.



If you are an Indigenous law student or law school graduate and you have not yet completed the IBA on-line membership survey, please visit our website and complete it now! The survey takes approximately 10-15 minutes to complete and by completing a survey your name will be entered into the draw for a \$300 credit towards your 2007 IBA Fall Conference Fees!

By Maggie Wendt  
& Bryce Edwards

Decision: July 28, 2006, Justice Smith, Ontario Superior Court of Justice

*Counsel:* Kate Kempton and Bryce Edwards, Olthuis, Kleer, Townshend

**NOTE:** At the time of publishing, we have received information that leave to appeal will be filed by Platinex in this matter

The case of *Platinex v. Kitchenuhmaykoosib Inninuwig et al* was decided on July 28, 2006. This case marks a victory for Kitchenuhmaykoosib Inninuwig First Nation ("KI"), formerly Big Trout Lake First Nation in Northern Ontario. The court denied an injunction application brought by a junior mining company, Platinex to allow mining exploration on the site, which was within KI's traditional territory, and allowed KI's application for an injunction to halt the mining exploration.

This decision is a step forward for First Nations seeking to protect their interests on their traditional territory for a number of reasons. In its decision, the court recognizes the relationship of KI's people, and Aboriginal peoples generally, to the land, and acknowledges that



interference with the relationship of Aboriginal peoples to the land constitutes irreparable harm, which can not be compensated for in damages. Further, the court decided that the perspective of Aboriginal people should be taken into account when assessing potential harm on an injunction application. The court also held that, by delegating consultation to the mining company, Ontario had not met its duty to consult, and that granting the injunction was in the public interest because it would make the consultation process meaningful and require Ontario to live up to its duty.

Over the last seven years, Platinex and KI have had discussions regarding mineral development, but no written agreement was ever signed. Platinex's mining claims were in KI's traditional territory. In 2001, KI put a moratorium in place against mineral development, because of a Treaty Land Entitlement claim (TLE Claim) to additional reserve land. During this time, Ontario granted numerous extensions to Platinex on its mining claims, without consulting KI.

In August and November of 2005, KI leadership sent letters to Platinex indicating that KI strongly opposed any development. Platinex did not tell the

“This decision is a step forward for First Nations seeking to protect their interests on their traditional territory”

investing public about these letters, and instead claimed that KI had consented to exploration. In January 2006, Platinex cancelled a meeting with KI because Platinex did not think it could change KI's mind about exploration. In February 2006, Platinex deployed a drill team without consent from KI. After encountering protesters from KI, the drill team left. KI claims the protest was peaceful, Platinex claims that it was hostile and destructive. Each side sought an interlocutory injunction against the other.

The court decided that Platinex's motion be denied, and that KI's motion be granted. The court granted an injunction in favour of KI, ceasing exploration activities for five months, provided that KI (i) returns the Platinex property and (ii) sets up a consultation committee to meet with Platinex and Ontario. After five months, the parties shall re-appear before the court to discuss continuation of the order.

*(Continued from page 16)*

The court held that to allow mining exploration would result in irreparable harm to KI and its people, not only because it might lose a tract of land it would be entitled to under the Treaty Land Entitlement process, but also because KI may lose land that is important to it from a cultural and spiritual perspective. The court accepted KI's position that it is crucial to view the nature of the potential loss from an Aboriginal perspective, where the relationship to the land is the foundation of Aboriginal identity, spirituality, laws, tradition and culture. The harm entailed due to a loss of land could not be compensated for in damages.

On Platinex's application for an injunction, the court held that Platinex, while it may go bankrupt if it was unable to continue exploration, created such a situation itself by ignoring or being willfully blind to the opposition of KI, and

understating the potential problems with access to the land. The court held that Platinex had the choice to continue consultation and negotiation with KI. In the circumstances, it would be inequitable to grant an injunction to Platinex.

On the question of the duty to consult, the court held that the Crown owes a non-delegable duty to consult. The evidence shows Ontario has abdicated its responsibility, despite repeated judicial messages over 16 years. When there is a failure of the duty to consult, the ultimate remedy is a declaration that the action in question is unconstitutional.

The court considered the public interest in the balance of convenience test. It held that granting an injunction to Platinex would make the duties owed by the Crown meaningless, and encourage other resource development companies to ignore Aboriginal concerns. Granting an injunction to KI enhances the public interest by making the consultation

process meaningful and compelling the Crown to act honourably.

