Federal Court ~ Aboriginal Law Bar Liaison Committee Meeting

Thursday, October 2, 2014
Calgary, Alberta

MINUTES

Attendance: Justice Leonard Mandamin (Chair), Koren Lightning-Earle, Krista Robertson, Gaylene Schellenberg**,** Julie Blackhawk, Patricia Esposito, Brenda Gunn, Scott Robertson
Teleconference: Justice Douglas Campbell, Aimée Craft, Diane Soroka, Andrew Baumberg, Gaylene Schellenberg

1. Welcome & Introductions – Justice Leonard Mandamin (Chair)
A USB key was circulated including the current Common List of Authorities as well as a draft revision to the Practice Guidelines, for review.

2. Review of (a) Agenda & (b) Minutes of Past Meeting (June 18, 2014)
(a) Agenda – approved.

(b) Minutes
Krista Robertson proposed a change on Pg. 3: **"**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."

Julie Blackhawk noted that the Crown's concern initially related to neutrality of mediators. Comments from the Department of Justice earlier had indicated a preference for a judicial mediator. She added an item that was missing under the title "Barriers to settlement on the part of Crown": "Ratification process" She proposed a change to the line: "the importance of phasing and bifurcation of issues – some issues can be settled and not others."

Other changes proposed:

- **"**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."
- "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."
- "Aimee Craft indicated that the suggestion would still be valuable, but the current priority is to add JR to Guidelines."

Any further corrections may be submitted later in the meeting.

Action: Andrew Baumberg is to circulate revised draft minute.

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

- Presentation of Working Draft Revisions to Practice Guidelines (ADR / Judicial Review)

Justice Mandamin provided a background on the existing version of the guidelines, which initially focused on actions. Since published, the court has launched a pilot project for mediation of governance disputes. The new working draft of the Guidelines is meant to capture this mediation process as well as judicial review proceedings, which were not included in the original version. The draft is for discussion

only. Comments were invited.

Krista Robertson – expressed appreciation for the emphasis on ADR (and the tools provided for this). The context, with its emphasis on traditional dialogue, gives a sense of what the Court is doing with respect to engagement with Elders. Some written comments will be provided in due course.

Julie Blackhawk noted that the revised Guidelines are helpful, and provided some useful context. There are a few issues for discussion within DOJ.

- It would be preferable to provide a clear link to the Rules – some areas have them, others not. For agreements between parties, please add more reference to the Rules.
- One area is not clear: the judicial review project expanding to all Aboriginal law proceedings. This needs more discussion.
- Section 1: it would be helpful to add more ways to streamline processes other than settlement – eg bifurcation of proceedings.
- Section on page 14 regarding discussions with the Department and how to contact it: usually the Department does not have a mandate, so these discussions would need to be open-ended and without prejudice; some parties are interested in this, others not.

More review will be needed within the Department

Justice Mandamin noted that the pilot project for dispute resolution of governance disputes is generally agreed to be well beyond a 'pilot.' The Chief Justice issued a set of guidelines for that specific project. The idea is that we can retire those guidelines and have them placed in these larger guidelines. The pilot was initially focused on governance disputes, but the Court has found that it could be equally applicable to a broader context, including all judicial review applications as well as actions.
He agreed with Julie Blackhawk that some areas are not particularly suitable for settlement by agreement. These are matters that touch on interpretation or application of the law. In some cases, counsel on both sides can look at facts and recognize the likely outcome. However, where there is a difference of interpretation or strongly held positions, these might require adjudication by a judge. For example, a constitutional question might be difficult to settle by agreement.
Re bifurcation – it is important to settle some parts and leave the rest for adjudication; we can look to find a suitable process to address this type of issue.
Re Krista Robertson's comments – the Court has been on a very interesting journey with the Elders and has learned a lot from them. It is appropriate to credit them with helping the process and development of the guidelines.

Andrew Baumberg asked the Committee whether there are types of cases not suitable for triage that should be specifically included in the Guidelines.

Scott Robertson responded that this should be case by case. Even for a difficult legal issue, there may be situations that can be settled – should not foreclose parties from trying.

