

**Federal Court ~ Indigenous Bar ~ Aboriginal Law Bar
Liaison Meeting**

Thursday, March 8, 2007, 9:00 a.m. - 5:00 p.m.
Winnipeg, Manitoba

MINUTES

PARTICIPANTS

Chief Justice Allan Lutfy	Federal Court
Justice Anne Mactavish	Federal Court
Prothonotary Roger Lafrenière	Federal Court
Justice L.S. Tony Mandamin	Alberta Provincial Court
Ms. Candice Metallic	Indigenous Bar Association / Assembly of First Nations
Mr. Don Worme, Q.C., I.P.C.	Indigenous Bar Association
Ms. Deborah Hanly	Indigenous Bar Association / CBA (Calgary)
Dr. Arthur Ray, <i>FRSC</i>	History Department, University of British Columbia
Ms. Kathy Ring	Department of Justice (Canada)
Mr. Grant Christoff	Department of Justice (Canada)
Mr. Brian McLaughlin	Department of Justice (Canada)
Ms. Melanie Mallet	Senior Advisor, National Judicial Institute
Mr. Wayne Garnons-Williams	Registrar, Federal Court
Mr. Andrew Baumberg	Executive Officer, Federal Court
Mr. Christopher Devlin	CBA Chair National Aboriginal Law Section
Mr. Gary Campo	CBA Treasurer National Aboriginal Law Section
Ms. Sandra Inutiq	CBA Nunavut
Ms. Karen Lajoie	CBA / Department of Justice (NWT)
Ms. Lysane Cree	Hutchins Caron & Associés
Ms. Jameela Jeeroburkhan	Hutchins Caron & Associés
Ms. Gaylene Schellenberg	CBA National Office
Mr. Jonathan Davey	Osgoode Hall Law School (LL.B candidate)

OPENING

The minutes were approved along with the additional summary of issues. It was recognized that the goal of this liaison process was to consult regarding practice issues and then to make concrete recommendations for the Court's Rules Committee, practice notices, or case management (CM). These recommendations could further be integrated into the Court's education program, with the next seminar planned for 2008.

PART I: SCOPE & TIMING OF DISCLOSURE RELATED TO EXPERT EVIDENCE

Ms. Ring noted that Justice doesn't usually know of a claim until filed and can't start work until then. Furthermore, the ability to mobilize depends on the nature of the claim and is simpler for modern claims as opposed to historic treaty claims. Although pre-claim discussions might be in play, these are not often with DOJ's litigation offices but rather with INAC and DOJ's Advisory Services Unit or INAC's Departmental Legal Services

Unit. Some examples were provided of agreements with First Nations litigants early in the litigation process regarding the appointment of experts.

Pr. Lafreniere noted that pleadings are often substantially amended, and timing of a defence is an issue. It is important to have a dialogue before filing so as to have intelligent pleadings. However, a formal process is required in order to have the Court involved – an originating document is needed (e.g., statement of claim). However, the rules are flexible. A “pro forma” statement was proposed as an option for consideration under the current rules, with the general issues and facts set out along with an immediate request for CM.

Mr. Devlin recommended consideration of a pre-claim period for complex litigation, with a voluntary set of rules to exchange information early and to have the experts speaking. In his view, rules for complex trial would be useful, selected either by parties or by Court order according to set criteria. This would provide a framework for complex trials (notice of claim, timeframe for exchange/identification of experts, “hot tub” process, agreement of expert issues). Rule 292 (simplified actions) was noted regarding its trigger mechanism. A party could file an application under the complex action rules, and the other party could then agree or else challenge the move. As for a “notice of intention,” reference was made to the old version of actions in Ontario (“notice of action” writ). In B.C., a writ of summons is filed and then some weeks are allowed to file the actual claim.

CJ Lutfy noted the lengthy process to make a substantial rule change and recommended a “pilot project” with First Nations and the government. Under Rule 55, the Court can appoint a CM judge “at any time.”

Ms. Ring noted that there is nothing stopping parties now, though there may be limitations issues. However, it is difficult to get experts up to speed to assist in a defence. Time is needed for the process. Perhaps an early CM process with an exchange on a “no prejudice” basis could be considered.

Dr. Ray noted that experts are often involved after the theory of the case has already been decided. The experts come in too late, with the damage already done.