KI was relieved of the requirement of an undertaking to pay damages pending final resolution of the matter. The court held that if an undertaking is always required, corporations issuing lawsuits for millions of dollars could disenfranchise First Nations from qualifying for injunctive relief, which would not be equitable.

The court also held that KI did not act improperly or illegally during the protest. Members of KI believed they had no other option but to confront Platinex at the drill site. Platinex failed to respect KI's moratorium, ignored KI's letters and notices, cancelled a meeting with the community and decided to drill despite being clearly told KI was opposed. ■

## IBA JUSTICE COMMITTEE REPORT

By Lee Schmidt

Over the past several years, the IBA Justice Committee has been dormant. While the IBA has been active in promoting access to justice and justice related activities, including the promotion of Indigenous appointments to the bench, there is the potential for members and student members to work together on justice issues through the committee. The IBA is exploring the revival of the Justice Committee. I am the IBA Board member chairing the Justice Committee.

If you have participated in the past as an IBA Justice Committee member, or if you wish to now participate in either a limited or extensive capacity, please contact me directly with your contact information. I will provide you with further information and details on the date and time of upcoming committee conference calls. Law students and articling students are also encouraged to participate.

I hope to have an opportunity to connect with members at the fall conference who are interested in justice issues to discuss what a revived Justice Committee might look like, and to identify some key objectives that would help to build terms of reference for the committee.

I welcome all members interested in justice issues to approach me at the fall conference to discuss how we might work together as an IBA in advancing justice issues for Indigenous Peoples in Canada. ■

For more information please contact Lee Schmidt, Chair, IBA Justice Committee at [lschmidt@indigenoubar.ca](mailto:lschmidt@indigenoubar.ca)





By Brian Calliou

The IBA International Committee held its first committee meeting in December 2005, which was attended by Brian Calliou (Chair), Kathleen Lickers, Lee Schmidt, Paul Chartrand, IPC, Sharon Manyfingers-Venne, John Hill and Aaju Peters.

The Committee reviewed the Terms of Reference which focus on issues at the international level. This includes international law developments concerning Indigenous Peoples and establishing links with Indigenous lawyers from other countries.

Kathleen Lickers updated the Committee on the International Lawyers Association (ILA) Conference, which

is scheduled to occur in Toronto from June 5-8, 2006. The IBA will host a half-day session on Indigenous Issues at the ILA conference.

The Committee decided that they will seek to establish more formal links with various international organizations that deal with Indigenous issues. Paul Chartrand, I.P.C., will be attending some international events throughout the year and will be discussing potential links with international jurists.

The Committee considered the role of the IBA in providing services and advice to Indigenous communities, as well as the IBA assisting in developing international standards from an Indigenous perspective. The Commit-

tee also considered the IBA's advocacy role related to Canada's failure to follow international agreements and standards with respect to its treatment of Indigenous Peoples. Finally, the Committee will seek to establish links with the University of Arizona Indigenous Peoples Law & Policy Program, and the Inuit Circumpolar Conference.

The IBA International Committee will be establishing a work plan over the coming months and welcomes input of interested IBA members. ■

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For more information please contact Brian Calliou, Chair, IBA International Committee at [bcalliou@indigenousbar.ca](mailto:bcalliou@indigenousbar.ca)

### IBA STUDENT DAY 2006—SASKATOON, OCTOBER 19, 2006

IBA's Student Day 2006 will be held October 19, 2006 in Saskatoon. Any inquiries or ideas relating to Student Day can be directed to the Student Representatives of the IBA Board of Directors: Koren ([klightning-earle@indigenousbar.ca](mailto:klightning-earle@indigenousbar.ca)) or Emma ([etaylor@indigenousbar.ca](mailto:etaylor@indigenousbar.ca)).

### MEMBERSHIP & OUTREACH COMMITTEE REPORT

By Judy Daniels

The IBA Membership and Outreach Committee has newly revised Terms of Reference which now include two new areas of responsibility. The Committee's mandate has been expanded to include outreach to our members and potential members as well as responsibility for the quarterly newsletter.

The Committee will plan for and actively recruit and welcome new members to the IBA. It will also seek feedback from the membership on how the IBA can improve in serving our membership and Indigenous communities more generally.

