Federal Court ~ Aboriginal Law Bar Liaison Committee
November 1, 2018 (Saskatoon, SK)

MINUTES

Attendance: Justice Lafrenière (Chair), Judge William A. Thorne, Jr., Utah Court of Appeals, Justice Michael Phelan, Justice Leonard Mandamin, Justice Paul Favel, Prothonotary Martha Milczynski, Scott Robertson (IBA), Robert Janes (CBA), Paul Shenher (DOJ), Prof. Aimée Craft, Dr. Ron Stevenson. By phone: Justice Michel Shore, Justice Strickland, Justice McDonald, Justice Grammond, Prothonotary Ring, Sheldon Massie (DOJ), Andrew Baumberg, Pamela Large-Moran, Julie Vincent, Andhra Azevedo, Gabrielle Lupien.

1. Review Agenda

Justice Mandamin added an item under Varia.

2. Adoption of Minutes of June 6, 2018

Approved.

3. How To Make Space for Indigenous Legal Traditions

Speaker: The Honourable William A. Thorne, Jr.: *Strategies that are currently being employed in the US to address and integrate Indigenous peoples and their laws into the justice system.*

Working definition of fairness: the ability to reserve final judgment until you have heard both sides – the reality of fairness and the appearance of fairness; one without the other is not enough.

Western view of fairness: you treat everyone the same, as a stranger; in the U.S., judges referee disputes with no stakes in the outcome, and truth is the byproduct of the court process when it is well-played. However, it has gaps: the community feels that Courts do not serve them – instead they serve corporations. They are not accessible for middle-income people, let alone poor people, and perceived differential outcomes based on income; courts are not good at fixing problems; they declare winners and losers, but don't fix underlying problem.

Tribal courts and justice: rooted in community values. Truth and healing are related; goal is to heal relationships, rather than creating winners and losers. Everyone is treated as family.

When he started at the tribal court, he received advice from a judge on the court, who listened, was fair, and was respectful and calm – a good job description for a judge. He said: the first responsibility of a judge is *not* to sit in judgment of people, but rather to treat everyone with respect. The test to apply: imagine that everyone who walks in the door is a family member who must be treated with respect. Can you tell your grandmother, that evening, that you treated everyone with respect?

An anecdote was given of an encounter with a man (from a non-tribal court) whom he had convicted but given an option that would allow him to leave jail, which ultimately convinced the man that he could recover. He had simply treated the man the way he had been taught: with respect. Similar outcomes occurred in family and child welfare matters.

He acknowledged the unceasing efforts that he would make to look after his own grandchildren if they ever ended up in the child protection system. Other peoples' grandchildren deserve the same, to be treated with respect. He had a stake in their success, in trying to help fix their problem. In the state court system, everyone is a stranger, but in the tribal courts, everyone is treated as family. This makes a significant difference in family disputes, custody disputes, and commercial disputes. Tribal courts are not an

imperfect copy of western courts – they are created differently: *to serve the community*. They should be judged by their success in serving those communities.

The 2 Court systems can learn from each other.

Conflicts of interest: how closely can you be related to someone and yet still hear the case? In tribal court, the key is *transparency* – identifying the relationship and then asking if the parties are still willing to have the judge hear the case.

He serves on the Navaho Nation judicial conduct committee, which is in the process of re-writing rules of conduct for judges. Reference to wisdom keepers: the traditional role of judge does not exist in early stories – the leader is the person who lead the people out of darkness into this world. The obligation is to provide for safety and well-being for the community. The role is not just in the courtroom, but also outside the courtroom: to be a leader by example. If there is ever an issue, the goal is to bring the leader back to proper path / conduct, rather than remove them from this role. The judge's role goes beyond deciding individual cases, but in trying to fix underlying problem.

Scott Robertson: asked a question regarding the judge's role in resolving public issues. What are the limits to political activism?

Judge Thorne: the judge cannot endorse political candidates, but can speak out on social issues. It is important for them to engage with social problems, but there is always the issue of politics. e.g., here is the opioid crises; are there enough beds, social support services, etc.? It is important to ensure that someone is working on problems.

Aimée Craft: what is the distinction between the formal / informal role?

