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

Wednesday, June 13, 2012
Saskatoon, Saskatchewan (with Teleconference access)

MINUTES

ATTENDANCE: In Person: Elder Stephen Augustine, Justice Lemieux, Justice Mandamin, Prothonotary Lafreniere, Aimée Craft, Marilou Reeve, Kathy Ring**,** Ron Stevenson**,** Diane Soroka, Peter Hutchins, Don Worme, Koren Lightning-Earle, Mike Jerch, Chris Devlin, Peter Grant, and others (incomplete attendance list). **By Teleconference:** Chief Justice Crampton**,** Andrew Baumberg (Recording Secretary), Sheila Read

MORNING SESSION

Elder Stephen Augustine offered an Opening Prayer, followed by a welcome from Justice François Lemieux (Chair) and then introductions.

Review Minutes of Past Meeting (September 28, 2011) & Agenda
Agenda and minutes were approved.

Global Revision of *Federal Courts Rules*
Justice Lemieux provided some background to the Rules Committee project relating to global revision of the Federal Courts Rules. A public discussion paper of the Rules Committee identified the following possible issues that could form the basis for reform of the Rules:

1) Court-led procedure vs party-led procedure,
2) The Court's authority to control abuse,
3) Trial vs disposition,
4) Introducing the principle of proportionality,
5) Making effective use of practice directions,
6) Uniform procedures vs specialized procedures,
7) Making the "architecture" of the rules more user-friendly, and
8) Other areas of possible reform.

Peter Hutchins noted that there is a debate in the Courts regarding the possibility of allowing for specialized procedures in the Rules. Given the special nature of aboriginal law proceedings, it is important for the aboriginal law bar to provide input.

Aimée Craft made a comment re process: is there still time to provide input? **Koren Lightning-Earle** added that the IBA had not specifically been asked to provide comments. **Andrew Baumberg** replied that the Rules Committee Discussion Paper was circulated for comment last Fall to those on the public distribution list for Court practice notices, and that members of the Bar had been reminded to subscribe last year.

Issue 1) Court-led procedure vs party-led procedure
Peter Hutchins noted that the Court should be more active in *requiring* the parties to sit down to find creative solutions, which can't be done from the Bench. In his experience, there is rarely consent from the Crown to negotiate. There is also a problem re disparity of resources.

He noted that we are in an era of constitutional supremacy and that the principles in the jurisprudence should be reflected in the Rules. It is extremely important for the Court to be in direct contact with clients, whether in a dispute resolution conference or at trial. This is part of a court-lead approach. There is a need to have more specialized judges in this area. Reference was made to Prof. Arthur Ray's comments regarding the very long process to get sufficient training to have a full understanding in this field. It is difficult to achieve this in the course of a single trial – the Court needs specialization.

Issue 2) The Court's authority to control abuse
Peter Hutchins thinks there is too much deference to parties – in some cases the Court needs to step in.
Justice Lemieux noted that the Courts have recognized that there is a problem. Many courts have instituted powers to deal with abuse.

Issue 3) Trial vs disposition
Peter Hutchins framed the issue: do you have to go to trial every time? The history of aboriginal litigation is "long trials." He noted that the Supreme Court has specifically required a complete record – parties have no choice but to have a full process. Rule 3 is an important rule requiring clarification.

Issue 4) Introducing the principle of proportionality
Peter Hutchins noted that this is the same issue: what does it really take to get resolution of the dispute?

Issue 5) Making effective use of practice directions
Peter Hutchins noted that perhaps this is less an issue for this area of the law, though it is useful to have practice directions from the Chief Justice.

Issue 6) Uniform procedures vs specialized procedures
The maritime bar has specialized rules and finds them very useful. In response to the reticence of the Court re "ethnic-based" rules, **Peter Hutchins** points to the *Indian Act* and *Constitution* which both are clearly singling out aboriginal peoples as falling under a special legal regime. Feedback from colleagues suggests that specialized rules would be welcomed.

