



November 3<sup>rd</sup>, 2006

Standing Committee on Justice and Human Rights  
House of Commons  
Ottawa, ON  
K1A 0A6

Attention: Diane Diotte, Clerk of the Committee

Dear Ms Diotte:

*Re: Indigenous Bar Association Submissions relating to the Law Commission of Canada*  
Further to your discussions earlier today with our office, I attach submissions to the Committee in relation to the above noted matter on behalf of the Indigenous Bar Association.

In addition, I signal concern that while other organizations appear to have been invited to make submissions before the Committee, the Indigenous Bar Association has not. Therefore, we were surprised to learn only at the last moment that such submissions were being heard by the Committee on this important issue – particularly in light of the IBA's public position on this matter. Regardless, we were able to finalise our submissions and provide you with the same.

I also confirm that while we have been notified that there is no time available on the Committee's agenda for additional witnesses we have one of our senior members, Mr. David Nahwegahbow on stand-by in Ottawa in the event some time does become available at Monday's hearing. I would kindly ask that you advise us as soon as possible should any time be available and thank you in advance for your consideration.

Please contact me directly should you have any further questions or concerns.

Yours truly,

Jeffery Hewitt  
President

Attach. (1)

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PRESENTATION TO THE STANDING COMMITTEE ON JUSTICE AND  
HUMAN RIGHTS - NOVEMBER 3<sup>rd</sup>, 2006

RE: DEMISE OF LAW COMMISSION OF CANADA

Jeffery Hewitt

President, Indigenous Bar Association

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I Introduction

We would like to thank the members of the Standing Committee for providing an opportunity for the Indigenous Bar Association (IBA) to make this presentation.

At the outset, it is important to state that our organization is greatly disappointed with the decision of the federal government to terminate the Law Commission of Canada. This is because the IBA is strongly supportive of the rule of law, constitutional supremacy, parliamentary democracy and the principle of law reform. We believe the Law Commission represented, reflected and promoted these fundamental tenets and principles within the Canadian federation.

In this presentation, we propose to address the following items:

- First, we will provide some background information on the IBA and our relationship with the Law Commission of Canada;
- Second, we will highlight some of the important projects regarding Indigenous law that have been undertaken by the Law Commission;
- Third, we will emphasize the significance of law reform and identify some of the flaws in the government's decision to terminate the Law Commission of Canada; and
- Fourth, we will provide some concluding thoughts.

## II Background

The Indigenous Bar Association is a professional organization representing Indian, Inuit and Métis lawyers, judges, legal consultants, and law students in Canada. Our mandate includes objectives linked to advocacy, public education and bringing about a fuller understanding of the Indigenous perspective of Indigenous legal matters.

The IBA Constitution outlines our objectives as follows:

- To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions;
- To promote the advancement of legal and social justice for Indigenous Peoples in Canada;
- To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to the Indigenous People in Canada; and
- In pursuance of the foregoing objectives, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous laws; and to discuss Indigenous legal issues.

We are a professional organization, with some members working as Crown Attorneys, negotiators and policy advisors within government; while others work as lawyers in private practice, First Nations or for national aboriginal associations.

We will focus our comments to this Committee on the work of the Law Commission of Canada related to Indigenous matters. This has been one of the high profile theme areas of the Law Commission in recent years.

We do feel bound to raise matters that are of concern to our organization, taking into account our objectives, our desire to see Aboriginal and Treaty rights honored and our obligation to promote and protect Indigenous Legal Traditions. In this regard, there are several matters of principle we wish to highlight regarding the work of the Law Commission of Canada, and the manner in which it has been dismantled.

Over the years, the Indigenous Bar Association and the Law Commission of Canada have developed a healthy and cooperative relationship. This relationship has involved joint research and participation in study panels and symposia related to the exploration and publication of materials on important Indigenous legal matters. It is the only partnership of this nature that the Indigenous Bar Association has entered into. We have felt comfortable in this partnership because the Law Commission is a non-partisan, highly regarded independent body, dedicated to law reform. Below is an outline of some of the work that has been undertaken by the Law Commission related to legal matters that affect our communities and in which, the Indigenous Bar Association has in some way participated.

### III Work of Law Commission re Indigenous Matters

#### a) Restoring Dignity

Several years ago the Law Commission published a work entitled "Restoring Dignity" which addressed the abuse of children in Canadian institutions. Restoring Dignity was a courageous undertaking which might not have been undertaken by an institution under the direct control of government. The Report to Parliament recommended that Canada address directly the question of sexual abuse of Indian children in residential schools. We know that the Restoring Dignity report was relied upon by the government of Canada in its determination of how to address issues related to sexual abuse in Indian residential schools. It was a landmark study that would not have been undertaken without an independent body, like the Law Commission

#### b) Fiduciary Relationship

The Fiduciary Relationship or the trust-like relationship between Indigenous peoples and the Crown is one of the most important building blocks of the special relationship between our peoples and the Crown. It is somewhat complex and has legal dimensions that are not fully understood. Several years ago the Law Commission undertook a study on the Crown-Indian fiduciary relationship and hosted a discussion or "safe forum" between government representatives, academics and the Indigenous

Bar Association members to exchange information on the various dimensions of the fiduciary relationship. The results of this forum were published in a book entitled "In Whom we Trust". The safe forum was one of the first of its kind between Indigenous lawyers and the Crown, and the publication continues to be a rich source of information used to inform and educate the public on a complex legal matter.

c) Métis Aboriginal Rights and section 91(24) and the Doctrine of Inter-jurisdictional immunity

