Federal Court ~ Aboriginal Law Bar Liaison Committee

June 18, 2014 Meeting
Iqaluit, Nunavut

MINUTES

Attendance: Chief Justice Paul Crampton, Justice Leonard Mandamin (Chair), Justice Michael Phelan, Justice Michel Shore**,** Krista Robertson; Gaylene Schellenberg**,** Thomas Ahlfors**,** Robin Campbell**,** Aimée Craft**,** Michelle Forrieter**,** Peter Grant**,** Michael Jerch**,** Diane Soroka**,** Janet Rowsell**,** Lorraine Land, Julie Blackhawk; **Teleconference:** Prothonotary Roger Lafrenière, Koren Lightning-Earle, Andrew Baumberg, Aaron Wilson

1. Welcome & Introductions
Justice Leonard Mandamin (Chair) welcomed those in attendance.

2. Review of (a) Agenda & (b) Minutes of Past Meeting (October 7, 2013)
Agenda approved. The October 7 draft minutes were approved with some corrections:

- Page 2 "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."
- Page 3 "… for example, mediation and coming to an agreement;"
- Page 3 "… whether the internal First Nations context would provide the proper forum where Aboriginal legal traditions could first be raised."

Andrew Baumberg to take minutes via teleconference for June 18.

3. Remarks by Chief Justice Paul Crampton
The Chief Justice noted the recent appointment of 6 new judges to the Federal Court, which now has a full complement:

- Justices Leblanc, St-Louis and Locke appointed last month;
- Justices Diner, Boswell and Brown appointed last week.

The Court has issued a Strategic Plan, now available on the Court web site. There is an opportunity for this Committee to take stock in light of this plan and look forward to the next few years. Key purpose: *how can the Court be of greater assistance to practitioners and litigants?* The Committee has in the past provided valuable input for a number of initiatives.

The Plan has 2 key elements: "access to justice" (reduction of time, cost, and barriers) and "modernization."

On the *Access to Justice* front, what can we do to better promote reconciliation and greater confidence in the Court and the Rule of Law – in individual cases but also the broader level? A second perspective is to look at the Court as a forum with multiple doors that are available – with emphasis on how the Court can assist to achieve resolutions in ways short of full-blown litigation. This includes resolution of disputes, *or parts of the dispute and sub-issues,* by agreement.

On the *modernization* front, the Court continues to take steps, including:

- Digital audio recording of all hearings now in place – parties can get copies of recordings from the Registry (the Court is still assessing the policy for wider media & public access);
- E-Court – 'trial run' of an electronic court hearing of the *Alderville* trial; another pilot was completed based on technology from the Competition Tribunal; other e-court models may also be considered
- E-filing / e-service also being pursued – there are issues though, at present, with system capacity
- Access to electronic records – a longer-term goal, requiring a new records management system
- Modernization of Rules – will facilitate use of technology

4. Court-assisted Settlement of Disputes: ***Next Steps & Long-term Goals***

- **Short video presentation:** ***October 2013 Education Program involving Elders***

Justice Mandamin described the October 2013 Court seminar at Kitigan Zibi First Nation, on Aboriginal Dispute Resolution. In addition to providing an opportunity for contact with members of the First Nation, there were also a number of Elders in attendance, as well as Justice Murray Sinclair, Justice Harry Slade, and Chief Justice Yazzi (Navaho Court of Appeal).
The video from Kitigan Zibi was then presented.

- **Court-assisted settlement of disputes by agreement, with possible increased use of Indigenous dispute settlement approaches**

Justice Mandamin noted that following the seminar, he has been consulting with members of the Court to develop a group of judges who are available to participate in a meaningful way in disputes that come to Court in this area of law. There might be a separate session with judges, practitioners, and Elders to look at how disputes might be approached.

There is a need to focus on 3 key components:

(i) development of a roster of judges available to assist in resolving disputes;
(ii) development of practical tools / documents / resources; and
(iii) getting the word out that this is an option that works.

If matters are successfully resolved, typically they are not publicized. This is different from Justice Mandamin's experience as a provincial Court judge with a First Nations community: each time there was a successful dispute, other members of the community would learn of it. However, at the national level, it is much more difficult for decisions to be shared with all First Nations.

Justice Shore read a short text that he had prepared. Beforehand, though, he noted that we need to know what litigants want before saying what can be offered. The key is "integral" mediation. He noted that he regularly teaches outside Canada, with a preference on teaching young people so as to be able to provide a long-term solution. There is a need for 'traveling' mediators. He told a story that highlighted the need to empathize with those involved in the mediation.
He noted that the Court has many options in mediation – while still working within the framework of the law. There is a need to move from piece-meal litigation to comprehensive agreements.