Ms. Inutiq provided a case example from a criminal trial in which it was necessary to bring someone to testify about common spiritual beliefs in the community. It was not clear who to bring in as expert: an anthropologist or an Elder.

CJ Lutfy indicated that the Court was interested in knowing what claims are coming up.

Ms. Ring noted that Justice knows in some cases. For modern day claims, there can be advance notice as noted earlier. However, there is more uncertainty with historic claims, which sometimes are filed with no advance notice. Sometimes the specific claims process is utilized but breaks down, providing some advance notice.

CJ Lutfy confirmed that if parties want to bring this type of “notice of claim”, the Court will deal with it.

Mr. Devlin suggested that a breakdown of specific claim be used as a pilot case. Although complex, the research has already been done.

Ms. Metallic agreed, noting that there were many cases suitable for a pilot. She indicated that she could speak with potential participants in a pilot.

Pr. Lafreniere noted the possibility of a letter asking for management by the Court, opening of a file number, etc. From here, it would be possible to structure the order of proceedings, bifurcate issues that could be deferred, and provide focus to the issues. The Court could direct that file number be opened.

J. Mandamin noted that sometimes a claim is filed because there is no dialogue at all. In a First Nation, the decision to proceed is a very significant event (e.g. decision by Band council with Elders). As for the issue re limitations, a *pro forma* statement may be necessary.

Pr. Lafreniere referred to Rule 182 (which provides the criteria for a statement of claim) and the need to state material facts, otherwise leaving the party open to a motion to strike the claim. It is important to consider different options, including a *pro forma* statement of claim (preferred) or simply a letter to the Court, allowing parties to embark on case management / mediation.

Ms. Metallic noted that parties often file a claim because mediation hasn't worked.

Pr. Lafreniere replied that sometimes a third party is needed, and that mediation sometimes has mixed success: even if only one issue resolved this can be very useful. Earlier mediation is usually better.

Mr. Worme described the mediation system in Saskatchewan: mandatory mediation upon filing of statement before parties have spent a lot of money. It is quite effective, allowing the defendants to put their position on the table. There are punitive sanctions by the court if reasonable offers are not accepted.

Pr. Lafreniere noted the Federal Courts Rules regarding costs, which also allow for sanction by the court. However, mediation is not mandatory, and can be attempted at different stages throughout the court process.

Consensus: parties should be involved as early as possible.

Chief Justice Lutfy noted that there may be flexibility in the Rules for a *pro forma* statement. Furthermore, counsel should start a dialogue with their experts, and encourage dialogue between the different experts, to ensure that the pleadings are accurate.

Mr. Devlin asked how to implement some of the changes discussed so as to avoid years or pre-trial work (after years have already been spent in specific claims mediation). He suggested bringing the minutes from these meetings to the attention of the Bar to advertise the Court's openness to a pilot project. Another option might be a practice direction, or some similar way to invite parties to file a pro forma statement of claim and work with the Court for guidance and to establish some structure to the claim. A pilot project might focus on a complex, land-based claim, involving counsel interested in finding creative solutions to make this work.

Chief Justice Lutfy noted that there is a similar dialogue with the intellectual property bar and efforts to establish a pilot project, on a voluntary basis, to have mandatory answers to discovery (rule 95), effectively for counsel to consent not to use the rules to delay the process.

J. Mactavish suggested a report at CBA CLE, possibly by Mr. Devlin (as Chair of the CBA Section).

Pr. Lafreniere suggested one option: counsel bring a motion and the Court put out reasons, which could then be circulated to the Bar. He added that if there are to be exceptions to the Rules, it is important that the Court be consistent across different practice areas.

Mr. Devlin noted that the Federal Court rules don't go as far as the rules in other jurisdictions. In B.C., the rules provide for early involvement of experts. It is much less expensive to get experts involved early and results in much cleaner proceedings.

J. Mactavish noted that there are similar issues with the IP Bar. A rules sub-committee on expert evidence was created and is at the early stage of its work. Its purpose is to shorten trials and make better use of judicial resources.

Ms. Ring noted that any early case management process must be a serious dialogue about the issues in play to assist the parties. In B.C., cases cost a significant amount of money, and there are efforts to simplify the rules and reduce the number of experts, allowing greater access to justice. With more dialogue, there is less guessing as to the nature of the case, and less chance of a "mis-framed" case.

Dr. Ray recommended early agreement regarding the documents to be used (or challenged) as opposed to the current "sandbag" approach.