Issue 7) Making the "architecture" of the rules more user-friendly
Any effort to simplify the "mystery" of the Court system for front-end users would be welcome.

Issue 8) Other areas of possible reform.
This is a catch-all of other areas of possible reform.

Justice Lemieux noted that most of the work in the Federal Court is judicial review – there are fewer actions. Over the years, actions dealing with land titles are generally taken in the provincial courts. The rules amendments may have more relevance to actions than judicial review applications.

Prothonotary Lafreniere qualified this by noting that although there are hundreds of actions, many are stayed pending the specific claims process. In some types of judicial review applications, such as election cases, the Court takes an active role. The Court will grant case management without requiring a formal motion. Re Court-lead versus party-lead litigation, he added that the Court does not have the resources to case manage *all* proceedings, but will get involved if there is a specific issue / problem. He is not aware of any request for case management being denied. If requested by only one party, he requires the other party to justify their opposition.

Aimée Craft indicates that she will circulate the Discussion Paper to colleagues and try to provide

comments as soon as possible. **Koren Lightning-Earle** added that she will do the same.

Re Dispute resolution: **Peter Hutchins** noted that in many cases there is no consent from the Crown to engage in a dispute resolution process.

Kathy Ring noted that the Department can't engage the dispute resolution process unless they have instructions from their client.

Prothonotary Lafreniere noted that dispute resolution conferences can be scheduled over many months, with the proceedings stayed to avoid the parties spending money, while one party tries to secure a mandate. However, early dispute resolution discussions can allow for preliminary discussion of issues leading to a recommendation from counsel to their client for a mandate, rather than waiting for the mandate to engage in the discussion. The Rules even allow for a stay of proceedings while the parties seek arbitration outside the Court, or early neutral evaluation / mini-trial. He noted that when he was counsel with DOJ, there was a government policy actively to engage in dispute resolution.

Kathy Ring noted that this is still the position. However, there is a very long process to get funding committed via Treasury Board.

Diane Soroka noted that the CBA was reminded of the Rules Committee Discussion Paper at the National CBA Liaison Committee meeting with the Federal Courts on June 1 and given a June 30 deadline for comments.

The issue shall be included on the next Rules committee agenda. Different groups can make submissions to the Rules Sub-Committee and share them within the Liaison Committee for further discussion.

Kathy Ring noted that DOJ provided formal submissions to the sub-committee and will not be making separate comments.

Judicial Review Practice Guidelines – *Alternate Dispute Resolution*
Justice François Lemieux provided an overview of the draft practice guidelines as well as the Court's pilot project re case management and mediation of aboriginal law proceedings.

Chief Justice Crampton confirmed the Court's commitment to the pilot and support of Justice Mandamin's work.

Justice Mandamin described the existing rules, which allow for case management and dispute resolution. However, parties are not always aware that case management and dispute resolution are an option. So, there is now a Court triage (by Justice Mandamin) of new proceedings with an assessment of the possibility of entering case management and dispute resolution discussions among the parties. This can include adoption of community-based processes for dispute resolution. If the parties agree, then a recommendation is made to the Chief Justice to order case management and appointment of a case management judge, prothonotary, or both. The judges / prothonotaries assigned are those who have expressed a particular interest in this area of work – there will be a specialized group. The case management judge will put options to the parties, such as:

- a consent stand-still order
- suspension of filing requirements
- dispute resolution sessions that could be held in Aboriginal communities or centers accessible to the communities
- formalization of mediation outcomes (a Court Order can incorporate agreements made between parties)

- if parties are not able to reach complete agreement, they may still narrow the issues, allowing for summary trial on some issues
- if there is no final settlement, the matter can revert back to the normal track with full oral hearing and adjudication by the Court

The Court is still working out the logistics of this project and assessing the preliminary results, which so far have been very positive. Justice Mandamin added that, for many reasons, First Nations across the country have had their decision-making / dispute resolution processes undermined over the decades. These processes need to be re-affirmed, both by the Court, by counsel, and by the parties themselves. This is a long-term process that requires counsel to take an active role. There are some 700 First Nations across the country, so it is difficult for one First Nation to 'learn' directly from the experience of another, often far away, in resolving its dispute.

