Federal Court ~ Aboriginal Law Bar Liaison Committee Meeting

October 7, 2013
Orillia, Ontario

MINUTES

ATTENDANCE:
In Person: Justice Leonard Mandamin (Chair), Justice Douglas Campbell, Justice Michael Phelan, Prothonotary Roger Lafrenière, Julie Blackhawk, Brenda Gunn, Dave Nahwegahbow, Diane Corbière, Krista Robertson, Aimée Craft, Don Worme, Scott Robertson, Lucia Shatat, Aaron Wilson
By videoconference: Chief Justice Paul Crampton

1. Welcome & Introductions by Justice Mandamin.

2. Minutes of Past Meeting - approved after a modification to the list of attendees was made.

3. Discussion regarding the paper by former Chief Justice Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice"

J. Mandamin introduced the paper. He explained that there have been a number of decisions dealing with Aboriginal perspectives and legal traditions. The Committee has looked at some narrow topics in that regard, such as the evidence of Elders. In law schools, we see more and more, indigenous legal courses (dealing with legal traditions), Aboriginal moots, various mediation approaches, etc.

He invited Committee Members to comment on the text, explaining that through these discussions, the Committee could identify the areas on which the Committee should focus over the next while.

Krista Robertson noted that it is essential that we progress in this area and that judges do have some discretion under the Federal Courts Rules to have different approached to evidence. There is procedural space to incorporate Aboriginal perspectives.

Aimée Craft noted that there are some important inherent challenges and that issues will arise. For example, how would we apply the rules regarding the applicability of evidence to Aboriginal issues?

Don Worme noted that it is essential that there is respect for Aboriginal traditions.

Prothonotary Lafrenière noted that parties need to raise, as soon as possible, important issues during case management. It is too late, when you get to trial, to speak about accommodation, etc. He underlined that parties have quick and easy access to a case management judges, so that they can bring up matters as soon as possible.

Justice Campbell indicated that he agreed with Justice Finch that the focus should be on the *person*, and not on the *system*. People in the system can control the system by changing themselves. He added that what is important is what you do not know, especially for judges. He referred to the Federal Court's Aboriginal Dispute Resolution Seminar, which will take place later this month; it will teach judges what the perspective of an Elder is.

Justice Phelan stated that judges have struggled with the reliability of oral evidence. Understanding Aboriginal issues will assist judges come to grips with this issue. He indicated also that it is not an insurmountable problem: judges know how to deal with laws from other jurisdiction and could apply the same analytic process.

Diane Corbière agreed with Don Worme and noted that she was very pleased with the progress of the Federal Court work so far. She noted, however, that if practitioners bring a case and lose, it will set a very bad precedent. The IBA, however, will continue to participate.

Dave Nahwegahbow explained how some introduce themselves with their spirit or Indian name. He noted that the system was rigid and that it takes enlightened individuals to open the system. You have the procedural aspects, but also substantive aspects. For example, he noted that when it comes to interpreting treaties, you need to take into consideration the Aboriginal perspective and how certain matters were interpreted by Aboriginal peoples.

Julie Blackhawk explained that the Department of Justice has been an active participant in the committee and is committed to participate to the extent that it can. She could not comment on substantive issues. DOJ is open to how the indigenous perspectives can be better accommodated in court procedures and how case management can be used effectively.

Chief Justice Crampton extended a warm welcome to everyone and regretted being unable to attend the meeting in person, but looked forward to seeing everyone at the IBA Gala.

He explained that the Court is looking forward to the Aboriginal Dispute Resolution Conference. He emphasized the work performed so far by the Court, e.g. the Guidelines and Pilot Project, and noted that the Committee should now consider having a broader perspective on the issues. He indicated that former Chief Justice Finch had given some helpful steps by indicating that we need to have a better understanding (to make space), and by showing how to approach the task in an effective manner. He noted that achieving true reconciliation is important and that the Court is ready and willing to do so to the extent that it is able.

The Chief Justice also provided an update on matters that took place since the last meeting. He explained that a Notice to the Profession regarding adjournments and a Notice regarding books of authorities had been issued.

Justice Mandamin stated that the Court and its judges also need to see what they can contribute. Judges are paired with various law schools, and maybe this relationship can be used. He also raised the issue of judicial review and how the concept of legal traditions can apply in the area of judicial review.

Justice Phelan noted that the very use of affidavits to encapsulate oral history makes matters difficult. He indicated that some of the rules on judicial review may need to be examined differently. He added that we may need to have a judicial review consider an oral evidence component.

Diane Corbière underlined that there is a fear amongst practitioners that Aboriginal law will get trumped by common law principles. It was her understanding that some lawyers had stated that as long as Aboriginal law and common law principles said the same thing, then Aboriginal law can be considered; but it could never trump common law. She indicated that education is the answer.

Prothonotary Lafrenière stated that in his view, a judicial review can be heard orally and that one could treat a judicial review as an action. He encouraged counsel to raise these types of issues with the Court and indicated that the Court is open to conducting a judicial review in different ways (e.g. oral evidence or a mixture of oral evidence and affidavit evidence).

Aimée Craft indicated that one of the challenges faced is the fact that Elders want to look at issues in a broader context (not the narrow points raised in a proceeding) – it is a holistic approach. To do otherwise would be similar to a judge interpreting a statute without having any knowledge of the Canadian Constitution.

Justice Phelan indicated that from a legal theoretical perspective, one cannot understand the narrow Aboriginal legal perspective without understanding the foundations.