Mr. Devlin raised concern regarding the scope of disclosure, the substantive discovery rules, and the Peruvian Guano test. How to limit discovery and avoid 10,000 documents being filed when, in fact, only a few key documents are usually needed.

Chief Justice Lutfy noted that the Court was looking seriously at the test for discovery, which had also been raised in the IP context. The current rule was meant to narrow the scope of discovery.

BREAK

Ms. Ring noted that in its Report (November 2006), the B.C. Justice Review Task Force is recommending a move away from the Peruvian Guano test. Instead, parties would disclose:

- documents cited in pleadings
- documents to be used at trial
- documents in control of the party that are used to prove / disprove a fact

The aboriginal bar would generally would be very pleased to reduce the scope of discovery. Many documents have no impact at all.

Mr. McLaughlin noted that some documents in archives are not really in the hands of the government. However, many must be listed.

Chief Justice Lutfy referred to rule 222(2). The limited jurisprudence to date indicates that it simply follows the previous Peruvian Guano approach, but the scope of discovery was not actually argued before the Court.

Mr. Devlin questioned whether the parties might agree to be relieved of the obligation to disclose, given the flexibility in the rules. If the experts talk, they can winnow down list.

Mr. McLaughlin noted that if a researcher finds something in a remote archive and discloses this early on, the party loses a tactical advantage.

Mr. Devlin responded that both sides are on the same level and need to give up some “tactical advantage” to have, overall, an efficient case.

Mr. Campo noted that the tactical advantage is often based on availability of funding for research. It is important to even the field.

Pr. Lafreniere advised parties to get a case management order / direction regarding the timing and procedure for disclosure of documents: put this to the Court early.

Dr. Ray noted that there is often a u-turn in a case because expert witnesses / Elders are brought in late. Flexibility is needed.

PART II: QUALIFICATION & CONDUCT OF EXPERT WITNESSES

Mr. Baumberg provided a summary of the discussion at the last meeting.

J. Mactavish noted that the rules sub-committee is recommending that disclosure include:

1. CV with qualifications
2. area of expertise

3. assumptions
4. reference to code of conduct
5. certification by expert

Ms. Ring referred to the Department of Justice paper, recommending that this be addressed as early as possible. In Alberta, the “Experts’ Document” includes these types of info. Opposing counsel then has 60 days to accept / challenge the expert.

Dr. Ray noted two key issues in ethno-historic research: *what is the data and how is it interpreted?* The first half of the 20th century was based on the evolutionary theory, with a strong influence on evidence produced in Court. The questions from 50 years ago are not necessarily relevant to today’s questions. It is important for experts to explain theories in old evidence versus the new evidence. Courts are right to be suspicious regarding claims-driven research, but it is quite clear that old research was also driven by a certain theories. The Court needs to understand the nature of the issues / evidence. Evidence is not strictly a fact. An old expression goes: “the anthropologist is the evidence.” These issues are not explored enough at trial. Considerable ethnography was done in the past based solely on oral evidence, and yet current oral testimony is discounted whereas older secondary sources are not. The Court needs to understand the types of questions asked and their implications.

Mr. Devlin noted that, if there is agreement between the parties on an *ad hoc* basis, or under a change to the rules, it is important to provide an exchange of information as early as possible and in as collaborative a manner as possible. An open, parallel approach is needed, rather than “A then B.”

Mr. McLaughlin expressed skepticism that parties would be open to such an approach.

Mr. Campo added that there is often considerable difference between the views expressed by adverse parties.

Mr. Devlin responded that parties can at least narrow the issues as much as possible to the ultimate issue(s).

J. Mactavish noted that if experts were to meet before trial, they could try to identify the issues and points of divergence, with some self-screening among peers, even if there remain many points of disagreement. In some cases, experts might testify as a panel.

Dr. Ray noted that this approach was used with anthropological experts in Australia, where there was a small community. However, the community is more polarized in Canada.

J. Mandamin added that he had heard Elders in a panel.

Mr. Devlin suggested that such a joint process creates a less “positional” response, whereas the adversarial approach results in polarization. The collaborative model may diffuse this extreme approach.

Dr. Ray recommended that the lawyers be kept out of the meeting of experts, though noting the possibility of experts with very different level of experience who could manipulate the process.

J. Mactavish added that there might be personality issues as well, with some dominating the group.

Ms. Jeeroburkhan expressed concern regarding pressure from colleagues in a discussion among experts and asked whether a single joint expert might be considered in smaller claims.