Judge Thorne: this is still an evolving concept. The judge fulfills their role adjudicating individual cases (not to be compromised by external political issues), but also has separate role outside court.

The tribal and state courts could learn from each other.

He gave an example from Ann Arbour, Michigan, of a state court judge (Judge Connors) using the peace-maker court model. Initial resistance from bar, but after some years, it has proven to be very successful in contract disputes, divorce, child welfare. Everyone is welcome in the circle, and speaks in turn when holding the talking stick / basket. First tell us your view of the problem; second time, listen so you can explain what is said, to focus on the goal of solving the problem. Approximately 80% of the cases are resolved completely, or the major issues are addressed. The circle works best when there is an on-going relationship – business partners, parents, criminal defendant (especially when there is a close relationship). The key focus is about restoring relationship rather than deciding winner and loser. It relies on the 7 grandfathers teachings. These are the rules that everyone agrees to work by. This is a tribal process that works, not a state process. It is not indigenous to every group, but once they hear of it, it rings true, though is modified to each. Judge Connors trained commissioners, and they follow the peace-maker process, and otherwise the dispute comes before him to follow a standard state court process.

Information is available on their Court website. Judge Thorne can send materials / papers in due course.

On most tribal courts, about half the judges are lawyers and half are non-lawyers. It is good to have a blend with input from both backgrounds.

An example was given of the sentencing process / discussion to solve underlying issue so that person will not come back to court (rather than to punish the person). There was a joint effort from all sides to *solve* the problem, including mandatory pre-trial, rather than default judgment due to failure to file a written response.

He described his efforts, in one tribal court, to address the underlying problem at the sentencing stage. He

involved all the different court and social services offices to discuss options on an informal basis. There resulted a joint effort to solve issues, and he considered their recommendations when deciding sentence.

He then gave an example of an early tribal court with significant focus on mediation – with lawyers waiting outside. Only consent orders could be issued. Approximately 80% of both civil and criminal cases settled. However, the tribal council eventually adopted changes to make the court look more like a "real" western court, despite the fact that it was working, and later, the state court adopted similar processes.

Regarding jurors: these are the most important people in criminal process. We need to treat them with respect, allow them to ask questions in writing, reviewed by legal counsel before being raised orally. Jurors were allowed to set the hours for the trial.

Part of the tribal approach: people have right to tell their side of the story. He gave an example of a civil disobedience case against ICBMs. The defendants, charged with trespass, wanted to raise the issues of *necessity* and *treaties*. There was case law that might have allowed the judge to disallow these defences, but because it was an honestly held view, he let them be presented. The jury adquitted the accused individuals on the defence of necessity.

He gave an example of criminal sentencing in an assault case, in which a girl had stabbed a 35-year old woman, and then pleaded guilty. He made an attempt to set up a mediation program between the victim and the 17-year old defendant, along with a counsellor and someone to provide security. They met for about 3 hours the day before the sentencing hearing. At the sentencing hearing, the *victim* of the assault pleaded for leniency for the young girl, and that she was too young to have her life thrown away – "who among us wants to be judged by our worst moment?" The defendant started to cry, and expressed surprise that anyone would plead on her behalf. No one had ever done so. He sentenced her to some limited jail time and probation. Ultimately, his decision is to help solve the problem.

He discussed seeing four generations of child welfare issues, after seeing the same issues in each of the previous generations. The definition of insanity is doing the same thing but expecting different results. We need to do things differently. "How do I solve the problem?" As a tribal court judge, there is an additional layer of responsibility.

He has seen judges who spend 15 minutes rebuking the defendant before sending them to jail. It makes no difference to the defendant, or the victim. Compare this with his approach (earlier) with the 17-year old defendant who was offered a chance at mediation with the victim.

He described the creation of a tribal court in Minnesota: the community was asked what it wanted for the court. In response: first, it did not want the judges to wear black robes, as this was a reminder of the Jesuits who had arrived with the French; second, it was against tribal tradition to terminate parental rights.

Description of tribal court custody issues: do not cut off children's relationship with their parents, but instead provide custom adoption to additional parents. This increases the number of relationships, fostering resilience. The state courts now authorize this type of tribal adoption. This was compared with statistics for the western model of breaking relationships / communities: for those who age out of foster care, within 2 years some 60% are either homeless, in jail, or dead. This does not work. Relationships are a counter-balance, providing resilience. The tribal approach is an alternative.

