Federal Court ~ Aboriginal Law Bar Liaison Committee Meeting	Cour fédérale ~ Barreau - droit des autochtones Réunion du comité de liaison

Minutes of the Meeting of April 27, 2011
Winnipeg, Manitoba

Attendance

In Person
1. Elder Dave Courchene
2. Justice Lemieux (Federal Court)
3. Justice de Montigny (Federal Court)
4. Justice Mandamin (Federal Court)
5. Prothonotary Lafreniere (Federal Court)
6. Aimée Craft (CBA - MB)
7. Michael Jerch (CBA - MB)
8. Cindy Kieu (CBA - NU)
9. Drew Mildon (CBA - BC)
10. Diane Soroka (CBA - QC)
11. Annie Thuan (CBA - ON)
12. Garth Wallbridge (CBA - NT)
13. Gaylene Schellenberg (CBA - HQ)
14. Zachary Davis (Office of Hutchins Legal Inc.)
15. Kathy Ring (DOJ)
16. Sheila Read (DOJ)
17. Julie Blackhawk (DOJ)
18. Ron Stevenson (DOJ)
19. Brenda Gunn (IBA)
20. Dr. Sabina Ijaz

By Teleconference
1. Elder Fran Guerin
2. Andrew Baumberg (Federal Court)
3. Catherine Twinn (IBA)

MORNING SESSION

Welcome & Introductions
An opening prayer was offered by **Elder Dave Courchene. Justice Lemieux** then welcomed members of the Committee, and the agenda was approved.

Review Minutes of Past Meetings (2009 / 2010 meetings)
Mr. Baumberg noted that there were numerous minutes from previous meetings that were almost complete but had issues to resolve. The key issue concerned assurance that the minutes properly reflected Elders' statements.

Ms. Twinn suggested that the minutes be circulated immediately after the meeting for the Elders to review and confirm that the minutes adequately represent their statements.
Mr. Courchene asked for clarification of the issue. In keeping with spirit of the Elders, he stated that it is most important to carry the spirit of the gathering.
Prothonotary Lafreniere noted that the key issue was whether the minutes reflect what was actually said. In his view, the minutes adequately reflect what was said, and he recommends that we adopt them. The minutes of today's meeting will reflect additional commentary of past meetings. Finally, he endorsed Ms. Twinn's recommendation.
Justice Lemieux agreed with the recommendation as well.
Ms. Craft noted that there are audio recordings for some minutes – these recordings could be made available.
Justice Mandamin agreed with the proposal to adopt the minutes and move on. He noted that at these meetings, there is a dialogue and exchange of views with Elders – our understanding deepens as we have the dialogue. Most important is the understanding that each person takes from the meeting, not the formal record. He referred to the Committee's visit to the Musqueam Longhouse in 2009, where it was noted that there is no recording at ceremony – people must remember and internalize what has happened.
Ms. Ring recommended, regarding the Turtle Lodge minutes, that the amended statement be reflected in next minute.
Mr. Baumberg suggested an additional option – for an addendum to the Turtle Lodge minute. This was accepted by the Committee.
Finally, he noted that for the October 2010 meeting, a stenographer was engaged and a transcript made. There was a consensus – the transcript is to be used as an internal working document for reference as needed.

Judicial Review / ADR Project
A discussion paper was presented by **Justice Lemieux**. Its central theme: how the Federal Courts Rules can deal with governance disputes, and in particular to involve the First Nation community in the dispute resolution process, leading to better results. Different First Nations have different governance structures, some customary, some under the Indian Act, so the guidelines must be flexible. It is key to engage the Court early via the case management process, with a Judge / Prothonotary assigned to assist with case management, allowing considerable flexibility to address issues that arise. He gave an example of a case where there was no early case management and dispute resolution; by the time parties had done all the preparation for the hearing, they were not open to mediation. The guidelines also can apply to situations where the First Nation and the Crown are both involved – Justice Lemieux noted a recent, successful example of his involvement in such a case. In addition to case management, on consent the parties can engage in a mediation / dispute resolution process, preferably with the community (including the Elders) directly involved. In Justice Lemieux's review of case studies, this has often lead to resolution of the dispute. He noted that Elders both within as well as from outside the community have been involved in different cases to assist in resolving disputes.
He added that in some exceptional cases, a judicial review application is so complicated that it should be converted to an action, allowing for additional options for presentation of the evidence.