Justice Mandamin referred to the Navajo Courts and the fact that they developed their own case law in which Navajo principles are used to resolve issues. He referred to a book regarding the Navajo Courts and principles (Navajo Courts and Navajo Common Law, by Raymond D. Austin, University of Minnesota Press, 2009).

It was noted that some disputes are highly contentious and the question was asked whether it is realistic to expect parties to mediate.

Don Worme referred to the fact that counsel also has the obligation to train themselves and that they have the necessary background when dealing with certain complex matters. This would allow them to offer the Court the kind of solutions that they want.

Brenda Gunn indicated that the situation is very difficult and was not sure how one can make indigenous legal traditions fit into the Canadian legal tradition system.

Dave Nahwegahbow agreed that lawyers have a duty with respect to mediation and that some lawyers are highly adversarial.

The option of forcing parties to first try mediation was raised, but **Justice Campbell** noted that while some Courts impose mediation first, Courts cannot drag people to mediation.

Justice Mandamin stated that we should be able, when an Aboriginal community is looking for ways to resolve a question outside of the community, to provide them with a choice: have it adjudicated with "tweaks" – or doing something within their own tradition (for example, mediation and coming to an agreement; and the Court can do whatever it can to assist, recognizing the agreement by making an appropriate Order). The Court will accommodate the legal traditions by giving effect to the agreement without looking at how it was reached. He added that the Court may have to look at the allocation of costs, because costs are a real concern.

Krista Robertson indicated that it is sometimes difficult to get your clients to agree to mediation.

Chief Justice Crampton wondered whether the internal First Nations context would provide the proper forum where Aboriginal legal traditions could first be raised.

Action: Justice Mandamin asked the Committee Members to think about what was discussed and come back with a short paragraph or statement regarding what we ought to be doing – and take this discussion to the next meeting.

4. Development of a Best Practices Compendium

Justice Mandamin suggested that the Committee prepare a resource document, based on Justice Ferguson's book on Ontario Courtroom Procedure. The document would be easily accessible and user-friendly, and could also be made available as a booklet at Registry counters. Other Courts and jurisdictions can be examined for ideas. Aaron Wilson will see what is done in Australia. It was noted that the book Aboriginal and Treaty Rights Practice Book (by Mary Locke Macaulay) could be used as an example as well.

Aaron Wilson would be the main drafter of the resource document and a subcommittee could be struck to work on the document. The work would be assigned to junior lawyers or students who could prepare a document for the Committee's review.

With respect to the subcommittee:

- Prothonotary Lafrenière will assist
- Brenda Gunn indicated that some University of Manitoba students could assist;
- Scott Robertson, Julie Blackhawk and Krista Robertson have indicated that they can assist.
- An employee from Don Worme's office (Josephine de Whytell will participate.
- A student from Aimee Craft's office will assist.

It was noted that various information, practical aspects and even certain interlocutory decisions, which are not posted on the Federal Court website, contain information that is useful and that could be included in the document. It was also noted that certain procedural decisions that are interlocutory in nature can be included in the Common List of Authorities.

It was suggested that the document could address issues such as advance costs and hot tubbing.

The subcommittee could work together via teleconference. The possibility of skype was raised, but issues surrounding security were noted. Various options for sharing work were also considered (e.g. google docs)

The document would constitute a how-to-guide that is accessible, which focuses on the Federal Court practice. Concerns were raises regarding the need to reach a consensus on the narrative of the document. It was noted that the document would not change what the Committee has accomplished so far (e.g. Guidelines). The subcommittee would simply try to put it in an accessible form. The document would not expand the Guidelines, but make them more accessible. For example, it could examine the question of how a hearing on a reserve could take place (e.g. security issues for judges, finding appropriate accommodation, the need to first contact the judicial administrator or the prothonotary – a checklist of things to discuss could be included). The document would bring the Guidelines "alive", accentuate the Guidelines, and explain what happens if you go to Court. It would really be a "how-to" book.

It was noted that the use of the Best Practices Template could be useful and that maybe more templates should be completed to be included (e.g. cases regarding judicial review). For example, they could be attached as schedules. It was noted that draft Orders and information regarding ADR could be useful as well.

The subcommittee could look at the structure of the document, and if they have any questions, they can submit them to the committee for discussion.

Justice Mandamin indicated that at the next meeting, guidelines for judicial reviews will be discussed.

5. *First Nations Elections Act*

The Act was referred to a Standing Committee of the House of Commons, but subsequently died on the Order Paper as Parliament was prorogued.

6. Common List of Authorities

It was agreed to add the following two cases to the Common List of Authorities

- *Lax Kw'alaam Indian Band v. Canada*, 2011 SCC 56
- *Manitoba Metis Federation Inc. v. Canada*, 2013 SCC14

It was suggested that certain judicial review decisions ought to make the list (e.g. Justice Russell's decision in *Roseau River Anishinabe First Nation*).

Dave Nahwegahbow suggested the following decisions:

- Justice Phelan's decision in the *Dene Tha* case
- The decision of Justice Mactavish in Assembly of First Nations/First Nations Child and Family Caring Society, which was upheld recently by the Federal Court of Appeal (via J. Stratas – 2013 FCA 75)

Justice Mandamin asked the Members to give some thought to judicial review decisions that could be added to the Common List of Authorities.

It was noted that interesting decisions can be distinguished from decisions that should be included in the Common List of Authorities. In the agenda for the next meeting, an item regarding interesting cases could be included so that interesting cases can be shared. It was also suggested that one may wish to cross-reference the authorities in the List by subject matter.

7. Spring 2014 meeting

The location of the Spring 2014 meeting was discussed, as the CBA conference will be held in Iqaluit on June 19 and 20.

Krista Robertson will share the draft agenda of the conference.