Aimée Craft asked about the child's *agency* in this process.

Judge Thorne noted that older children have a veto. Most customary adoptions are to a relative, but the children retain a relationship with their parents. There is recognition that it is abuse to cut children off from relationships. The standard for removal from a home has been increased: it now requires active efforts. "If something does not work, what else can we try?"

He gave an example of judges taking over the role dealing with tribal cases in one area. They started by visiting the communities, to get to know the people, and found it life-altering. The communities effectively 'adopted' the judge, having them participate in community activities.

Joint state-tribal courts: there are a number of such joint sittings. For example, in a drug court, they sit side-by-side.

In the 90's, the conference of Chief Justices created a project to bring tribal courts into their discussions. In Arizona and Washington, there was joint leadership, and early projects that could be agreed upon, which resulted in success. There are now 17 forums for joint state-tribal court discussions in U.S., including three with federal judges.

He gave a description of re-thinking social services – the focus is on relationship, on preventative work. It is much more likely that a family member will ask for help if they know that their call will not result in the children being taken away, or the person with a drug problem being sent to jail. It is important to ask for help early. In one social services organization, the prevention work over years resulted in a drop from 459 children in foster care to only 19.

Justice Lafrenière thanked Judge Thorne. He noted that even though Judge Thorne described his experience with child welfare, family and criminal law, there are numerous aspects of his presentation that are transferrable to the Federal Court's practice.

There followed a short lunch break.

Justice Lafrenière then noted that in discussion with Professor Craft, it was agreed that her presentation be deferred to the next meeting to provide sufficient time for her remarks.

4. Update – Subcommittee studying the Identification and Appointment of Indigenous Law Experts to Assist the Court (Rule 52 of the Federal Courts Rules)

Robert Janes: the sub-Committee developed a framework for identification and appointment of Indigenous law Experts to assist the Court, which was reviewed by an ad hoc external advisory group.

The proposal is to have a permanent indigenous advisory group to assist with requests for appointment of an assessor. This body would consider requests from the Court under Rule 52 and make recommendations. The sub-Committee does not recommend a formal list of assessors, given that the recommendation in any given case depends on the facts. The remarks of Judge Thorne regarding close relationships were noted – in some cases, the parties *will* want an assessor appointed who has a close relationship with them.

A draft framework, with input from the advisory group, was circulated today to the Committee for consideration.

Justice Cecily Strickland: for the process to work, it needs the support of all the parties. The goal is to move to a neutral advisor rather than a battle between experts.

> **Action:** Written comments are requested by December 15. Subject to the comments, the framework could then be implemented before the next meeting.

5. Framework for Receiving Oral History evidence

Justice Lafrenière reported on the sub-Committee's mandate: the goal is to develop a tool for disclosure and discovery of oral history evidence. An initial compilation framework, prepared by a small group of law clerks, was circulated to the Committee.

Paul Shenher noted that since the Practice Guidelines were published, there have been numerous cases involving oral history in both the federal and provincial superior courts. A lawyer in Robert Janes' office

prepared a memorandum with a survey of cases, and Paul Shenher conducted a similar survey of cases involving the department. He also noted the comprehensive work of the law clerks of the Court compiling all the source materials into a coherent protocol.

He then reviewed the key elements of the protocol. This will require some further consideration by members of the Committee.

Robert Janes noted the reference to testimony by "an Elder." However, there are often situations where Elders have protocols regarding involvement of other Elders, or regarding limits to what they may speak to. In some situations, a panel of Elders may be more appropriate.

Justice Lafrenière noted that the comments are appropriate. We are looking at options for joint panels, but these need to be raised by counsel. In Intellectual Property cases, the Court is encouraging joint panels of experts, but there is reticence from the Bar. He encouraged feedback from the Bar.

Aimée Craft noted overlap between the proposed framework and the Practice Guidelines.

Justice Lafrenière: the proposed framework is meant to complement the Guidelines, possibly as an addendum. The document provides sources so that the reader knows where the content comes from.