Justice Mandamin added some comments on the *Temagami* case, noting that there were 3 separate judicial review applications in parallel. The leading case was delayed pending a dispute resolution process involving the community. He noted that the Elders made a decision according to their customs. In some circumstances, it is useful to put the outcomes of a mediation process, even if 'unsuccessful', on the record, though this varies from the normal court process (typically, the mediation process is confidential). He gave an example of a case involving a custom election code that resulted in recognition of the council, amendments to the custom election code acceptable to the community and government, and application of the First Nation's own traditional laws. This result was far beyond that available in a standard judicial review process.

Justice de Montigny asked how the Court ensures that one party is not pressured into a solution. What is the role of the Court in these mediation processes?

Justice Lemieux noted that the simple presence of the judge is often beneficial. In the 2 mediations he conducted, he let the parties find their own solutions. His own involvement was very limited. If there was a block in the discussion, he might suggest a possible way forward.

Justice Mandamin provided an example where the formality of a circle is used: individuals are respectful, one person speaks at a time, there is no debate, and the person speaks to the whole circle – one person speaking to the whole community. The Elders in the circle know how to arrive at a consensus.

Prothonotary Lafreniere: the discussion paper represents what is being done right now in the Court. The Court is trying to find a way for the community to resolve disputes themselves, without having to go to a Court hearing.

Justice Lemieux: after a review of the discussion draft guidelines, it was hoped that the guidelines could be published in the Fall.

Justice Mandamin provided his experience while in the provincial criminal court. Initially, members of the community preferred to bring criminal matters to the Court, but over time, with experience in a "peace-making" process, they preferred not to go before the Court. The peace-making process allowed them to be heard by the community. There is a preference for the First Nations to resolve disputes according to their own laws. If they go to the Court, it will be resolved according to non-aboriginal laws. The challenge here, though, is for the First Nations to gain experience with the First Nations dispute resolution process.
He added that the 'confidentiality' rules for mediation may not work in the community. What is said in the circle stays in the circle. The outcomes of the mediation can be captured in a report by the judge to file on the record.

Ms. Read asked whether the dispute resolution is open – what if a journalist asks to attend?

Prothonotary Lafreniere noted an experience where two journalists attempted to join the process. The community refused to allow them to attend.

Ms. Craft asked whether the terms of the mediation (e.g., who can attend) are established in writing in advance. There may be different protocols depending on the community involved.

Justice Mandamin noted an example of the Temagami case where at some stages only the Elders were involved, and at other times the whole community was involved.

Prothonotary Lafreniere noted that where the whole community is affected by the outcome, it is important to consider including the whole community in the process. Otherwise, there may not be buy-in from the community afterwards.

Ms. Twinn thanked Justice Lemieux for this draft. She noted the use of the term "faction" by different Committee members referring to groups within some First Nations. Context is important for the paper: there has been considerable oppression from outside First Nations communities which, when internalized, leads to conflict and violence within the community.
There are different forms of conflict resolution processes, from the family level to the community level. She noted that arbitration is one option that is not mentioned in the guideline – it might be useful to consider. Finally, the 'mediator' should be third party neutral. Parties should have confidence in the mediator in order to agree to participate in the process.