Mr. McLaughlin expressed his personal opinion that experts positions are often affected by the adversarial process and that the only expert the court should hear is an independent court-appointed expert. Costs could be paid by parties, possibly with names being submitted to the Court to choose.

Dr. Ray cited a commissioner in Australia who had a Court-appointed expert to give an opinion regarding the evidence of others experts. There was a rotation from among a small pool of experts, which worked well.

Mr. McLaughlin noted that the utility of the expert’s answers depends on the questions, which need to be specific.

Mr. Devlin added that counsel could make submissions with recommended questions to the expert from the Court.

PART III: THE ROLE OF ELDERS

Ms. Metallic noted that the IBA discussion paper was a “work in progress” and was solely a draft version only, though given some sense of the direction the IBA was taking. Two key issues are raised:

- substantive interpretation of evidence by Elders
- procedure context and jurisprudence regarding admissibility

The cultural divide makes acceptance of oral history evidence difficult, though bridges exist that might assist in this process. The inherent difficulty is due to the non-static nature of oral history. The excessive evidence is in part a response to the “requirement” to support this oral history. Furthermore, there is variation across different First Nations with respect to transmission of oral history evidence.

There are serious consequences of cross-examination of Elders:

- shrinking pool of Elders willing to testify (but also, “histories are disappearing”)

- significant personal / communal impact from severe cross-examination

It is important to have balance, recognizing the frailties of oral testimony and finding ways to address them. The testimony of an Elder adds the inherent mask of authenticity. Finally, it was noted that the IBA is less concerned with the issue of admissibility as with that of weight afforded this evidence.

Mr. Worme expressed concern with the ridicule and devastation of Elders under cross-examination, with their evidence then rejected. He further noted that he did not give up the request for rules specific to aboriginal litigation: these communities have the right to have their histories put before the Court on an equal basis.

Pr. Lafreniere described examples in Court of cultural awareness. Where the issue is raised by counsel, Elders have been heard in their own community rather than a formal courtroom.

Ms. Hanly noted the willingness expressed by the court to hold such hearings closer to the communities directly affected, but questioned whether it was realistic given the limited number of judges. There was a perception that the Court often conducts hearings by teleconference for efficiency.

Pr. Lafreniere responded that this option is for meetings between counsel. If there are witnesses, the court can sit anywhere.

Chief Justice Lutfy made reference to the court's generic rules, noting that a case can be heard in a remote community. If a request is received, the court is open, whether for an application for judicial review or for a trial. As for the rules of evidence, these are not in the Federal Courts Rules but in the case law.

Ms. Metallic noted that the Bar was not challenging the admissibility so much as the weight given such evidence, which is not treated in the same manner as with other experts.

J. Mactavish noted that, in some cases, to achieve substantive equality it is necessary to treat people differently. She questioned how the concerns might be address while still allowing the Crown to test the evidence.

Ms. Metallic gave an example from the practice of the Indian Claims Commission, which travels to the community involved. Questions come through commission counsel. This results in a consistent approach to the treatment of Elders and is very effective.

Mr. Worme stressed the importance of treating individuals in a respectful way so as to allow them to tell their story and also allow the adjudicator to reach a sound decision.

Ms. Inutiq noted that judges have an important role in setting the tone, ensuring a respectful approach (e.g. not to allow counsel raising the voice, posturing, or using an aggressive approach).

Mr. Davey suggested that a “friend of court” might investigate the relevant culture / values for the benefit of the court to assist in choosing an appropriate process.

J. Mandamin noted that the purpose of cross-examination is to test the truth of evidence. He gave examples he had seen of negative effects

- in one case, counsel used “legal language” and so the Elder did not understand, looking as if he was not competent – lawyer failed to use appropriate language
- in another case, on a fishing charge, the Elder was a fisherman for over 50 years and was charged with selling fish not caught under license – the Crown conducted a polite but persistent cross-exam for several hours which was quite tiring – as a result of the challenge to his testimony, the Elder gave up fishing and his role in the community

Some options were suggested to reduce the risk of such negative results of “truth-testing”:

- perhaps have testimony in panel – constrained by “audience” to ensure credibility
- testimony in the community (e.g. Indian Claims Commission model, where the first hearing is held in the community)

With a wide audience, it is much more reliable than by using cross-examination.

