Federal Court ~ Indigenous Bar ~ Aboriginal Law Bar
Liaison Meeting
Thursday, October 25, 2007 (9:00 a.m. - 4:30 p.m.)
Victoria, British Columbia
MINUTES

PARTICIPANTS

Justice François Lemieux	Federal Court
Justice Michael Phelan	Federal Court
Justice Leonard Mandamin	Federal Court
Prothonotary Roger Lafrenière	Federal Court
Justice Marvyn Koenigsberg	B.C. Supreme Court
Mr. David Nahwegahbow	Indigenous Bar Association
Mr. Jeff Hewitt	Indigenous Bar Association (President)
Professor John Borrows	University of Victoria, Faculty of Law
Ms. Kathy Ring	Department of Justice
Mr. Grant Christoff	Department of Justice
Ms. Louise Marcotte	Senior Registrar Officer, Federal Court
Mr. Andrew Baumberg	Executive Officer, Federal Court
Mr. Christopher Devlin	CBA Aboriginal Law Section (National Executive)
Ms. Aimée Craft	CBA Branch Section Chair (Manitoba)
Mr. Peter Hutchins	CBA Honorary Executive Member
Ms. Deborah Hanly	Indigenous Bar Association / CBA (Calgary)
Ms. Angela Cousins	Indigenous Bar Association (Board Member)
Mr. Drew Mildon	CBA Branch Section (Vancouver Island)
Ms. Lee Schmidt	Indigenous Bar Association (Board Member)
Ms. Katherine Hensel	Indigenous Bar Association
Ms. Jodie-Lynn Waddilove	Indigenous Bar Association (Board Member)
Mr. Jeff Schnuerer	Indigenous Bar Association

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OPENING

Ms. Kathleen Lickers welcomed the committee members on behalf of the Indigenous Bar Association. The committee then reviewed the agenda:

- The key focus: discussion on proposed practice guidelines – no decision will be made yet – these are guidelines, not rule changes, and this committee should work in tandem with Rules Committee
- Discussion papers are still in development regarding the role of Elders / oral history – these can be assisted by today's discussion
- Re rule reform (expert evidence) – the rules sub-committee intends to maintain a generic set of rules, though recognizing that there may be some areas in aboriginal law that warrant specific rules – it looks to this committee to identify specific areas that warrant special treatment for Justice Lemieux to report back

The minutes of March 8, 2007 (Winnipeg) were approved in principle, with Mr. Baumberg to make some final, minor corrections.

PART I: ORAL HISTORY EVIDENCE & THE ROLE OF ELDERS IN JUDICIAL PROCEEDINGS

Professor John Borrows

Professor Borrows noted the importance of interaction between indigenous traditions and the common law / civil law. Within indigenous traditions, there are different kinds of facts on which aboriginal peoples might rely when presenting history to courts:

- concrete events in history
- metaphorical facts – evaluation, interpretation – perhaps rooted in events, but including a continued "adding on" due to the event's significance

This presents a challenge for the decision-maker:

- *what type of fact is involved?*
- *what to do with it?*

Often, when oral evidence is presented, it is a form of law – not just an event, but a standard of judgment attached to the event – "an attempt to make significance." This places the Court in a position of receiving something as *evidence* which is actually *law*, and which might be used to assist in establishing the reference / normative structure. Law is always a structure providing a means to establish the significance of events, and this other perspective is often mixed in with 'factual' perspective (e.g., the snail in bottle from an English common law tort case is a story about more than a snail, but as much about "who is neighbour" – similarly, indigenous stories about land include reference to history as well as relationship / law). This can be challenging: *what weight to give to these stories?* *Delgamuukw* has given some guidance to deal with this, but it is just an opening on evidence standards and legal pluralism. Aboriginal law is *sui generis* – "of its own kind." *What are the standards for approaching it?* *Delgamuukw* says that the approach to sui generis common law is useful. Certainly one can look to the common law, but one also needs to look at indigenous law and then "triangulate." Indigenous law is based on inter-societal experience and so incorporates different perspectives. We think of Canadian legal system as bi-juridical, but from the aboriginal perspective, it is polyjuridical. Civil and common law are often separate, but there also is much interaction.

Question: *what is indigenous law / what are its sources?* Customary law is one source of indigenous law, but it is more than that:

- positive law / pronouncement about rules to apply in a particular area
- deliberative sources (e.g., circles, consensus-building to formulate rules, dialogue)
- natural sources (e.g., draw lessons from interactions in nature that are informative)
- sacred sources (respect because from Creator or sacred treaty / pledge)

So, when a story is told and heard solely as evidence, much of this might be missed. Professor Borrows added that many Elders see themselves as law givers rather than historians.