There were comments from the Bar regarding the Court's outreach:

- a recommendation that more prominence be given to the Practice Direction on the Court web site, particularly for SRL's
- re triage project – it conveys the Court is being proactive and taking on an outreach role
- re barriers to settlement – it is good to raise settlement at a case-management conference, high-lighting the cost savings, though noting that there are costs even with mediation. If Elders are involved, it is important to address the selection process.

There was also some comment regarding the role of the Crown within the ADR pilot project.

Justice Mandamin reiterated that the Court is screening cases under the triage project to identify cases that might be good candidates for to settlement discussions or other forms of resolution. Some parties welcome the opportunity, while others prefer to continue with litigation. The practice guidelines do not indicate that the Elder must be a member of the First Nation. He referred to Kathy Ring's paper and the need for an impartial mediator.
A case example was provided where one party wanted to challenge the Court's jurisdiction. However, both parties were receptive to having the Court assist with settlement. Each party invited an Elder to be involved. It is important that the Elders not be placed in a position that compromises them.

The Chief Justice raised a question whether a 'roster of Elders' might be created.

Justice Mandamin noted a practical challenge in this regard, with about 600 First Nations. Also, in the process of getting to an agreement, the parties often want to be directly involved in the selection of Elders.

Prothonotary Lafreniere noted that the roster of Elders raises a cost issue. The Court offers free mediation services, whereas it is not clear who would pay the Elders. Sometimes the mediation can take as long as an adjudicated process. There needs to be some thought regarding the benefits of dispute resolution and ways of keeping costs down. Often, meetings are held initially by teleconference or video-conference to reduce costs.

Julie Blackhawk noted that the idea of a roster of Elders might facilitate the involvement of the Crown in settlement discussions. Possibly, each party could choose their own mediator. There is a desire within the Department of Justice to expand the 'pilot project'. Perhaps there could be a tripartite group to draft a paper outlining types of cases that might be suitable. The large constitutional cases might not fit, but smaller, discrete cases might work.

The Chief Justice asked for clarification regarding the impartiality of the mediator.

Julie Blackhawk noted that the Crown's concern initially related to external mediators. Comments from the Department of Justice earlier had indicated a preference for a judicial mediator.

Justice Phelan noted the example from maritime law, with a tripartite mediation model. This might take the form of a judge along with 2 Elders.

Justice Mandamin noted that the pilot has either involved a judge or prothonotary as mediator or else the parties resolving the matter themselves, but with ratification by the Court.

Justice Shore noted that we need to be sure not to have a process with multiple Elders that pits one Elder against another.

Aimee Craft noted the wide regional variation, though it would be possible to create local rosters. The roster process would allow us to build on experience. "Anishnabe law tells you what is there, but not what you have to do." There is a lot of work to do within Indigenous communities. In one recent settlement discussion, the most important question asked was: "*What do you want for your children?*" Research is needed for the development of a theoretical framework for indigenous dispute resolution – including process and steps for implementation.

The Chief Justice noted that there has been some discussion re the threshold for triggering the Court's jurisdiction, perhaps via an initial pro forma notice. This could allow the Court to be engaged, possibly along with an Elder or Elders, following a framework to be developed.

Justice Phelan suggested a bare-bones application for declaration X, without the need for any affidavits. This could immediately go into case-management.

Aimee Craft agreed this might allow for anticipatory settlement discussions before a dispute really arises.

The Chief Justice referred to Rules 3 and 55, which could be used if needed. He noted the need to highlight the pilot project.

Justice Shore noted the importance of reconciliation, providing an example of mediation with the government involving PTSD with soldiers. Possibly, major issues that need reconciliation could be resolved in advance in healing circles *before* they become full-blown fights.

- **Discussion re barriers to settlement: (i) Crown (ii) First Nations**

Julie Blackhawk noted that apart from the ADR initiative, the Crown is generally open to settlement discussions. It doesn't always involve court processes. From a review of internal inventories, often the settlement discussions are outside the court processes. There might be a need for Rules changes within the court process, but many settlements are and will remain outside the court.

With some education and understanding, the Crown can engage in different ways of settlement.

There are approximately 300 Aboriginal law cases in the Federal Court, with about 60 active files. Many have some form of settlement discussions. The Crown is always open to bona fides offers to settle, though it is recognized that the Crown can do better on settlement process.