Chief Justice Lutfy questioned whether a new structure / vocabulary might be possible. There is a lot that can be done without changing rules. *Why doesn't counsel ask?*

Pr. Lafreniere noted Rule 270 (trial management conference) whereby counsel could discuss the trial venue and protocol with the Court.

Mr. Campo described his personal experience in the context of the recent Chief Williams case in British Columbia (J. Vickers presiding). He spent 4 years in preparation in the community and then 2 years presenting the evidence to J. Vickers in court (360 days in court), with a lot of evidence via Elders. This evidence was “useful and necessary,” sometimes all that is available. In his view, it should be accepted on its own and given independent weight. Oral evidence is often the only record for an oral society. Laws of evidence must be adapted to allow the aboriginal perspective to be presented. Failure to accommodate would put an impossible burden on them.

He gave an example of a conflict between oral and written evidence. There was reference in the Eurocentric evidence written by non-aboriginal peoples to “*murder* of outsiders.” These documents refer to murder, theft, and looting, compared with the oral history which explained the legal structure regarding the right of exclusive use of the land and sentencing for violations. The colonial documents painted a very limited picture which needed the context provided by oral history.

As for the weight to be given, there is a wide spectrum currently applied by the courts, from “always reliable” to “never reliable.” In his view, oral testimony should be considered as generally reliable, where appropriate. However, he noted that the Crown’s expert witness, Dr. von Gernet, took the position in court that oral history is only reliable

if supported by the written record. However, the Supreme Court of Canada rejects this view (Delgamuukw). The Mitchell case indicates that the courts need a flexible approach and need to weigh evidence with awareness of the special nature of these proceedings.

His position is that this evidence should stand on its own where appropriate, after considering all the evidence. He referred to the approach of J. Vickers, who suggested a preliminary process (not a *voir dire*) to verify the reliability of the evidence, with the Crown able to make submissions and cross-examine the witnesses. J. Vickers set up threshold questions to determine if the testimony met the admissibility stage, similar to a qualification process. J. Vickers subsequently tested the evidence vis-a-vis other witnesses and documentary evidence.

Mr. McLaughlin noted clearly that Dr. von Gernet's position on evidence is not that adopted by Canada. He then referred to, and strongly agreed with, the position at page 53 of the IBA paper: "*Evidence must be provided to explain why the event being attested to is Indigenous oral history and how the orator has come to be in control of such knowledge.*" Canada's view is that the role of Elders is analogous to that of an expert witness. It is necessary to show that this person is an Elder and is in a position to tell the story. A preliminary process is needed to show this.

He then noted a second quotation from the IBA paper, at page 56: "*In an attempt to rekindle the Courts' attention to the notion of corroborating Indigenous oral history evidence through the use of "local experts" a culturally-appropriate process for gathering evidence from Indigenous communities will be addressed. In order to obtain such evidence agents of the Court may have to interview Chiefs, Elders and other leaders in the Indigenous community, about their recollections of what occurred in the past.*" He considered a "friend of the court" to be a very valuable option. It was considered very difficult to cross-examine Elders, especially via an interpreter, and often not very helpful to the Court or to the Elder. In his view, Elders wanted to be heard in person, and so he was concerned about the Court hearing their evidence via third party non-aboriginal experts.

Finally, he referred to a third quotation at page 58: "*Respecting and accommodating Elders, during the cross-examination process, is a feat that can be accomplished through preparation, focus and research.*" In his view, it is possible to conduct a cross-examination in a respectful fashion. He described Ms. Julie Blackhawk cross-examining an individual in a school classroom which had been turned into a court room in Feb 2005. However, he noted it was a logistical challenge to have the whole trial there.

J. Mactavish raised a question regarding cross-cultural training by counsel, which is often somewhat artificial. It is important to have real contact.

Mr. Christoff noted some efforts to institute a training program, with B.C. most active on this front in the Department of Justice.

Mr. Worme questioned the approach to sensitivity training and its ability to take into account local variation.

Ms. Ring noted that training was a challenge. All counsel do training, though local histories are very different. Counsel needs to understand the protocols and history of the specific First Nation involved in the litigation, but they can't go into the community very easily. In theory, it would be possible to conduct examinations for discovery in the community. In practice, however, the First Nation's counsel may be reluctant to agree to this because it may elevate expectations that the Department intends to settle. Accordingly, the parties often meet near the community instead.