Prothonotary Lafreniere referred to Rule 389, which allows the court to conduct a dispute resolution process, including an early neutral evaluation, but also allows the Court to stay the proceeding while the party pursues a process outside the Court. This has a cost, though. It would be useful to have a body within the First Nations community that could offer this sort of service at a cost-effective rate. Essentially, there needs to be an external individual / group in which the party has confidence. This could be the Court, but it could be outside the Court as well. Note that the Rules do not provide for arbitration in the Federal Court – though this is an interesting proposal. Parties must agree to be bound by the result.

Ms. Read noted that arbitration typically provides a quick, binding solution by an individual who has particular expertise in the area. However, it is expensive. The Court's jurisdiction is not engaged until something is filed, but it then allows use of public resources.

Ms. Twinn would like to see appropriate dispute resolution processes more accessible to parties with limited financial resources. This needs to be advanced by the Court, the Department of Justice, and the Bar. The failure to resolve these issues leaves communities with serious unresolved conflicts.

Justice Lemieux asked how best to continue this process to formalize these guidelines.

Mr. Courchene thanked the Court for this initiative, which allows communities to take more responsibility to resolve their own governance issues. This is a matter of authority and control – one of sovereignty. He recognized the openness and respect between the Federal Court and Elders, as reflected at the Turtle Lodge meeting. We need to define a partnership process – how much authority will really be afforded to the Elders and communities? He noted the issues of poverty within communities, leading to dislocation and disconnection from a traditional way of life. There is a need to restore balance – this will require considerable time and resources. He noted that we all face challenges, and need to find ways to work together to resolve them. He

expressed concern with the number of people caught up in the court system – it seems that this is a business that takes advantage of those who are caught in poverty.

Ms. Read: the Department is encouraged by this discussion. It is important to get the word out.

Mr. Stevenson: we are mandated under the *Canadian Human Rights Act* to consider the First Nations' laws and traditions. It is in force already, but applies to band councils as of June 1, 2011. There are some parallels in terms of *respect* – this could be caught within the preamble. He noted two concerns in the draft:

- The courts should not to be drawn too far into internal processes of First Nations communities;
- if there is a requirement for an Order, the judge has a residual discretion to ensure that the Order complies with the law – this might be considered for inclusion in the paper.

Ms. Gunn: this is a strong first start. The scope could be expanded beyond election and governance issues within a single First Nation. It should apply to any circumstance where an aboriginal person or community is a party, whether a proceeding with multiple First Nations or one involving First Nations and the Crown. This should be made more prominent. A clear process is needed for Elders to be consulted before any decision is made with respect to the document. This should be done broadly, at a regional level.

Ms. Craft expressed strong support for this first draft, in particular the emphasis on flexibility and the case studies – *these should be expanded*. She recommended that we look at the existing mediation processes that exist within First Nations, and noted that the Canadian Human Rights Commission is conducting consultations regarding First Nations traditions and dispute resolution processes. She will check to see if there are any similar initiatives with the provincial Courts.
A key question regarding the discussion paper: *is there a selected pool of judges doing this mediation work? Is there any special training? Is it possible to ask for one of these judges to participate in a case management / ADR process?*
She noted that there is a Bachelor / Doctor of Indigenous law degree program at the University of Victoria – this is a great opportunity to work in collaboration with the university, perhaps with law clerks from the Court. Finally, the CBA section is meeting on Saturday – Ms. Craft will use the opportunity to get feedback on the paper.

Justice Lemieux requested comments by **June 30.**

Justice Mandamin noted that we should not be assigning this as a 'task' to the Elders. We should ask them how they wish to be involved in reviewing this draft guide.

Phase II Practice Guidelines ("Toolbox")
Justice Mandamin circulated this first draft guideline on oral history and requested **comments by June 30.** He provided some background on this subject and presented the document. In order to understand the aboriginal perspective, one is lead eventually to hear from the Elders. They are the primary source of understanding. These guidelines seek to balance appropriate reception of Elder testimony and oral history evidence with the practical needs of a civil justice system in a manner that promotes fairness and truth-seeking. If there is no clear answer on a specific issue, parties must go to the Court to resolve the matter.