Julie Blackhawk agreed, adding that in some cases, the Crown is exploring agreements on core substantive issues even if parties agree to disagree, so that they can move forward and resolve a matter. The Federal Crown is looking at that, though certain things cannot be negotiated, i.e. Constitution and interpretation.

Andrew Baumberg noted that even for some constitutional issues, there might be a settlement of some disputes by treaty, which are themselves specifically recognized and affirmed by the Constitution.

Scott Robertson noted that lawyers are obligated to seek to settle cases by agreement.

Justice Mandamin noted that the issue is to get the message out. We have had a session on dispute resolution in-house and briefed new judges on this process. We are looking further to:

- better assist judges / prothonotaries to have the tools needed to deal with ADR;
- create a forum for public discussion on the subject, including other groups – possibly a Symposium, co-sponsored by the Court, DOJ, IBA, CBA, which would give it sufficient profile.

However, counsel still need to educate their clients so as to make informed choices about how to proceed. The issue remains: how to get the word out? (There will be an opportunity at IBA conference this coming Saturday.)

Krista Robertson noted that at national section meeting, there was a report on this initiative, with a very good response and commitment to promote it. There is a need for promotion amongst all sections in CBA.

Aimee Craft added that there is work to be done to promote this to legal counsel and for them to clients; resources in plain language from the Court would be useful, such as a pamphlet to promote the discussion – this would be helpful as an entry point. Such a promotional tool fits with the goals and the strategic plan that the Chief Justice described.

Justice Mandamin noted that this is similar to the short *Guide to Court Proceedings* proposed last year (ie the Ferguson model).
Any further comments on the current draft Guidelines?

Brenda Gunn added that IBA members have expressed some hesitation about dispute resolution given that these processes can just add costs; it would help to have something in the opening about why we engage in this process; something about the need to expedite cases and increase efficiency (see p. 4).Encouraging these processes can add costs.

Reference to purpose: trying to resolve disputes without adding an additional layer, in plain language: expeditious / timely dispute resolution.

Julie Blackhawk expressed caution regarding emphasis on cost-savings, as there may not necessarily be reduced costs, but improved relationships.

Justice Mandamin noted that this is important: mediation of disputes helps restore relationship / trust between parties, a form of reconciliation.

Brenda Gunn added that we must make sure the guidelines do not force negotiation; determine when dispute is right for resolution; ensure no pro forma process.

Krista Robertson noted that in part I, there is significant reference to triage; the judge is to assess whether the case is really ripe. This provides an opportunity but without imposing process.

Justice Mandamin noted that Committee members could send further comments in writing. These will be reviewed at the Spring 2015 meeting.

Judicial Review Component of Guidelines

Julie Blackhawk expressed caution regarding expectations for mediation in the context of judicial review applications. In particular, pre-notice discussions are not necessarily appropriate for the Department; in any event, it is unrealistic to expect the Department to be able to get a mandate in place for pre-motion

discussions. She noted that there are numerous barriers, as listed at the last meeting. However, if the case is specially managed, the time-lines can be revised. She added that she was not taking a position that mediation shouldn't be extended to judicial review, but simply the need for recognition of the practical limitations.

Scott Robertson noted that he has been involved in 2 judicial review applications that settled.

Krista Robertson noted section C regarding discussions with the Department in the pre-notice phase. This would be an interesting option, but she would have no idea about who to contact within the Department.

Julie Blackhawk responded that if there is no claim, she cannot necessarily provide contacts. This would need to be reviewed.

Justice Mandamin added that, similarly, the Court cannot become engaged until the parties file something.

Krista Robertson noted that the pre-notice period (only 30 days) is very short. Is it realistic to keep this section in the Guidelines?

Justice Mandamin suggested that we simplify the section, keeping a general statement about the time-frame for applications, but removing the specific information encouraging pre-notice discussions. Other than that, though, parties are always free to have 'without prejudice' discussions.

Julie Blackhawk agreed. She will inquire with the group in charge of settlement and ask whether there is a point person.