Paul Shenher: there is some repetition, and there has not been any editing yet. For now, this is simply meant to be a survey of what has been done. If there are additional suggestions, please provide them for inclusion in the working draft.

Robert Janes noted that in some cases of will-say statements (item #18), the Elder's testimony is often interpreted by counsel and framed in writing in a way that does not adequately reflect the essence of what will be said. In some situations, this can put an Elder in an embarrassing situation through no fault of their own, but simply due to counsel's approach to preparing a will-say statement.

Justice Lafrenière: this simply provides a summary of issues to be considered, leaving out nothing. But this is not a rule. There needs to be an assessment as to whether a will-say statement is required.

Scott Robertson: regarding will-say statements, the options are very case-specific. In some situations, there are protocols that would preclude a will-say statement.

Justice Lafrenière noted that the prothonotaries will be doing the lion's share of this case management work. This is a small, experienced group – they can consider this protocol, and then options that are appropriate to the case can be selected.

> **Action:** comments on the draft oral history framework should be provided 2 months before the next meeting to allow for in-depth discussion – **April 15, 2019.** Advance reminder by Andrew Baumberg.

Paul Shenher then referred to a memorandum with list of questions for consideration. Also, the issue of will-say statements came up a lot in discussions with DOJ counsel. We may need to consider this further.

Justice Lafrenière referred to the Australian concept of 'hot-tubbing of experts' – by which a panel of experts appears before the court. In our context, the goal is to allow an appropriate forum for Elders to speak.

Aimée Craft referred to discussion papers from the early 2000's.

> **Action:** Andrew Baumberg to circulate discussion papers regarding oral history evidence.

It is important to make sure that key questions are identified in the Guidelines, rather than being prescriptive. (e.g., *Should there be a circle or no circle?* could instead be framed as *What is the*

appropriate protocol?)

She then noted an emerging issue: evidence of oral history to support a claim in a Western legal construct versus evidence of law as Indigenous legal tradition. It is not yet identified in the document, but an issue of which the Court will need to be aware.

There followed some discussion regarding a hearing held in a circle.

Robert Janes added that for some communities, the circle is not particularly relevant, but there was a protocol that required special witnesses and order of address for certain matters. It is important to address the Indigenous' communities own protocol.

Justice Phelan: we need to set up the process tailor-made to the needs of each case.

Justice Lafrenière referred to remarks of Judge Thorne regarding judges appearing in dark robes, which related to earlier abuse by missionaries.

Aimée Craft: this comes back to accountability. We need to ask the right questions rather than suggest options / answers.

6. Approach to deal with chronic disputes

Justice Lafrenière noted that certain disputes fester, returning to the Court on a regular basis. In many cases, they result in a short-term result but no long-term resolution. The Court has considered various options to address the issue :

- on request by a party, the Court would retain jurisdiction after issuance of the judgment, to ensure that implementation takes place and holds;
- all Aboriginal law cases are presently triaged by a judge; the matter will come to the Court's attention as well as the judicial administrator, who will track recent disputes involving the same parties, to assist with appointment of an appropriate case management judge

Aimée Craft suggested that relevant provincial court proceedings also be identified in this process.

Robert Janes made a suggestion: get rid of concurrent jurisdiction with respect to band governance.

Aimée Craft: the CBA made submissions on this before it came in force – there is forum shopping.

Justice Lafrenière: when filing material, the lawyer could bring other disputes to the attention of the court.

Robert Janes: for judicial review of decisions under a treaty, the standard language refers disputes to the provincial Superior court. The Federal Court is a good specialized court in governance jurisdiction. In the provincial courts, there are problems.

Aimée Craft reiterated that there be a search of disputes in the registries of the provincial courts as well as Federal Court. In Manitoba, it is possible to search by party name.

Justice Lafrenière: we will conduct such as search where it is available.

Scott Robertson added that the Federal Court schedules Applications much faster than the concurrent provincial court.

Justice Lafrenière added that the Court has a 3-person triage group of judges. The Judicial Administrator will check for other cases in Federal Court (the triage judge may search re: other courts). The court also has specialized judges for this area of law – the court will try to have the same judge assigned to the same community, to the degree feasible, or at least to have one of the judges from the specialized practice group; however, there are scheduling challenges.