He noted a key principle: "Elders who testify should be treated with respect." After the Badger case, Justice Mandamin asked an Elder involved in the case about the essence of Elders' laws. The Elder responded in one word: "respect." In many cases, he noted that protocols are not observed by lawyers in a Court proceeding simply out of ignorance of the protocol. Regarding whether or not an Elder is to testify, this is a decision solely of the party calling the Elder and the Elder. This is not a matter for other parties or the Court. However, how to accept the testimony and the weight to give that testimony is a matter for the trial judge alone. The Court, as an institution, cannot direct the judge how to weigh the testimony.

The party calling the Elder should provide some advance information to the other parties, so they know the case that they have to meet. The protocols involved with the Elders providing testimony are important and should be communicated.

Re will-say statements: detailed will-say statements are difficult to provide. "You cannot control and structure what the Elder will say. You cannot give that kind of detail. You know the subject matter but you cannot spell it out. The Elders are individuals who, for the most part, are unfamiliar with the Court and its processes. The will says can only be summaries, not details. That is a fact of life. However, a summary should be provided, and if there is an issue with respect to its sufficiency, this can be raised with the Court.

A key debate in previous meetings concerned cross-examination of Elders. If this is anticipated to be an issue, the Elders should be consulted. This engages the Elders in the process, providing them advance notice of what to expect in the Court process, and they are open to helping ensure that the process is workable.

Regarding commission evidence, it is preferable to complete it in a way so that both parties can participate, allowing the possibility for the evidence to be accepted in Court without requiring the Elder to testify a second time. This was raised at the April 2009 Symposium, where Elder Gordon Lee welcomed the proposal to video-tape the evidence of an Elder in the community and then use this recording for the trial.

It is important to consider protocols to ensure that the evidence presented before the Court is not mis-appropriated by third parties. Such control over sensitive evidence is common in commercial litigation.

Justice Vickers approach in the Williams case was cited, where there was an Order for a "preliminary inquiry" (this language is more typical in provincial criminal matters); a new term for the procedure, that is more appropriate to the context here, might be helpful. In any event, the special hearing involving the Elders testimony is best done as early as possible in the proceeding, allowing the option for parties to try mediation after hearing some of the primary evidence from the Elders. Justice Mandamin noted that there are many different sizes and types of First Nations, so there would likely be different types of Orders for a preliminary hearing depending on the situation.

Re language: there is a trend to testimony in English, but it is important to address interpretation issues.

Re examination in Court: the Elders' experience has not been very positive. In many circumstances, the Elder speaks more in the form of a prayer than a simple 'recounting' of information. It is important to be alive to this.

Some communities may wish to record the testimony of their Elders to keep as part of the community record.

Re new Federal Courts Rules on expert witness evidence: the "hot tub" procedure might be a useful option for collective discussion among competing academic positions.
Justice Mandamin plans to prepare a revision of the guidelines, with case examples and citations, allowing practical details that might be of assistance
He asked for feedback by **June 30** so an amended version could be reviewed at the Fall meeting, with the aim of eventually including this as Part IV of the existing practice guidelines.

Ms. Twinn noted the circulation to Elders of the two draft practice guideline. The Elders would be offered the opportunity to comment on them.

Justice Lemieux: the necessary time would be provided to the Elders for this review.

AFTERNOON SESSION

Update - Education Project
Justice Mandamin provided an update regarding the Turtle Lodge proposal for an education program that would provide education for the judiciary regarding indigenous laws and perspective. A meeting was held on April 18 with Elders Fran Guerin, Greg Sam, Dave Courchene, and Stephen Augustine, along with members of the Federal Court and senior personnel from the National Judicial Institute (NJI). Professor Brettel Dawson of NJI provided an overview of the work done in preparing previous aboriginal education programs for the judiciary in Canada, as well as similar work in New Zealand. We hope to invite the original group of Elders to the Fall meeting to provide an opportunity for them to meet to discuss the proposal.