This is an area of law that is again complex and not well understood. There is very little information available to the public on the topic, and some of the subject matters requires the attention of government. For example, while it is clear which level of government has responsibility for the Indians and the Inuit, it is not clear which level of government may make laws and exercise jurisdiction for the Métis. This has left the Métis in a legislative vacuum and they continue to be the "forgotten people". Again, the Law Commission, along with the Métis National Council hosted a safe forum between various government officials, lawyers and academics with a view of having an honest dialogue on the topic. By all accounts, the symposium was a success and the results were to be published by the Law Commission later this year. More importantly, the materials were also to serve as background information for a Report by the Law Commission to Parliament on this matter. The Report would have hopefully made suggestions around the resolution of the Métis dilemma. Parliament and Canadians generally will now not have the benefit of the Law Commission Report.

d) Financing on Indian Reserves

The issue of financing on reserves has long been a problematic subject. Because of the unique character of Indian reserves, Indian people cannot use reserve lands in order to secure traditional financing. In other words, traditional mortgages are not available to Indians living on reserve. In addition, as the *Indian Act* places limitations on the seizure of property on reserve, it is difficult for Indians to obtain financing for personal loans, and when financing is available, it is at extravagant rates. In many

instances, these restrictions have blocked the flow of capital into our communities which remain “islands of poverty in an ocean of prosperity”. The Law Commission had undertaken work on this topic which was eventually to be turned into a Report to Parliament. Parliament will no longer have the benefit of this Report which would have likely suggested some legislative solutions to the problem at hand.

e) **Indigenous Legal Traditions**

Canadians generally consider their legal system to be strictly bi-juridical, or consisting only of the civil law and common law traditions. But this is not the case. Our history and the courts have been clear that the Canadian legal system recognizes the common law traditions, the civil law traditions and Indigenous legal traditions. Yet, because of events of history and legislative restrictions, our own Indigenous Legal Traditions have not been allowed to flourish. The Law Commission has prepared a discussion paper on the question of Indigenous legal Traditions. In doing so, the LCC has asked two basic questions: What are Indigenous Legal Traditions? And, how can these traditions be better accommodated in the Canadian legal system. The research by the Commission was a bold undertaking, and long overdue in this country. Eventually the Discussion Paper would have been turned into a Report to Parliament. It is likely that the report would have suggested ways of accommodating or making greater space for our traditions within the Canadian legal system. Unfortunately, and to the great disappointment of many Indigenous peoples, Parliament will not have the benefit of a Report on Indigenous Legal Traditions.

**IV The Importance of Law Reform and Flaws in the Government’s Decision to Terminate the Law Commission of Canada**

As we indicated at the onset, law reform is part of and essential to the fundamental principles underlying our legal and political system in Canada, including the rule of law, constitutional supremacy, and parliamentary democracy. Law reform provides our system with the flexibility to grow and evolve to meet changing circumstances. Without law reform, our system would be imprisoned by its own rigidity – the rule of

law needs this flexibility to operate. So does the principle of constitutional supremacy – we are all familiar with the metaphor of the constitution as a living tree.

Law reform is also vital to parliamentary democracy, which is what we have in Canada. In our country, we rely not only on the courts to reform the laws: Parliament can bring about reform through statute. Almost all western democracies and countries with a common law tradition have law reform agencies. This is because law reform agencies are considered to be institutions of good governance that are able to provide independent advice and recommendations to Parliament on areas of the law that require change.

Under its legislation, the Law Commission is to engage Canadians in the reform of the law and in doing so, has an obligation to undertake a consultative process. Oddly enough, in the decision to dismantle the Law Commission, we understand there was little or no consultation with the Commission, its partners, the general public or the Members of Parliament. This is particularly disturbing given the central role of law reform to parliamentary democracy.

Indeed, the mechanics used by the federal government to terminate the Law Commission, gives the appearance that government is thwarting the parliamentary process. The Law Commission has been established by legislation and can only be dismantled by the legislative process. While it is clear that Cabinet has discretion to undertake funding cuts to run a more effective government it is also clear that the complete annihilation of the Commission under the guise of a cost-cutting exercise amounts to the executive circumventing the parliamentary process by doing indirectly what cannot be done directly.

We are disappointed that a government that has been elected on a mandate of good governance, transparency and accountability has chosen to exercise its power in such an undemocratic and cynical manner. Clearly, Parliament established the Law

Commission of Canada with the intention that it can only be dismantled by an Act of Parliament. Any other way is inappropriate.

## V Conclusion

The Law Commission of Canada has undertaken important work on Indigenous matters that no other body in Canada has undertaken. It was able to do so because it is independent and has a legislated mandate to engage Canadians in the reform of the law. Because of this independence, the Indigenous Bar Association was able to partner with the Law Commission and participate in the process of law reform that would otherwise not be available. It is regrettable that the work of the Law Commission on Indigenous matters will not continue.

Before we conclude, we would pose this question, which is significant to the Indigenous Bar Association: *Was the Law Commission terminated by this government because of the priority it was giving to Indigenous legal issues?*

As a Committee and Members of Parliament, you are in a better position to seek and provide the answer to this question given the seeming exclusion of Aboriginal People from even being consulted on the dismantling of such an important independent institution. If this is the motive, it would be decidedly improper and bias. To that end, we hope not another signal of what may well develop into a coordinated initiative to further degrade the role and history Aboriginal People have in Canada's past and future, merely because we have been deemed politically expedient.

Thank you again for providing us an opportunity to make this submission, and we hope that our comments are helpful.