Robert Janes asked whether a rota of mediators, with experience in governance issues, could be developed in consultation with the Indigenous Bar Association.

Justice Lafrenière: the Federal Court offers free dispute resolution services, but cannot order 3rd party mediation costs to be paid by the government.

Pamela Large-Moran expressed appreciation for Judge Thorne's remarks regarding restorative justice. Regarding chronic issues, these would be assisted by a restorative approach.

In March 2017, INAC (now CIRNA) did a call-out for mediators with experience in Indigenous law. They created a small specialized roster of mediators, initially for specific claims, funded by INAC. Since then, it has expanded to other claim types, including self-government issues.

She followed up with INAC program managers regarding the option of sharing the mediation list with the Federal Court. They needed to get procurement approval, but agreed to share the roster with other departments if there was a formal request from the Department to share the list. The proposal, now, is to set up some dialogue for collaboration between Federal Court, Specific Claims Tribunal, and CIRNA. The goal is help parties get to the root of the problem.

Justice Lafrenière noted, from the email chain, the limited up-take on the list. Would the mediation process be open for judicial review of band governance matters?

Pamela Large-Moran: possibly yes. CIRNA described it as "self-government issues." One could take this broadly to cover governance issues.

Justice Lafrenière: Rule 389 allows proceeding to be stayed pending mediation. If there is a roster that parties can use, it could relieve the court, and allow people closer to the community to help address the issues. He asked for follow-up by Pamela Large-Moran.

Pamela Large-Moran: regarding payment, it is meant to be for the DOJ negotiating teams, etc. In sharing this list, they would not agree to pay, but this might be open for discussion.

Robert Janes: this is a good time to have further discussion with INAC, the Court, and the Bar on this. He gave an example of a current governance dispute with complex matters in courts. A number of federal and provincial government initiatives, as well as neighbouring First Nations initiatives, are stymied. It would be very good to invest in dispute resolution processes.

Justice Lafrenière: the problem is the issue of funding. The Federal Court provides free dispute resolution. However, it can sometimes stretch the Court's resources..

Andrew Baumberg suggested providing information regarding the resource requirements to judicial affairs re costing, to share with INAC.

Sheldon Massie: does the Court have more requests than it can handle?

Prothonotary Milczynski: probably not, but it is a question of how quickly the court can respond to any individual requests. It takes months.

Justice Lafrenière: the Court is able to deal with it. In some cases, the Court is involved in this process over a period of months, or even years, but it is very resource-intensive to manage multiple cases.

He then read material on behalf of the Chief Justice:

1. Very pleased to see the ambitious agenda the Committee has set for itself today. It holds very real potential for advancing the Committee's work and the Court's practice in some important ways.
2. Particularly happy to see that you are spending a good amount of time addressing the issue of

how to make space for Indigenous legal traditions. As many of you are aware, the Court has made this an important priority. We have been pleased to have made some progress on the process side of things, on issues such as:

- having being open to working with Elders when mediating a dispute
- having a round courtroom and conducting hearings in the community, and
- being open to ceremonial traditions prior to the formal commencement of the hearing – at the discretion of the individual judge.

However, we continue to struggle to make progress on the substantive law side of things.

3. Strategic Plan – focuses on twin priorities of Access to Justice and modernization. We have accomplished or are in the process of accomplishing virtually all of the goals identified in our 2014 - 2019 Strategic Plan. Will be consulting with the bar and more broadly. I encourage you to start to think about both inside the box and outside the box ideas for how we can continue to make progress on the twin over-arching priorities of increasing access to justice and modernizing.
4. New Federal court website:
   - It will be much more intuitive and user friendly.
   - We have added a lot of new content and reorganized the main menus as well as the drop-down menus
   - We also have a new mobile interface
   - There are many new resources, such as flow-charts, pre-populated forms and checklists for Self -Represented Litigants.
   - There are also new tools that will improve access to justice
   - Launch is scheduled for this coming Spring.
5. Electronic proceedings – Rolling out state-of-the-art equipment to Quebec City, Toronto, Montreal, Ottawa and Vancouver over the course of the next year. Will then roll out to the rest of our facilities the following year. Pilot projects in Alderville, Southwind and Blood Tribe proceedings were all a success.
6. Electronic scheduling – We are hoping to be able to offer a public interface in about 18 months.
7. Associate Chief Justice (ACJ) & additional prothonotaries.
   - We are awaiting an imminent appointment of two new prothonotaries.
   - We understand that the Minister will be forwarding her recommendation for the Court's new ACJ sometime in the next few weeks.
8. Vacancies - Looking for one or two leading members of the aboriginal law bar. As I typically say when I make this pitch to bar groups across the country, we are looking for people who are prepared to take off their advocate's hat and be prepared to interpret and apply the law impartially.
9. Media – in the second phase of Justice Zinn's recent Blood Tribe trial, which shifted to Calgary after the first phase was held in the Band's Community, we had a live video stream back into the community. I gather it was an unequivocal success. We hope to do more of that in the future.