Sheila Read provided some background on the work of the Committee in this area. She framed the question: should the committee finalize the existing draft practice guidelines or else expand on them to include broader matters, such as Crown – First Nations disputes.

Justice Lemieux noted that the pilot project addresses many of the issues raised and leads to the need for revision of the guidelines to address a broader range of cases. He described a few cases where this type of dispute resolution has been attempted, and in each case, the ultimate result could never have been achieved via traditional adjudication by the Court.

Peter Grant noted that he cannot understate the value of a judge / prothonotary being present. This elevates the respect given the resolution process, and lowers the level of tension: parties enter a type of diplomacy when the Court is present. In sum, the presence of the Court can mean the difference between success and failure.

Chief Justice Crampton recommended that the current note regarding the pilot project could be made public, possibly in a slightly different form, to promote the initiative.

Justice Mandamin indicated, in response to a question, that the pilot covers a wide range of governance-type cases: election disputes, removals from office, etc. He described the process by which this could lead to broader recognition, within individual communities, of their own dispute resolution capacity.

Justice Lemieux added that all these type of community decision-making bodies are seen as federal tribunals subject to judicial review by the Court.

Ron Stevenson asked how best practices from these proceedings can be compiled, given that some settlement agreements are confidential.

Justice Mandamin suggested that the consent orders might formally include a preamble setting out the factual background and process followed, which would allow for consideration by the Committee

Sheila Read asked for Andrew Baumberg to provide a report in this area:
- number of cases adopting the dispute resolution process
- outcomes

Prothonotary Lafreniere asked if counsel could identify cases to assist the courts in this matter. He added that the *First Nations Election Act* could cause problems in this area, as it introduces concurrent

jurisdiction, possibly leading to members of a First Nations community bringing a governance dispute for review before different courts.

Justice Mandamin responded to a question as to whether the Court is called to interpret customary law, noting that many cases involve procedural issues, though in some the Court is called to interpret First Nations customary law, just as the Court interprets other laws. This might lead to the Court hearing Elders as to the proper interpretation of the law in the community.

Aimée Craft suggested a Court direction that the parties consider the existing triage process, with formal guidelines to follow. This could make a significant difference in the parties' decision-making process *before* they file.

Peter Grant agreed, noting that once you file a notice of application, usually you are far along the track.

Peter Hutchins noted the challenge of accumulating dispute resolution "jurisprudence." Availability of jurisprudence would be quite useful.

Andrew Baumberg made reference to the Phase I practice guidelines, which already provide such a frame-work for a "protective claim" along with a request for case management / dispute resolution.

CJ Crampton suggested that there may need to be a change of mind-set re the function of the notice of application. It could be seen simply as a "key" to engage the Court's broad range of dispute resolution tools.

Sheila Read suggested further discussion amongst counsel to encourage use of this process.

Andrew Baumberg proposed a draft practice direction to counsel, with information about the pilot project and availability of Court dispute resolution services, encouraging counsel to consider these options before filing an application. The application could be filed along with a request that the application be streamed into this pilot at the time of filing the application. The formal practice guidelines will follow, but in the interim, parties and their counsel could refer to the Phase I guidelines for options.

Decision: All agree.

Action: Andrew Baumberg to prepare a draft notice in consultation with Justice Lemieux, Justice Mandamin and Chief Justice Crampton, with the draft to be circulated to the Committee for comment before finalization.