Mr. Worme noted that the issue was even more difficult across Canada, but that the IBA was ready to assist.

J. Mactavish questioned whether this "education" might be part of the lead-up to trial.

Ms. Metallic was very supportive of this proposal, though acknowledging that it depends primarily on the receptiveness of the parties and the judge.

Pr. Lafreniere considered that two days spent in "training" for a 3-year trial was "time well spent."

Mr. Campo was suggested a special protocol for such testimony. For example, some Elders' testimony could be heard only at night. Also, there was a problem with judges wearing robes, which was a reminder of the authorities who committed abuse within residential schools.

Dr. Ray also noted the many local variations and different types of Elders. There was a need to have a transparent way to "qualify an Elder." Some concerns were addressed in his paper and earlier comments. Without native oral testimony, there would be no native anthropology, legal anthropology, or archeology. It was all tested and based on oral evidence. In essence, an evidentiary loop existed: oral evidence lead to written evidence, and this was then used to challenge new oral evidence. There were numerous links between the sources, many of whom were fur traders who either were native or married to native people.

Ms. Ring expressed concern regarding the lack of early pre-trial disclosure of oral history evidence. In the 1970's much evidence relating to the signing of the historic numbered treaties was transcribed or recorded due to the fear of it being lost. The medium in which evidence exists now significantly affects the disclosure process. For non-standard evidence, context is needed to understand its relevance, yet often there is no early disclosure of oral history. Will-say statements would be very helpful. In its report (November 2006), the B.C. Justice Review Task Force recommended that will-say statements be disclosed. However, these are often too brief to be useful. Where oral history is transcribed, access to the transcript or tape is necessary, as there may be concern regarding the quality of translation.

Ms. Jeeroburkhan noted that the disclosure obligation was considered a disincentive for communities to record their culture for their own purpose. This private knowledge should not all be open to use in court. This issue related to the proper interpretation of Rule 222(2).

Pr. Lafreniere noted that for the rules for simplified proceedings allow evidence in chief via affidavit. Non-contentious evidence could be entered in this manner. The other side can then identify the specific limits of the evidence on cross-examination.

Mr. Campo noted that this approach was used in the William case. However, less weight was given because of the “coached by counsel” argument. However, the affidavit approach saved a lot of time.

Mr. McLaughlin found this approach acceptable for uncontested evidence. However, if contested and the witness is not available, it is difficult for the court to deal with the evidence.

Pr. Lafreniere noted that the rule allows for examination out of court via video, which can be quite efficient.

Pr. Lafreniere confirmed, in answer to a question whether a document exchange protocol existed, that e-mail service was allowed on consent as an exception to the normal rules for service of documents.

Mr. McLaughlin found that a hybrid paper and electronic trial was the worst of both worlds. It only works if all lawyers plug in.

Mr. Worme described some lessons from public inquiries such as Ipperwash and Milgaard, which had exceptional data management systems. In those cases, the Commission required counsel to follow its lead.

Ms. Ring noted the need for special consideration for Elders when using technology.

J. Mandamin recommended sequential simultaneous interpretation. It is difficult if the speaker has a limited grasp of English while being solid in his or her own language. One needs to be careful of testimony in a second language. Also, the transcript loses the quality of body language; on appeal, the transcript is not a good record. Sometimes the community’s choice of interpreter is best able to say what the witness “means”. For oral history, testimony in the original language is very important.

Mr. Campo reiterated the need for a protocol for Elders, whose culture is built on respect. Disrespect to an Elder does a disservice both to the Court and the Elder. For example, asking a question twice may be lack of respect, suggesting that the audience didn’t listen the first time, yet an Elder may be asked the same questions many times before getting to trial. Sometimes the use of leading questions may be the best way to ask questions.

Ms. Hanly had a case in which there was a special ceremony with sweetgrass, paying respect to the Elder.

Pr. Lafreniere suggested that counsel bring this to the attention of the Court at the pre-trial conference to be decided on a case by case basis.

Ms. Jeeroburkhan added that this is not just an issue of “respect” – this is tribal law. These are part of the checks and balances to ensure the authenticity of the testimony: protocol is very important.

Ms. Metallic reiterated the far-reaching consequences arising from the treatment of an Elder and the weight given to his or her evidence. In one case, with competing First Nations, some Elders’ testimony was given no weight – devastating for the community. The judiciary might be sensitive to this when crafting reasons.