The Newsletter will be issued quarterly, and as a result, we will be continuously seeking content contributions from our membership. We strongly encourage our members to send us case comments, legal news,

photos and articles of interest. The Newsletter will allow us to improve our communication with members, potential members, the legal community and the general public. The Committee is responsible for development of the Newsletter which is ultimately approved by the Board for publication. We will distribute the Newsletter by email and will post it to our website.

Finally, the Committee has been working to develop a survey of Indigenous law graduates and law students which will provide vital feedback to the IBA on our programs and services.

We will be promoting the survey by way of email and would encourage all members to forward the survey to as many Indigenous law graduates and law students that they know. Your feedback is important to us.

Indigenous law graduates and current law students who submit a completed survey will have their names entered into a draw for a \$300 credit towards their 2006 conference fees.

The survey will provide us with important information related to membership development and retention, membership dues, and, among other things, provide valuable feedback on Board accountability.

Data collected will be analyzed and used to develop a work plan for membership development and retention, which will then be submitted to the IBA Board of Directors for approval. ■

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For more information please contact Judy Daniels, Chair, IBA Membership & Outreach Committee at [jdaniels@indigenousbar.ca](mailto:jdaniels@indigenousbar.ca)

## By Emma Taylor and Koren Lightning-Earle

Well summer has come and gone and it is time to return to our studies! Welcome back to those returning students; and welcome to first year students. Congratulations to those who have graduated and entered into the bar admission course and articling. It has been a busy several months for the Eastern and Western student representatives.

On March 9th, we travelled to Calgary to attend the IBA retreat. This weekend gathering provided an opportunity for the Board of Directors to meet with the IPCs to discuss the vision and goals of the organization and to lay out a five-year work plan. Student issues were very much at the forefront of our discussions and all participants were eager to discuss ways to improve the law school experience for Aboriginal students.

Some of the priorities identified include creating a speakers' list of Aboriginal lawyers and academics who will be available to speak at law school events, developing a mentoring program to partner law students with Aboriginal lawyers and Indigenous law keepers, and producing an annual student edition of the IBA newsletter.

We were also able to sit down together and make some decisions about student involvement in the organization. In another effort to increase student involvement, we are creating a more formalized Indigenous Student Council. This body will be comprised of representatives from each law school and will serve as a forum to discuss student issues, achievements and concerns. In March, the first meeting of the Student Council was held via teleconference with representatives from Ottawa U, McGill, Osgoode, U of A and U of T on the call. We discussed some of the highlights of the IBA retreat, Student Day 2006 planning and changes to the Student Election policy. In addition, each student highlighted the activities and achievements at their schools. We



are hoping that more students will be available for the next meeting which will be held later in the summer.

In other news, planning is underway for Student Day 2006. Based on our own ideas, as well input from the IBA Board, IPCs and Student Council members, we have developed a draft agenda for the day. The morning session will focus on law school life. It will be an opportunity to meet new Aboriginal law students and re-connect with

old friends. This will also be the time for students to decide on their level of involvement in the IBA for the upcoming year, whether as the Eastern or Western student representative, school rep to the Student Council, newsletter contributor or IBA committee member. Students will also have the opportunity in the morning to discuss the strengths, weaknesses and achievements of their law school, as well as any concerns that they may have. Several issues have been raised in the last few months regarding low recruitment levels of Aboriginal law students, and a lack of Aboriginal faculty, curriculum and resources at various law schools. From this session, we will produce an anecdotal "report card" of Canadian law schools from an Aboriginal student perspective. The afternoon session will concentrate on life beyond law school: jobs, the licensing process, articling, clerkships etc. This portion of the day will provide some insight into what to expect over the next few years and will allow students to make some valuable professional connections. Overall, we have some great ideas about Student

### STUDENT REMINDERS!

Fill out the Law School Student Survey online at [www.indigenousbar.ca](http://www.indigenousbar.ca)

Students make up a significant portion of IBA membership. Your input can have tremendous influence on the shape and direction of this organization. PLUS, you can enter your name to WIN \$300 credit towards your 2006 fall conference fees!

Contact Koren or Emma if you would like to:

Be added to the IBA Student email list

Volunteer for 2006 Student Day planning

Participate in the next Indigenous Student Council meeting.

Day, and have received valuable input from a number of students.