LUNCH – COMPLIMENTS OF THE CANADIAN BAR ASSOCIATION

Revised Phase II Practice Guidelines – *Elder testimony and oral history*

Justice Leonard Mandamin provided background regarding development of the guidelines and the basic principles set out in them. He reiterated that they are guidelines, not rules, so not formally binding on the parties and Court. He then went on to provide a report of his meeting with Elders on November 13 – 14, 2011, to discuss the draft guidelines. He noted that the Elders were generally supportive of the guidelines, though a common theme was that the Court is not a 'natural' environment for Elders. He then briefly described the discussion with Elders regarding a proposal for a court education project related to oral history and aboriginal law.

Elder Stephen Augustine noted that the Elders are very attuned to the flexibility of the Court, subject to judicial independence. Some issues need to be resolved on a case by case basis, rather than via over-

arching guidelines.

Kathy Ring circulated the revised draft guidelines to her colleagues within the Department of Justice. Some noted that the most recent draft contains significant changes, apparently based on a meeting with Elders. She noted that the Department was not present, so it is not able to gauge what was behind the changes. The inclusion of timely disclosure is seen as a very positive development. However, some changes raise concerns for the Department, and so it does not support them as currently drafted.

General comments:

- best practices – the guidelines should include examples of best practice that have been used so far (she had provided some scenarios at a previous meeting).
- excessively remedial nature of guidelines – reading the guidelines, one is left with the impression that there remains a huge problem in the practice of aboriginal litigation; however, the Department has taken considerable steps in recent years to address issues that have been raised in discussion within this Committee and elsewhere, and these should be presented in the guidelines.

Specific concerns:

- The committee mandate relates to practice and procedure. However, the guidelines touch on rules of evidence at Clause 4 – "Elder testimony informs the Court of the Aboriginal perspective and will usually be admissible where an Elder is a person recognized by his or her community as having that status." This seems to be adjusting the rules of evidence and indicates that the Court is taking a position.
- At Page 9 / 10 – "Counsel should take care to ensure the Elder first understands the question asked." This puts a positive obligation on counsel, under cross-examination, to check that the witness understands each question.
- Bullet #4 "Alternative ways of questioning on cross-examination should be explored. In one case, a party had the other include questions to which the first desired answers; in another type of proceeding, Elders were questioned by a third counsel retained because of his knowledge of and acceptance by the Aboriginal community; and in a third, questions were simply put in a courteous manner." The Department agrees that all questioning must be done with respect. However, the first two examples entail the Crown handing over the cross-examination process to someone else. This is not consistent with the right to cross-examination. The Crown's experience with the Specific Claims process was that it undermined the position of the Crown and was not acceptable. Reference was made to the Supreme Court of Canada decision in *Lax Kw'alaams Indian Band v. Canada* (re question whether pleadings are proper), where it was concluded that the procedural advantages of a civil process are lost if the hearing becomes a simple inquiry. The process is no longer fair.
- Finally, the guidelines appear to be elevated to a quasi-mandatory status.

Ron Stevenson added that the guidelines provide some extremely valuable and creative proposals. He noted that the on-going discussions in this committee have provided valuable insight and experience for the Department to take back to revise their process. Two years ago, the Department developed 5 case studies to work through some issues. The guidelines still appear to be remedial, even though the Department has done considerable work. It is recognized that Elders are a source of knowledge of indigenous law, but also they are a witness in Court.

Koren Lightning-Earle indicated that the IBA attended the November consultation solely in a supportive role for the Elders. With respect to the guidelines, she noted that the IBA supports them.
There was a suggestion from one IBA member re framing of the issues at Page 1, paragraph 4:

"Aboriginal Elders are the primary source of evidence about Aboriginal perspectives and Aboriginal oral history. Their testimony about the Aboriginal perspective, touching on indigenous customs, traditions and identities, conveys the context that informs the Court's understanding about indigenous normative values and the significance of events. The Elders' accounts of oral history convey their historical evidence as understood from the Aboriginal perspective." Elders provide evidence of indigenous laws, but may also exercise laws in the same way as judges. It is important to move to an education / training process.