Question/comment from Committee: *the key issue for the Court is "why is this evidence being given?"* It is the role of counsel to define the issues and explain the underlying reasons for presenting story. Counsel must explain ultimate issues and the link to the story being told. This requires an explanation of the meaning of legal pluralism along with clarification of what different legal systems have to offer in a given case.

Professor Borrows noted that it is challenging because different issues are presented together. Stories can provide concrete evidence of history as well as an indication of the proper legal test to apply.

Question/comment from Committee: *How do you distinguish between competing stories?*

Professor Borrows noted that this is determined in part by an assessment of the appropriate legal test.

Justice Lemieux added that this is similar to evidence of foreign law. One can't make any assumptions. Foreign law is proven as an issue of fact (e.g., evidence of U.S. law re maritime liability), and expert evidence is needed. However, aboriginal law is not "foreign" law – it is the law of the country.

Prof. Borrows said that evidence can be presented as well as authorities for the proper approach to assessment of the evidence (Supreme Court and Federal Court jurisprudence, etc., but also local indigenous legal tradition).

Justice Phelan questioned how a court should best receive indigenous law, given that it is not a familiar legal system?

Prof. Borrows answered with reference to common / civil law harmonization, which provides rules for assessing different understandings in common / civil law: "*look to community."* However, there are no rules for the judge to receive / interpret indigenous law – *how to integrate it into wider framework?*

Mr. Hutchins noted that it is law foreign to the *common law*, not foreign to Canada. This raises some questions of jurisdiction – *is it the role of the Court to set the appropriate interpretation of foreign law?* The judge's job is to concentrate on the degree of incorporation of indigenous law. This is an important inquiry, as the Supreme Court talks of the common law living with indigenous law. The common law has incorporated some indigenous law, and this is an on-going process.

Mr. Devlin noted the possible use of neutral assessors to look at the indigenous laws of different groups and take the exercise away from the hands of "expert witnesses." Assessors could provide a technical report "this is the law." This point is developed in the CBA discussion paper.

David Nahwegahbow noted two key perspectives explored by the Supreme Court:

- *Delgamuukw* recognizes "prior occupancy" and tries to reconcile societies that were here and had their own systems of law
- *Haida* talks of "de facto sovereignty - not de jure sovereignty" – a very difficult task to reconcile

Indigenous laws are very strong in spirit / philosophy, but are vulnerable. He favours the assessor approach, rather than having an "expert" undermine the integrity of the Elder.

Justice Lemieux noted that the role of elders can't be defined in the abstract. Judges decide issues. The role of Elders is determined in a specific case.

Ms. Hanly noted a tendency for the courts to use the system that is known best. This choice determines the analytical tools. Some Elders won't take the stand because they see themselves as givers of law. As a result, it is very difficult to get at the law.

Justice Koenigsberg noted that how you treat the expert's evidence turns on the specific issue in question. The forum has a body of law that a judge is bound to apply. What is the place for indigenous law in the hierarchy of laws? If needing to decide between competing views of experts as to foreign law, then a judge must choose. The judge must be open / accessible to all the nuance and must ask key questions: *why am I hearing this evidence? what do I have to decide? do I have jurisdiction? what law applies?*

Prof. Borrows noted that the key question is the place of indigenous law in this hierarchy. Indigenous law is often seen at the bottom, because customary, but another view is that it is at top, because it is constitutionally-protected.

Justice Koenigsberg added that one must first assess what the issue is – e.g., is it question of ownership of Blackacre – which law applies?

Mr. Hutchins returned to the issue of the degree to which the common law has incorporated indigenous law. The judge is an expert on constitutional law and common law, but not on indigenous law.

Justice Phelan queried how judges should probe an Elder's story so as to get this needed information without offending the individual

Professor Borrows suggested: "imagine yourself being asked the same question as a judge."

Mr. Devlin noted that a different approach to Elders is needed, as with expert witnesses (problem with adversarial academy). Key challenge: how to deal with Elders as judge in their community, rather than simply establishing historical fact. To have their knowledge presented and then shredded on cross-examination is not the best approach.

Ms. Hensel noted the need for sensitivity to the fact that, from the community's perspective, this person has a formal role and should be treated as an Elder regardless of the underlying purpose for the testimony.