Mr. Baumberg noted the need to develop some form of funding for the Elders to meaningfully engage the various issues that are on the table – an education project, the ADR discussion paper, and the oral history guidelines.

A question was raised regarding the timing of the next meeting of Elders.

Justice Mandamin noted that there are numerous events at the Fall meeting – we are trying to find an appropriate date for the next meeting.

Miscellaneous Issues

Rule 114 Representative Proceedings – Style of Cause
Mr. Baumberg noted that, at the last meeting, the Chief Justice asked that this remain on the agenda to monitor the issue. He referred the matter to the Rules Committee for consideration.

Ms. Ring is developing a list of representative proceedings for referral to Ms. Julie Gordon at the Registry.

An additional related situation, that appears to be emerging, involves cases with the duty to consult, often amenable to settlement. It is typically a tri-partite proceeding, with the federal government a respondent and the developer as a co-respondent. In some cases, the First Nation settles the matter with the developer via a confidential settlement (the Crown is not a party),

followed by discontinuance. Do the Rules require approval of the settlement and the discontinuance? They indicate that the settlement is not effective unless approved.

First Nations Tax Commission procedure

Justice Lemieux reported on this topic, which was raised initially by Mr. Hutchins before the Rules Committee. This is an important piece of legislation, setting up different institutions with authority on First Nations, including the authority to impose taxes. The First Nations Tax Commission would be an oversight body. The question arises regarding the appeal procedure, and whether the Court has jurisdiction. Justice Lemieux will review the matter with Mr. Hutchins and report at the next meeting.

Settlement talks vs. fixed Court schedule

Mr. Baumberg provided context regarding the issue, raised last Fall by Mr. Hutchins, concerning parties' efforts to pursue settlement discussions despite having a fixed Court hearing date.

Prothonotary Lafrenière noted that some Courts have a waiting list approach to hearing dates, whereas the Federal Court uses a fixed hearing date system. Any request for an adjournment must go to the Chief Justice, and such requests are generally discouraged.

Justice Lemieux noted situation where parties proceed to trial but attempt settlement discussions instead of proceeding with the trial. However, this is not always successful – parties must be prepared to proceed with the trial.

Prothonotary Lafreniere noted that the settlement opportunity should be raised as early as possible within the case management process, rather than simply sending in a request directly to the Chief Justice for an adjournment.

Updates to Common List of Authorities

Ms. Ring proposed four new cases to be added to the list.

- *Quebec (Attorney General) v. Moses,* 2010 SCC 17, [2010] 1 S.C.R. 557
- *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650
- *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696
- *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103

Action: Mr. Baumberg to proceed with updates to list and then advise members of the Committee.

Varia

Ms. Read noted the discussion at the last meeting regarding the discussion paper on complex judicial review proceedings – distinguished by their size and scope, longer than a half-day hearing, outside the typical case anticipated under the rules. It was suggested that this be discussed with the larger committee for additional feedback. Four proposals, in particular, were raised:

1. consideration of early case management or special management in complex judicial review

applications;
2. consideration of extended timelines in complex judicial review applications;
3. consideration of flexible timelines in complex judicial review applications;
4. consideration of flexible application or relaxation of certain rules respecting service and/or filing of materials.

Action: This is to be added for the Fall agenda, and **Mr. Baumberg** is to circulate the discussion paper to members of the Committee.

Planning for Fall Meeting

The meeting is planned around the Indigenous Bar Association conference:

- Thursday September 29 – pre-conference workshops / opening reception
- Friday September 30 IBA conference Day 1 – gala banquet
- Saturday October 1 IBA conference Day 2

The IBA has requested that the meeting of this Committee be held on Wednesday September 28 rather than on Thursday, when the day will be taken up with pre-conference workshops.

Decision: the next meeting is **September 28 in Ottawa** – location to be confirmed.

***** Close of Afternoon Session *****