Finally, we are very pleased to announce the creation of the first ever special Students Edition of the IBA newsletter to be issued this month. We hope that this special edition of the newsletter will serve to keep Indigenous students across Canada informed and connected.

We hope that the summer was a welcome break from your laptops, and that you got out of the library and onto the patios and pow wow trails! We hope to see in October in beautiful downtown Saskatoon. Until then, take care. ■

Hai-Hai, Miigwech,  
Koren Lightning Earle, Western Student Representative  
Emma Taylor, Eastern Student Representative  
[klightning-earle@indigenousbar.ca](mailto:klightning-earle@indigenousbar.ca)  
[etaylor@indigenousbar.ca](mailto:etaylor@indigenousbar.ca)

**F.A. v. Henley**

Practice - Severance - at Trial - When Granted - Settlement  
Against Other Parties  
Residential School - Sexual Assault - Severance - at Trial -  
Liability - Damages

May 18, 2006 (released July 10, 2006)  
B.C.S.C., Halfyard J. 20 paras., 3 pages  
D. Kwan, M. Shea and L. Riddle for Defendants 2006 BCSC  
908  
I. Lawson for Plaintiffs

Cases Considered: *Nguyen v. Bains, (2001) 11 C. P.C.,  
(5th) 177*

Statutes Considered: *B.C. Court Rule 39(29)*.  
Ten Plaintiffs filed a claim for psychological damages they  
suffered as a result of sexual abuse that allegedly occurred at  
a residential school. On the eve of trial, Crown applied to  
sever the issues of liability and damages. The claim was ini-  
tially filed against other parties, but that was settled ten days  
earlier. The claim involved negligence and breach of fiduciary  
duty by Crown.

HELD: Application granted. The issues of Crown negligence  
and breach of fiduciary duty should be argued first. There was  
a potential for a real cost saving if Crown was successful and  
it could also avoid the necessity of Plaintiffs having to give  
painful testimony regarding the sexual assault until there was  
a likelihood of success. The Court noted that the recent set-  
tlement changed the circumstances and thus Crown's motion  
was not made too late.

**F.A. v. Henley**

Evidence - Psychological Examination - When Granted - At  
Trial - Support Person  
Residential School - Sexual Assault - Psychological Examina-  
tion - When Granted

May 19, 2006 (released July 10, 2006) B.C.S.C.,  
Halfyard J. 23 paras., 4 pages  
D. Kwan and L. Riddle for Defendants 2006 BCSC 909  
I. Lawson for Plaintiffs

Cases Considered: *Mahoney v. Roland, (1997), 40  
B.C.L.R. (3d) 79*

Plaintiffs alleged that they suffered sexual assault in a resi-  
dential school and Crown sought an order that all ten undergo  
psychological evaluations. Nine of the ten were previously  
examined by two psychologists. Plaintiffs argued that the re-  
quest should be dismissed as it was made at the beginning of  
a trial when the claim was filed three years ago. Plaintiffs  
filed an affidavit indicating that they had already suffered  
much emotional stress from the previous psychological exami-  
nations. The application initially requested only two Plaintiffs  
be examined, but was increased to all ten two weeks later.

HELD: Application allowed regarding two Plaintiffs, otherwise

dismissed. Plaintiffs also will be allowed to have an  
Aboriginal support person present. The support person  
however, will not be allowed to comment without the  
consent of Crown psychologist.

**F.A. v. Henley**

Fiduciary Obligations - Breach of Duty - Constructive  
Knowledge of Risk  
Residential School - Sexual Assault - Foreseeability  
of Risk - Constructive Knowledge

July 4, 2006 B.C.S.C., Halfyard J.  
96 paras., 16 pages  
No appearance by other Defendants or by Third Parties  
2006 BCSC 1008

I. Lawson and A. Peeling for Plaintiffs  
L. Riddle, D. Kwan and M. Shea for Defendant A.G. of  
Canada

Cases Considered:  
*Blackwater v. Plint [2005] 3 SCR 3; Cooper v. Hobart  
[2001] 3 SCR 537; R. v. Spence [2005] 3 SCR 458; R. v.  
Find, [2001] 1 SCR 863; Ryan v. Victoria (City) [1999] 1  
SCR 201; Frame v. Smith [1987] 2 SCR 99; Wewaykum  
Indian Band v. Canada [2002] 4 SCR 245; Nocton v.  
Lord Ashburton [1914-15] All E.R. 45 (H.L.); Regal  
(Hastings) Ltd. v. Gulliver [1942] 1 All E.R. 378; R. v.  
Adams [1996] 3 SCR 101; E.D.G. v. Hammer [2003] 2  
SCR 459; K.L.B. v. British Columbia [2003] 2 SCR 403*