Justice Lemieux agreed that an Elder should be treated with respect, as any other witness. The challenge is when there is conflict as to views.

Justice Mandamin referred to Justice Sinclair's description of a fact-finding process in a community. Individuals would speak in turn, one after another. Eventually, even if there were minor variations, a consensus position would be reached. This is very different than the adversarial approach, but *very* effective. The Manitoba inquiry, raising questions about the aboriginal justice system, convened a symposium with participants from varied justice systems. The conclusion was that such an approach is feasible, and is being done. This approach doesn't necessitate contradiction of any one speaker – as you hear the overall process, you get a larger picture and a sense of the underlying currents of what is being said. This is a different than a panel of experts. Achieving consensus in the aboriginal community is a skill inherent in the community. You don't attack each other. He noted reports that the first use of Australian panel of experts model in the Canadian Competition Tribunal did not work very well – there was no consensus. The circle approach is more relevant – moving around the circle until a consensus is reached.

PART II: DRAFT PRACTICE GUIDELINES

Justice Lemieux provided an initial overview of the discussion paper, followed by a more detailed discussion of key elements.

Part V - Pre-claim phase / Filing phase

Ms. Hanly noted that at the previous meeting, there was discussion regarding a collaborative pre-claim model. Rather than waiting for case management, the parties can discuss issues before the case begins and then arrive to the CM judge with a proposal. This can be encouraged in the guidelines.

Mr. Nahwegahbow added that typically these claims come out of the specific claims process, and the issues are already defined. However, often this means working with a different group of people in government, and they do not move the previous file over to the new litigation group. It is very difficult to engage the Crown in pre-claim discussions. As a result, the plaintiff needs to start the litigation process. He suggested that a voluntary pre-claim procedure doesn't work due to bureaucracy. If less voluntary, it would be more helpful.

Justice Lemieux responded that the Court doesn't have jurisdiction.

Justice Koenigsberg agreed that a formal claim is needed, and then parties have different options. They can immediately go to CM judge: *what can be mediated?*

Ms. Hanly recommended that an effort be made to avoid too much paper, and instead use a "notice of claim."

Mr. Devlin added that in B.C., they still use two documents, first a writ of summons with a small endorsement, followed later by the full claim, which they have one year to serve. This stops the limitation period. In his view, a *pro forma* claim should suffice, and it also helps the defence, as it takes a long time to engage counsel, get the defence filed, and hire expert witnesses.

Prothonotary Lafreniere noted that for judicial review applications, there is a possibility of a 'pre-application process' to ask for extension. It would be useful to have a

similar mise-en-demeure process – a notice of claim. This probably needs a rule change. It is possible to bring a motion to strike the claim if it doesn't disclose a reasonable cause of action.

Justice Koenigsberg noted that the overwhelming trend is to get a judge assigned to the case early if it has any complexity. The Court has a protocol for dealing with CM. It is necessary to define what is complex litigation to avoid overload.

Mr. Nahwegahbow described the Ontario approach, with a requirement to give the crown notice of the claim. The plaintiff files a notice of intent to file an action, but with a short time frame then to file a statement of claim. The key is to engage the court early. If you can develop the factual issues early, you can avoid lengthy requests for particulars.

Prothonotary Lafreniere recommended avoiding the strict operation of the rules until the CM judge has had a chance to look at the file.

Ms. Ring queried whether the objective of the proposed pre-claim phase is to engage the *Court* or the *Crown* early. There is a particular organization to the Department of Justice. A party could contact the Director of the Aboriginal Law Section in the DOJ's Regional Office to discuss an individual case before filing. Justice is interested in exploring different approaches to management of claims. In response to the earlier comment about 'Chinese walls' in the Department, this was not Ms. Ring's experience. When litigation is commenced that raises the same issues as a previously filed Specific Claim, she obtains all the documents from the Specific Claims Process. Generally speaking, however, documents exchanged during the Specific Claims process are exchanged on a "without prejudice" basis for the purposes of settlement talks, and therefore consent of all parties is needed to produce them for trial. As for the *pro forma claim / pre-claim stage,* Justice won't have hired experts yet. Practically, therefore, it is very difficult to have formal discussions about the claim at that stage. They need to engage experts, and in order to engage experts they need to know the issues (via pleadings), which brings the process back full circle.