Krista Robertson added that in a consultation table, there may be counsel there from the Department. If there is a definitive decision, then the first person to contact would likely be that counsel from the Department.

Julie Blackhawk responded that it depended on the issue. It is not clear that there is any more that can be said at this point.

Scott Robertson added that it is incumbent on counsel to protect the client's rights. If there are ongoing negotiations, counsel needs to file a judicial review to protect the client's rights.

Brenda Gunn added that it would be helpful to have some reference in the Guidelines to the 30-day limit for filing an application for judicial review. This is not always clear to potential litigants.

Krista Robertson noted that she really likes the hearing venue options, and in particular, the possibility of a hearing in the "Aboriginal community" (rather than "on reserve") and options for special ceremonies. It is good to tell parties that the court is open to this. She noted that the application procedure for special case management should refer to a joint proposal "where possible." It should not suggest that absence of a joint proposal would preclude this option.

Justice Mandamin noted that usually, the request is by one party only. This is one way to get the Department to get a mandate. They can look to see if a mandate is possible for special case management.

Opportunities for dispute resolution can come up at any stage of the proceeding – that should be reflected

in Guidelines.

Proposed Timeline: comments in writing, followed by review at the Spring 2015 meeting.

Justice Mandamin invited everyone to circulate item by item comments in writing to allow compilation of suggestions and revision in time for the Spring meeting. A time-frame of 60 days was proposed for comments in writing.

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

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

Justice Mandamin noted that the Court has continued with this project:

- the majority of Court has expressed interest in participating
- we are looking toward providing tools to members of the Court for dispute resolution process, both conventional but also education for judges who don't have background regarding Aboriginal communities (structure, decision-making process, role of Elders, etc.)

There is a need to ensure sufficient judicial capacity as well as to focus on education.

Within the legal community, you should also be considering this, reviewing options with client so they can make informed decision.

This is also important for the more general community (i.e., to the clients – federal government, Band Council, etc.). Based on experience as a Provincial Court judge, the focus was on getting the word out to the community re outcomes of "peace-making" process. With time, the community began to see this as *their* process – all parts of the community slowly began to favour peace-making.

How do we get the message out from one community to the broader level, where there are 100's of communities? Also, even within a single community, how do we ensure there is a way to record the settlement for the future?

Perhaps we need to develop some process for recording the settlement. It is noted that conventional settlements include non-disclosure agreement – this is counter-productive. If settled in the community, it should be an *open* exercise, such as in the band council hall. If closed, there is suspicion.

It is only necessary to communicate the basics, not all the details (ie, enough information to tell someone how it was settled). For instance, there was an earlier reference to the Navajo peace-making process, run by an Elder; if settled by agreement, it was recorded by the Court to close the legal proceeding. For the Tsuu T'ina, the peacemaking process chose peace-makers by asking, house by house "who do you trust to be fair?" This provided a list of 200, which was then narrowed down due to possible conflicts, health issues, etc.; this resulted in list of 50, who were approached to join a training program; if a dispute arose, this mediator was invited to participate in the peace-making circle, along with the Elder (who gave advice but was not tasked to act as the formal mediator).

There are many options available, but it depends on context and the interests of parties. An example was given of settlement with parties. Each party was invited to bring an Elder.

Another example was given of a mediation session with an Order recording the result. It is possible to have a summary Order that a settlement discussion was held, along with the result. These could then be

compiled by the Court in a 'common list of settlements.'

Diane Soroka responded that this would be a very good idea. It would be helpful to profession, though she had a question regarding self represented parties, who won't know where to go to find the information.

Justice Mandamin suggested that perhaps we need a pro bono group.

Krista Robertson raised a few suggestions for consideration re mechanisms for recording a settlement:

- best practices template (some were developed by this committee, with an outline to be filled in) – a summary of the mediation could be prepared, including location, participation by Elders, etc.; the case management judge could encourage parties to develop a summary
- this can be a very positive outcome for parties
- Canadian Human Rights Commission toolkit (they had funding for dispute resolution mechanisms) – counsel could look to the examples in this toolkit

Andrew Baumberg added that this could be added as one 'optional' step in the settlement process under the Rules – ie, parties to prepare summary of settlement.