Statutes Considered: *Indian Act, ss. 114, 118, 119;  
Occupiers Liability Act (BC)  
("Act")*

Ten Plaintiffs sued Crown and the teacher they alleged  
committed sexual assaults against them when they  
attended a residential school. Four of the cases were  
adjourned. The teacher had pled guilty to the assaults  
against six Plaintiffs and was sentenced in 2000. The  
claim was severed after Crown admitted that the as-  
saults had occurred. Plaintiffs sought to prove Crown  
was liable in negligence, breach of fiduciary duty and  
breach of a statutory duty under the Act.

The assaults occurred prior to 1983 which was the first  
time the teacher was suspected of any wrongdoing and  
asked to resign. Crown had delegated its control and  
operation of the school to the provincial school dis-  
trict, but Plaintiffs alleged its duty remained. It was  
disputed whether Crown paid all or part of the opera-  
tional costs of the school after the delegation. Plain-  
tiffs argued that Crown had constructive knowledge of  
the risk based upon other teachers being convicted  
during that date range. Plaintiffs sought to admit a  
1996 Royal Commission Report ("Report") that criti-  
cized Crown's operations of residential schools during  
the relevant period.

HELD: Claim dismissed. Plaintiffs established a partial  
*prima facie* case regarding Canada's duty, based upon



its funding of the school and its powers under the *Indian Act* to designate which school Indians had to attend. However, Plaintiffs did not show that it was foreseeable, either in its claim for negligence or a breach of the Act, prior to the delegation, that a school teacher would sexually assault the children. The Report could not be admitted for the truth of its contents. It also did not conclude that Crown ought to have known about the sexual assaults until 1990. The Court could not take judicial notice that Crown possessed constructive knowledge in order to prove foreseeability. There could not be a breach of a fiduciary duty without Plaintiffs proving that Crown had some constructive knowledge of that risk.

### Tsuruda v. Canada

Corporate / Commercial - On Reserve - Taxation - Income - Exemption  
Employment - Taxation - Income - On-Reserve - Exemption  
Tax - Income - Exemption - Corporation On Reserve - Live Off Reserve - Purpose of

July 7, 2006 T.C.C. (B.C.), Bell T.C.J.  
35 paras., 16 pages  
Richard B. Wong for Appellant 2006 TCC 288  
Tom Torrie for Respondent

#### Cases Considered:

*Mitchell v. Peguis Indian Band*, [1990] 71 D.L.R. (4th) 193 (S.C.C.); *Williams v. Canada*, [1992] DTC 6320 (S.C.C.); *Neuman v. M.N.R.*, 98 DTC 6297 (S.C.C.); *Recalma v. The Queen*, 98 DTC 6238 (F.C.A.); *Shilling v. M.N.R.*, 99 DTC 5441 (F.C.A.); *Canada v. Folster*, (1977), 51 DTC 5315 (F.C.A.)

Statutes Considered: *Income Tax Act* ("Act"), s. 81(1)(a); *Indian Act*, ss. 87, 89, 90

Appellant was an "Indian" for the purposes of the Act, but had never lived on a reserve. Appellant argued that employment income paid to her by a corporation controlled by her which provided management services to a sawmill was not taxable. Appellant argued that meetings regarding all business matters were held on the reserve as were all the banking and purchasing activities. Appellant admitted that the arrangement was made to provide her with a income tax exemption. Appellant argued that the employer was located on the reserve as was the place of payment. The sawmill operation for which Appellant provided the management fees did business entirely off the reserve. The owner of the sawmill was Appellant's husband, a non-Indian.

HELD: Appeal dismissed, income taxable. The purpose of the exemption was to prevent interference with Indian property on a reserve. The benefit to the reserve of Appellant spending money there and not otherwise contributing, was not enough to come within the exemption.