Mr. Nahwegahbow indicated that his experience was that Crown lawyers were so over-worked that you can't get their attention. Regarding experts, it is the same issue for the plaintiff. Experts are not all available, but the parties may have some. INAC may have some experts for the historical research process who provided advice and are familiar with the claim.

Mr. Hutchins agreed that prior notice is an excellent approach. In this view, there are two imperatives: (1) the plaintiff wants the court engaged so there is a third party to arbitrate; and (2) the plaintiff wants to get to trial.

Justice Phelan queried whether the pre-claim process would realistically lead to settlement.

Ms. Hanly and Mr. Hutchins responded by noting that parties were looking for discipline in the court process.

Prothonotary Lafreniere noted a special rule for class actions, which provided for automatic CM. Perhaps it would be useful to have a similar approach for complex cases.

Mr Devlin questioned what the criteria would be for complex cases. Would an election dispute qualify as a complex case?

Prothonotary Lafreniere distinguished between applications and actions. For an application, the party would need to justify CM.

Mr. Hutchins noted that he was involved in two cases that are implementing some of the principles in guidelines. In the *Alderville* case, counsel are committed to a collaborative approach, facilitating discussions between the witnesses.

General consensus: move with pro forma claim and get early involvement of court.
Mr. Baumberg asked committee members for formal input of detailed suggestions / protocols worked out by parties in specific cases, as these could then be incorporated into the practice guidelines.

Expert Witnesses
There was reference to the new process under the rules committee for qualification of experts.

- Disqualifications will be up-front
- Pre-trial conference memoranda will include details regarding expert's qualifications / area of expertise
- Code of conduct – will include rules as to what the expert's report must contain

The rules committee is also working on changes to the summary judgment rule.

Regarding oral evidence, there were questions whether rules for disclosure could be developed.

Mr. Hutchins stressed the importance for this committee to develop a protocol for Elders.

Mr. Nahwegahbow agreed with the need for a special protocol. Regarding the process for rules / practice direction, he noted the very long process for the rules committee and recommended moving first with a practice direction. Finally, he was concerned with use of the summary judgment options, as it might not lead to resolution on the merits.

Justice Koenigsberg responded that summary judgments are used in B.C. where appropriate to provide resolution of discrete issues, with appropriate assessment of whether a summary process is the right vehicle before engaging considerable resources.

The CBA circulated a discussion paper on the role of elders / oral history evidence. The different roles for Elders (testimony regarding facts vs. law) may require different approaches. For example, in some cases, presentation by a panel may be the ideal approach. Use of the assessor rule was also promoted, either with indigenous assessors or officers of court (with some specialization) to advise the court about indigenous traditions. Rule 52 (assessors) could mitigate some of the negative consequences of cross-examination.

Justice Lemieux referred to the case of *Porthouse Seguro* in which the Supreme Court struck down use of assessors because they were seen to overtake the judge's role to assess facts because they are not subject to cross-examination. There is some controversy regarding a single, court-appointed expert, but it is preferred as opposed to use of an assessor.

Prothonotary Lafreniere expressed agreement that earlier involvement of experts is best, but the practical reality is that few experts are engaged until the trial is imminent. This is the purpose of the change to the rules to require disclosure of the expert report by the pre-trial conference. However, there are rules that provide flexibility. For example, it is possible to video-tape evidence in advance, in the community. Parties should raise this in CM.

Mr. Hutchins noted the challenge among counsel to reach a protocol for elder's testimony, and so in some cases they simply video-taped oral testimony without the opposing party present. It is important for the Court to establish a frame-work for pre-trial evaluation of Elders.

Ms. Ring noted that Justice was preparing a paper for the February 2008 meeting regarding Elder's testimony, noting two key issues:

- pre-trial production of evidence – will-say statements
- how to deal with oral history evidence at trial – *should it be tested at all?*

In her view, oral history evidence should be subject to testing, but the key issue is how to go about doing that. She queried whether the underlying concern of First Nations is the manner in which cross-examination questions are asked of elders who give oral history evidence, or is the issue more fundamentally whether such evidence should be tested at all because the Elder's credibility is questioned and therefore his or her role in the community may be undermined. She noted that all of the participants in the court process have a role in the proper treatment of this evidence at trial. Plaintiff's counsel should educate elders being called as witnesses at trial about what to expect, and Justice counsel, as well as the courts, must be more alive to the protocols surrounding the giving of oral history evidence. She noted the significant variation of cultural norms – cross-cultural training is important, but challenging (i.e. such training is most effective if it relates to the specific First Nation in question). By way of example, it was noted that at the Ipperwash inquiry, there were two days of cultural training at the beginning. Ms. Ring anticipates that there may be divergence between the CBA – DOJ positions regarding advance pre-trial disclosure of oral history evidence and related protocols, but noted that it is less likely that Justice counsel may ask what may be perceived to be "inappropriate" questions on cross-examination at trial if there is advance notice.