Things that can assist in settlement:

- placing cases in abeyance for a particular period of time – the court should be open to this, to allow the parties to engage in discussions, with or without court monitoring (sometimes the time-lines are not long enough);
- the importance of phasing and bifurcation of issues – some issues can be settled and not others;
- in jurisdictions with mandatory settlement discussions, the settlement rate is not increased (as the Federal Court moves forward, it would be useful to review the experience in other jurisdictions)

Barriers to settlement on the part of Crown:

- firm awareness is needed of the practical realities for settlement – under the Financial Administration Act framework, there must be a formal risk assessment and identification of funding (there is no standing 'settlement budget'); these processes take time; although there are efforts to streamline these processes, they will always exist;
- need for full discovery, or phased discovery, in order to assist with chances of settlement – there is a need to know enough about the claim, and its risks, in order to make a proper report to get funding for settlement;
- poorly defined pleadings – these can be resolved through case management;
- development of a theory of the case, including settlement, is being completed within DOJ
- ratification process

The Department of Justice is looking at identification of classes of cases suitable for settlement, such as rent and leasing issues.

Justice Mandamin suggested 3rd party management be considered along with rent review. He noted that one further barrier to settlement is that some parties are locked into 'litigation' mode. Perhaps there are some tools to get parties to consider mediation – even a simple meeting.

Justice Phelan added that a 'reality check' early in a proceeding encourages consideration of settlement.

Justice Shore noted a concern that some lawyers might take a narrow view that they will 'make more money' via litigation, whereas a constructive project might be more in everyone's long-term interest.

5. Practice Guidelines: *Next Steps & Long-term Goals*

- **Practice Guidelines: priority on addition of *Judicial Review* component**
- **feedback from CBA / DOJ regarding "Courtroom Manual"**
- **discussion re 'best practice examples' (specific principles / practices)**

Justice Mandamin commented on the mixed feedback regarding the Courtroom manual proposal.

Aimee Craft indicated that the suggestion would still be valuable, but the current priority is to add judicial review to Guidelines.

Koren Lightning-Earle added that clients are often unaware of options in Court, leaving litigation as the only option. A simple booklet might assist in raising awareness. This could be circulated at AFN or regional meetings.

Justice Mandamin highlighted the consensus that there is a need to add the judicial review component to the existing practice guidelines. There was a suggestion to consider minor amendments throughout the existing practice guidelines, or possibly a new section.
Action: Justice Mandamin's next law clerk and Andrew Baumberg are to develop a draft, in collaboration with Justice Mandamin.

Regarding the 'best practices' template, Justice Mandamin highlighted the use of the *Delgamuuk* case in the template.

Julie Blackhawk referred to a list of 'best practice' tips and examples, developed a few years ago in collaboration with Kathy Ring.
Action: She will re-circulate this to the Committee.

There was a request to develop a CD with an archive of committee work.
Action: Andrew Baumberg

6. Miscellaneous Issues
First Nations Elections Act **-** Royal Assent (2014-04-11) but no in-force date yet.
There was some discussion regarding the origin of the 'concurrent jurisdiction' provision. No one knew how it appeared in the Bill. There was concern expressed by members of the Bar that it will complicate litigation, possibly leading to conflicting results. Members of the Bar had made representations to the Parliamentary Committee, but these appear to have been ignored.

Update re Common List of Authorities
Justice Mandamin described how the Common List works.
He added that the Rules Committee has proposed an amendment that would exempt a party from filing a full paper copy of 'any case that exists electronically' – only an excerpt would be required.

Varia
The Canadian Human Rights Commission has now published a toolkit for development of community-based dispute resolution. It was noted that the Commission had some funding – this might be considered as the Court moves forward with the project noted earlier in this meeting.

7. Planning for Fall 2014 Meeting
Note that there is a conflict between the IBA Fall conference and the Fall Court meeting:

- IBA conference – October 2 – 4 (Calgary)
- Court meeting – October 1 – 3

Tentative Proposal: Committee meeting in Calgary *after* the IBA conference (October 4).

The Chief Justice invited participants to consider further options, in addition to the suggestions raised above, to increase access to justice.
Action: The Chief Justice will work with Andrew Baumberg to look at options for promoting the Practice Guidelines on the Court web site. The CBA will look at options via its web site to highlight it.

Justice Shore suggested that the topic could be raised whenever the Court attends meetings with the bar across the country.

Gaylene Schellenberg noted the CBA's *Access to Justice* project, which has some overlap with the Court's project.

The Chief Justice suggested that the Court could be directly involved in national or regional meetings of First Nations representatives.

8. Close of Afternoon Session