### Sweetgrass First Nation v. Gollan

Band Governance - Election - Appeal Board - Appointments to - Apprehension of Bias  
Practice - Costs - Solicitor-Client-When Awarded-  
Voluntary Service-Tribunal Members

June 20, 2006 F.T.D., Sask., Barnes J.  
61 paras., 15 pages  
Richard Danyliuk and C. Eisner (student at law), for Plaintiff ("First Nation") 2006 FC 778  
Terry I. Zakreski, for Defendants

#### Cases Considered:

*Gabriel v. Canatonquin*, [1978] 1 F.C. 124; *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Cardinal v. Dir. of Kent Institution*, [1985] 2 S.C.R. 643; *Bone v. Sioux Valley Indian Band No. 290*, [1996] F.C.J. No. 150; *Nfld. Telephone Co. v. Nfld. (Bd. of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Ghirardosi v. B.C. (Min. of Highways)*, [1966] S.C.R. 367

Statutes Considered: *Sweetgrass Band Election Act* ("Act"); *Federal Courts Act*, s. 2

Texts Considered: *Prof. Mullan: Administrative (2001)*; *Jones and de Villars in Principles of Administrative (4<sup>th</sup> ed.)*

First Nation challenged the right of two Defendants appointed by a previous Band Council to sit on an Election Tribunal panel ("Tribunal") and sought to replace them with candidates of its choosing. First Nation argued that First Defendant was biased and Second Defendant was appointed irregularly. First Defendant previously acted as legal counsel for First Nation, but after being dismissed, refused to step down from being Tribunal Chair on the grounds that Tribunal was independent of First Nation.

First Nation argued that there were a number of time requirements not met as First Defendant was appointed 88 days before the election, not 90 as required by the Act. Second Defendant was appointed after that date to replace another member of whom First Nation now wanted to reappoint. The suggested replacement had a close family tie with two members that now challenged the election. First Defendant did have a close relationship with the former Chief, had acted for him personally on another matter and consulted with him regarding filing an action against the present Chief.



## IBA NEWSLETTER FALL 2006

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**We are on the Web!**

[www.indigenousbar.ca](http://www.indigenousbar.ca)

## VOLUNTEERING WITH THE IBA

The IBA relies on volunteers to do the things we do. As a non-profit organization without core funding and only one part-time staff person, the IBA functions thanks to thousands of volunteer hours each year. Whether you are an Indigenous law graduate or a current law student, there are many opportunities for members to volunteer with the IBA.

### Committees:

The work of the IBA occurs largely through the activities of our Board of Directors and our Committees. IBA members are invited to participate.

### Public Speaking:

We are routinely asked to provide names for potential speakers for law schools, conferences and career fairs. Put your name on a speakers' list.

### Mentoring:

Newly called Indigenous lawyers, law students or pre-law students who have not yet entered law school often seek the guidance of a mentor.

### Newsletter:

We are now publishing a quarterly IBA newsletter which will feature articles from members regarding new case law, cutting edge legal and policy initiatives, practice points, etc.

For more information or to volunteer with the IBA, visit our [website](#).

(Continued from page 21)

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HELD: First Defendant removed, Band Council to select new representative within 30 days. Defendants also were to receive their solicitor-client costs. The time requirements stated in the Act were directory, not mandatory. Band Council had the right to appoint members to the Tribunal without obeying the time requirements in cases where members withdrew and the change would not affect an election. It was valid to appoint Tribunal members before the election in order to ensure fairness throughout and into any subsequent appeal.

In regards to Second Defendant, the Court would not tolerate First Nation's attempt to replace him with a member who had close family ties. Bias could not be attributed to him simply because First Nation had challenged his right to sit. First Defendant, however, had to be replaced due to an apprehension of bias. The fact that First Defendant had also lost her retainer adds to the perception of bias as she had a financial stake in the proceedings.

Regarding costs, Defendants should not have to bear their costs in such a proceeding as otherwise it would be unlikely that people would volunteer for such a position. First Defendant would have to repay any monies she had accepted in return for serving as Chair. ■

*FIRST NATION FAX* is a monthly newsletter that concisely summarizes selected written decisions from Canadian courts that consider Aboriginal issues. For more information, including how to subscribe for a free three month trial subscription, please go to [www.cite-on-site.ca](http://www.cite-on-site.ca) or call Brad Brooks (editor) at 1-888-259-4700.

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