Mr. Nahwegahbow returned to the issue of assessors, maintaining that it was still a good idea. In his view, there won't be agreement between the Crown and the First Nation on a single joint expert, as the process is too adversarial. Even if assessors are not allowed in maritime law, it might still be possible in *sui generis* area of aboriginal law.

Justice Mandamin described his recent exchange with the judiciary in Australia, noting two key processes: the "hot tub" and "on-country hearings."

Hot tubbing

This came out of the Competition Tribunal in Australia. Experts meet and attempt to come up with a common position before the trial / hearing. At the hearing, the experts sit on a panel and give opinions. This was not always successful, so rules were adopted.

- Experts signed undertaking that their primary duty was to the court
- Conference outside of court is facilitated by someone from registry
- Specific rules for process of examination
    - Produce memorandum – points of agreement / disagreement
    - At hearing, focus only on points of disagreement

On-country hearings

For aboriginal witnesses, it was recognized that they had difficulty in the courtroom, and so the court started to hold hearings out in the country.

- Special registry team was developed for transcripts, etc.
- Held hearing in area suitable to witnesses

An example was given of a very sceptical judge who eventually switched from in-court hearings to on-country hearings for witnesses, coming to the conclusion that this was a very effective process. The witnesses / evidence were much more coherent and effective in familiar territory.

Justice Mandamin went on to express his difficulty in using Elder and expert as being in the same category. Communities exist through time and transformations, with a large body of laws over time to deal with issues. In relation to these laws, there are Elders who are Elders in classic sense, being taught to transmit knowledge (e.g., Elders with formidable capacity for memory who carry on knowledge from generation to generation). However, there is another type of Elder, immersed in culture, though not a specific "carrier" of knowledge, but simply thoroughly aware of the culture through direct experience. Similarly, there are more and more Elders who are in part schooled, with a university degree (e.g., Master's degree / PhD) but also participating in the aboriginal community. Over time, this third category may become the core group. Any discussion has to accommodate the value brought by these different groups of Elders. There is significant variation over time and over different geographies, especially with the death of the older generation of "classic" Elders. Some Elders have a pre-eminent role and cannot sit on panels with others, because everyone will defer to them. Flexibility is important regarding qualification of Elders. A system is needed for development of a protocol.

Mr. Nahwegahbow protocol might simply set out measure of recognition within a particular society

Mr. Devlin made reference to page 12 of the CBA paper, describing Justice Vickers' effort to contextualize the Elder's role. There should not be a set formula, but some basic principles could be put forward. Also, some process is needed to understand the underlying traditions of the group. One can't use the standard expert witness rules for Elders, as this is a *sui generis* category. Special guidelines would provide useful direction to the court and parties regarding the *process* for understanding the type of Elder and how to receive testimony.

Ms. Hanly noted that an Elder should not be seen as half-way between expert and lay witness, but rather half-way between expert witness and law-giver. She added that there would always be different shades of a story given over time, as Elders had heard the stories from different angles themselves.

Mr. Hutchins noted that another problem is use of non-aboriginal experts pronouncing on Elder testimony using in-depth and harsh critique. As a result, Elders are offended. Plaintiffs won't put an Elder on the stand only to be shredded by opposing counsel. He provided an example from the Sampson Cree case, where there was discussion of the oral history process, an understanding of the roles of different Elders, and the framework for transmission of history.

Ms. Craft noted that in different communities there are different mechanisms for the passage of history. Often this is instinctual, not formalized. Elders appreciate the fact that the judge is given a framework to better understand the role of Elder.

Mr. Devlin added that it is very problematic for one Elder to come in to refute another, and even more so for a non-aboriginal expert to come in to do this.

Consensus: the committee agreed to continue building a protocol.

Mr. Nahwegahbow volunteered the IBA to develop an initial draft.