Julie Blackhawk agreed, as these were meant to be attached to the compendium. She sees value in this, but there may be a challenge to get a waiver of privilege regarding the settlement.

Justice Mandamin noted that the Canadian Human Rights Tribunal has used the Guidelines for a recent proceeding. Also, the Advocates' Society is looking at the Guidelines as part of their study on the increasing costs of trials.

- **Discussion re possible *2015 Symposium on Alternative Dispute Resolution***

Justice Mandamin asked whether there is any interest from the bar to hold such a symposium.
At the Court seminar in October 2013 at Kitigan Zibi, the Elders described the Aboriginal perspective for resolving disputes by talking things out. This is the more traditional method of resolving disputes, as opposed to adversarial litigation in Court. This is reflected in the contextual section of the guidelines.

Scott Robertson suggested a joint symposium within the IBA conference next year, with theme of 'talking things out'. Also, he suggested a similar event when the Department has their lawyers come together for in-house training.

Julie Blackhawk thought that this is a good suggestion. The Department would probably be open to a broader discussion. She will raise the proposal in-house.

Scott Robertson indicated that he will raise it at the IBA board meeting as a possibility for Fall 2015.

Brenda Gunn noted that the IBA has held a dual conference in the past.

Justice Mandamin suggested that we would want at least a half day, which would provide a manageable size that would be 'portable.'

Krista Robertson raised a question regarding the role of the Court.

Scott Robertson saw a role for judges as to their perspective on this type of process. This provides an

opportunity for the Court to share its direct experience.

Justice Mandamin suggested a possible 'travelling Symposium' that could participate in different events.

Andrew Baumberg noted that it could be filmed as well, if there is agreement.

Justice Mandamin asked for 1-pager on the issue for review by the Committee.

Action: Andrew Baumberg to prepare draft outline for circulation
DOJ, CBA, IBA to check within their own groups to confirm their position.

5. Miscellaneous Issues

- ***First Nations Elections Act*** - Royal Assent (2014-04-11)

Tony Oliver provided a short overview, noting that C-9 is mostly the same as previous bill, but also includes power for the Minister regarding customary elections. It is not yet in force. There was debate in Parliament regarding the absence of a regulatory process to guide the government's exercise of this power. Section 41 provides a broad framework for further powers, but without a process.

Aimee Craft noted that it is the Governor in Council that would make regulations. This bill creates a few problems:

- Minister's broad discretion to bring First Nations into the scope of the Bill
- The Legislation provides for concurrent jurisdiction for election disputes – we shall certainly see competing decisions, or parallel proceedings
- If a dispute resolution process is allowed by the Federal Court, putting matter in abeyance, this could be undermined by a decision from the Superior Court

- **Update re Common List of Authorities – suggestions for new cases**

A USB key was provided to participants with a copy of the Common List. There were some additions suggested from Justice Mandamin – *Daniels, Tsilhqot'in, Ahousaht, Kitsilano,* etc.
Action: Participants to provide suggestions.

The Guidelines should include a reference to this Common list – if cases are on common list, no need to file paper copies. Part C Updates can be integrated into main list.
Question: should the list be organized in any particular order – alphabetical? Possible two part list: actions & applications (e.g., jurisdiction of court to hear judicial review of common law appeal tribunal).

7. Planning for Spring 2015 Meeting

CBA Spring meeting at the Membertue Trade & Convention Centre, Hampton Inn, near Sydney, N.S., from June 10 to 12, 2015. Theme: Building Indigenous Economy
Reception on June 10 (arrivals day), which is open for Liaison Committee meeting.
Proposal: meeting on June 10 at 1 p.m.
Justice Mandamin noted that there is a MicMac College nearby

The goal is to have draft guidelines with consolidated input from the Bar; it would then go to the Court for review / approval by the Chief Justice. The First Nations Governance Pilot would then be withdrawn.

8. Close