Don Worme applauded the work of the Committee. There has been considerable movement here, as well as in restorative justice. He noted that no-one is trying to undermine the right to cross-examine witnesses. The Court needs to take the lead in restorative justice.

Aimée Craft noted that the Committee has engaged in substantive discussions over 5 years, and was not expecting to continue such discussions at this meeting. The current document is one of inherent compromise: the CBA has given up ground on various issues to reach this version, and it is time to move on.

Justice Lemieux noted that the Department's comments are important, but in his view the issues could be fixed. We are very close to resolution.

Peter Grant noted that this document is one of compromise. Early disclosure is a challenge for private bar counsel – this is of significant benefit to DOJ; other issues are of benefit to Aboriginal litigants. He noted, re cross-examination, where the Crown asks separate counsel to do the questioning, that the Crown is already doing this in some cases, on its own initiative. He gave examples where this is being done. But clearly, it is not binding on parties.

Kathy Ring noted that they accept the need for compromise, but not on the key issue re cross-examination.

Prothonotary Lafreniere noted that in the end, it will always be for the trial judge to decide such issues. These are guidelines, nothing more. They do not make changes to substantive law.

There was some discussion concerning whether the practice guidelines are being elevated to the status of a rule, or might necessarily become rules as a next step. It was noted by some that these are guidelines that would be included as part of the Phase I guidelines, which are clearly non-binding.

Re Cross-Examination
"Elder testimony informs the Court of the Aboriginal perspective and will usually be admissible where an Elder is a person recognized by his or her community as having that status." This goes to treatment of the Elder with respect and is reflective of the reality in indigenous communities.
One CBA lawyer noted that once an Elder takes the stand, the Crown never indicates that it is not admissible, but simply that it should be given little weight. So, this sentence has little impact on the Crown.

Sheila Read raised concern with the directive language under the cross-examination section.

Re "Counsel should take care to ensure the Elder first understands the question asked." - **Peter Grant** said that this is normal practice.

Justice Mandamin noted that it is important that the Elder first understands the question.

"Alternative ways of questioning on cross-examination should be explored. In one case, a party had the other include questions to which the first desired answers; in another type of proceeding, Elders were questioned by a third counsel retained because of his knowledge of and acceptance by the Aboriginal community; and in a third, questions were simply put in a courteous manner." It was noted that this is not mandatory, except that parties must have a *discussion* about options, not that they must adopt any of the examples.

Prothonotary Lafreniere noted that this is common sense, so that everyone is not wasting their time. The word "should" encourages counsel to think outside the box and simply think about the options. If they don't want to, then they can follow their normal procedure.

Proposed revision: "Alternative ways of questioning on cross-examination should be explored."

Ron Stevenson suggested that the preamble be modified to reflect the work of the Department re cross-examination. The actual differences are not very great.

Justice Mandamin recommended posting these as draft guidelines.

Justice Lemieux asked the Department to provide suggested changes (with a rationale) by **July 4**. There will be a call on **July 18** to discuss the proposals.

Farewell to Justice François Lemieux
There was recognition by all of Justice Lemieux as outgoing Committee Chair, given that he retires as judge of the Court in October 2012.

Miscellaneous Issues
First Nations Elections Act
This government Bill, introduced through the Senate, has passed all 3 readings in Senate, and is now at 1st reading in the House of Commons. The CBA is making submissions to the standing committee. For inclusion on the agenda for the Fall meeting.

The Bill, if passed, could cause significant problems. It allows for concurrent jurisdiction in the Federal Court and provincial superior courts, likely leading to conflicting jurisprudence.

Planning for Fall 2012 Meeting
The Fall IBA conference is October 17 (student day), 18, 19, 20, at the Delta Hotel in Winnipeg. This Committee will tentatively meet the day before the student day – thus, on **October 16**.

CLOSE OF AFTERNOON SESSION