Ms. Ring added the following comments on the Discussion Paper for the Development of Practice Guidelines:

- oral evidence (p.6)– the Justice paper will explore ways to seek pre-trial disclosure of oral history evidence (timing, form, scope). In some cases, will-say statements have been ordered by court, but often they are too brief.
- written evidence (pp. 6-7)– it would be useful to include options in the CM process to ask the CM judge to limit the scope of production – often there is an assumption that the *Peruvian Guano* test is required
    - Justice often receives motions from opposing counsel for additional disclosure, and so the standard approach is to provide wide disclosure – it is good to see mention of the possibility for narrowing the scope of disclosure in the Discussion Paper.
    - It is a challenge to establish a workable, agreed upon standard to define the scope of disclosure, but the current wording in the discussion paper ("*directly relevant to the material issues")*is likely acceptable – Justice will explore approaches in different courts for comparison
- public documents under crown custody (p. 7)

  this is more an issue in the provincial courts since Rule 222.3 of the *Federal Courts Rules* provides that a document is not considered in custody of the Crown if the adverse party is entitled to the document. There is a remaining issue in this Court, however, relating to documents that are in the National Archives that are not accessible to the general public. She noted that documents in Record Group 10 in the National Archives – the Department of Indian Affairs - are largely

available and therefore this may not be a significant issue in most cases, but can be discussed in CM for parties to collect documents in the public domain

- privilege (p. 7)– it is not clear what the specific issue is, given that solicitor-client privilege lasts forever
    - on this point, Mr. Baumberg responded that, in the survey of the court for suggestions for inclusion in the discussion paper, there was a question raised in one submission as to the merit of maintaining privilege for *historic* documents

Prothonotary Lafreniere recommended documentary discovery for issues as they become material. Strategic staging of discovery is more effective.

- Identify at beginning of case a timeframe for procedures: are you bringing a motion to strike, a motion for summary judgment, etc., then set out progressive disclosure for this purpose

There was strong endorsement among members at table of this proposal.

Trial Management
Regarding disclosure of expert's working papers, it was noted that there was some discussion in the expert evidence subcommittee on this point, and the preference was not to force disclosure of working papers. This is related to other issues, still under deliberation.

PART III: MISCELLANEOUS ISSUES

5. Rules Committee – Expert Evidence
This was discussed briefly by Justice François Lemieux earlier in the meeting.

6. Rules Committee – Representative Proceedings
Justice Phelan noted that the request for reinstatement of the previous rule went to the Canada Gazette. Some comments were received, with minor changes suggested. The general consensus was that the representative proceeding rule will be reinstated. The Court will have some role as gate-keeper: one party can challenge on various bases the appropriateness of a case for the representative proceeding rule, among others whether it is the most just means of proceeding. There was concern regarding a transition provision, and so Ms. Ring will send this on to Mr. Brian Saunders, member of the Rules Committee, and Mr. Baumberg could also raise this with Justice Blanchard (sub-committee chair).

Justice Phelan then provided a brief comment regarding Altana vs. Novopharm, released October 23. The previous view was that each party was allowed 5 experts *per issue*. The decision now says there may be a maximum 5 experts *per case*, except by leave of the Court. So, this should be addressed under case management if a party wants more than 5 experts.

7. U.N. Declaration on the Rights of Indigenous Peoples
Mr. Hutchins noted that the Declaration was finally adopted, this being more a substantive than rules issue. He commented on a recent article by Justice LeBel that the

Supreme Court hears international law more and more as long as its relevance is clearly stated for the courts. In terms of extra-territorial issues (e.g., Mitchell case) where indigenous territories are separated by international border, article 36 indicates that there is a right to exercise rights over such borders. This is not *conventional* law, but *customary* international law, not needing ratification to be effective.

Ms. Ring noted that Canada, U.S., and New Zealand all voted against the Declaration. She further noted that the position of the Government of Canada is that the Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.

Ms. Craft added that some hold the view that it will eventually become customary law. She also noted the specific reasons for which Canada objected on a limited number of points, and that on other points Canada was not in opposition.

CLOSING & NEXT STEPS

- **Mr. Baumberg** to revise discussion paper
- **Mr. Nahwegahbow** to circulate Discussion Paper to IBA for comment
- **Mr. Nahwegahbow** to develop protocol by February
- **Ms. Ring** to revise DOJ paper by February
- **Mr. Devlin** will prepare notes and circulate draft guidelines to CBA
- **Mr. Baumberg** to arrange a conference call for early January
- **CBA** to host next meeting on February 20 in Yellowknife before CBA conference
- Proposal to have meeting available via podcast / teleconference – no objection to recording the meeting and making it available
- **IBA** to host Fall 2008 meeting in Toronto on October 16, 2008