Mr. Devlin noted in a similar situation, after which the community was “litigation shy” as they didn’t want to put the Elders through this again. He suggested that the court could accept that a person is an expert but still not accept the testimony in full.

Mr. Baumberg suggested that these possible outcomes be raised by counsel in advance as a possible outcome to help manage the expectations of the parties they represent and their witnesses.

Ms. Metallic noted that this is sometimes an issue of the treatment rather than the final result.

Ms. Jeeroburkhan recommended that the committee look to the specific communities for models. For example, the Labrador Inuit Courts have a protocol for the treatment of witnesses. Examples include the recommendation not to use the hearsay rule to discount testimony, or the recommendation to use group testimony.

Ms. Ring questioned, with respect to the IBA paper, whether the issue was if cross-examination of elders should be allowed at all, or whether the issue was the current process for cross-examining elders, as there were references in previous meetings to alternate models for hearings.

Mr. Worme responded that, in his experience of Elders, all were ready to be tested on the knowledge they had. The key issue is process. Many counsel try to destroy the person, whereas some are very respectful.

Ms. Metallic agreed, noting there are common litigation tactics which need control by the judge.

CLOSING

There was an opportunity for all to make final comments.

Mr. Garnons-Williams noted the Federal Court Registry's commitment to support creative solutions within the Rules.

Mr. Christoff found this very useful to see various options to address these issues.

Ms. Ring asked how the committee would move forward. There was concern in getting consensus in the various constituency groups. Clear recommendations by the Committee were needed to take to constituent groups for approval, as there were diverse views in Justice.

Mr. McLaughlin questioned whether any real lessons had been learned since Delgamuukw, as the Williams case was the same length.

Ms. Metallic confirmed that there would be further revision to the IBA paper with additional topics to add to the agenda for the next meeting.

Mr. Worme noted he was encouraged by this meeting. There were many positive words: "accommodation ... flexibility." It was still possible to find justice in the courts: "our Elders haven't given up on you."

Mr. Davey noted that the dialogue was useful to provide context for the discussion papers, and that this was a very encouraging experience for a law student, with a very strong model of professionalism by all present.

Ms. Jeeroburkhan will circulate a draft paper in coming weeks. In her view, there needs to be change in the adversarial process is needed to address the issue regarding Elders' evidence.

Ms. Cree questioned how this will play out in the courtroom, confirming her commitment to work on a discussion paper to be submitted via the CBA.

Mr. Campo quoted Tom Berger: "don't make us prove the obvious ... we were here first." He recommended that the position of Dr. von Gernet not be accepted.

Ms. Lajoie discussed the flexible interpretation of rules in her jurisdiction. Counsel must also be flexibly creative vis-à-vis the 19th century model of justice.

Justice Mactavish reiterated that counsel must tell the Court what they need and what the Court needs to know so as to be able to respect the witnesses. She further expressed thanks to Mr. Davey for a remarkable paper from a law student.

Mr. Devlin noted that this would be his last meeting as president. In his view, after a number of meetings and numerous issues explored, it was time for the Bar to look at the minutes and make concrete proposals, whether by way of proposals for Rules

amendments or possibly practice directions to ensure more public knowledge within the bar of the options available.

Ms. Schellenberg confirmed that the CBA can assist in this regard, whether via announcement at seminars, regular meetings, e-newsletter, or e-mail.

Dr. Ray noted that colleagues had asked about the possibility of change in the judicial system. As a result of this on-going process, he was very encouraged. In particular, he expressed appreciation for the IBA paper.

Justice Mandamin confirmed that he would take the suggestions back to his Court.

Ms. Hanly reiterated the need to look to alternate models which work in other jurisdictions (e.g. mediation). As for communication, she asked whether it would be possible to webcast the next meeting.

Ms. Inutiq noted that the key element of this liaison group was the attitude and values of the participants.

Ms. Mallet confirmed that the NJI would explore how to translate the practical issues raised into formal education for the judiciary in both skills-based and social context programs.

Pr. Lafreniere reiterated that dialogue is very productive. Counsel should make use of flexibility in the Rules. The Court is open to requests. It may be helpful for the Court to write reasons in a given case to use as a model.

Chief Justice Lutfy endorsed the comments of his colleagues. In his view, the key challenge was to marshal the ideas and good spirit and then communicate it to both practitioner as well as members of the Court.

Next meeting: October 18, 2007 (Victoria) in conjunction with the IBA conference.