Robert Janes: regarding Sheldon Massie's question as to whether the Court has sufficient resources to do this mediation work, the best people to appear on a mediation roster for these governance disputes are people who are closer to the community and understand the detailed history to the dispute. However,

these people are unlikely to show up on the government roster.

Justice Lafrenière added that you need someone who knows the community and speaks with authority. The underlying issue, though, is funding. Who will fund mediation work?

> **Action:** Justice Lafrenière asked Sheldon Massie, Paul Shenher, and Ron Stevenson to follow-up regarding options for securing government funding for mediation.

Scott Robertson noted the issue of governance jurisdiction.

Aimée Craft noted possible support from the Federal Court via recognition of indigenous mediation mechanisms, such as a roster of mediators recognized by the court, and possibly funded. The Truth & Reconciliation Commission calls for this.

Judge Thorne noted that there is always some expense for mediation work, even if not major.

Justice Lafrenière has no issue with Professor Craft's proposal, but the court does not have funding.

Scott Robertson: there needs to be a cost-benefit analysis. There is a loss of opportunity. For instance, you cannot ratify contracts if there are governance issues.

Robert Janes gave an example where a local opportunity to do something creative may be entirely lost due to unresolved governance disputes.

Sheldon Massie asked whether there might be some role for an indigenous organization such as the Indigenous Bar Association to assist with development of a roster.

Prothonotary Ring noted an emerging trend: more First Nations are developing land codes. Disputes may arise between Council and families who assert existing interests in land (e.g., certificate or hereditary rights). This brings up many judicial review applications, which don't get to the root of the problem. In one recent case, an application was converted to an action to get to the underlying evidentiary issues. According to Judge Thorne's presentation, the role of the judge is to address the underlying dispute. Is there some role the court can play in assisting indigenous dispute resolution processes?

Justice Lafrenière: this agenda item is tabled to the next meeting.

7. Scope and Cost of Aboriginal Litigation

Prothonotary Ring referred to remarks at the last meeting: the primary problem faced by litigants is the rising cost and the ever increasing scope of Aboriginal litigation – an access to justice issue. A sub-committee was struck at the June 6 meeting, with an initial mandate to develop an online survey to assess perceptions of the problem and possible solutions. Members include: Prothonotary Ring (chair), Sheldon Massie (DOJ), Kathryn Deo (CBA), and Brooks Arcand-Paul (IBA), as well as Susan McDonald (DOJ research group). Each sub-Committee member was tasked with developing one of the following four elements:

- Background information
- Perception of whether there is a problem and its extent
- Causes
- Possible solutions

The sub-Committee has developed a working draft survey, though it requires further editing before it will be ready. The proposal is to revise the survey for initial review by a sub-set of the Committee, with full review at the next meeting. There are two foundational questions that remain in play:

> Question 1: *scope of mandate – is it only proceedings involving Aboriginal law, or any litigation*

involving indigenous people (e.g., a tax dispute with CRA)?

Question 2: *who is the target group for the survey?* Lawyers only, or past parties and members of judiciary?

Robert Janes suggested that the survey target only lawyers. Judges don't always see background issues, and parties will likely have a very different thought process regarding the issues and costs. There would be very different types of questions for lawyers than for parties.

Justice Lafrenière: lawyers might have a very different level of understanding of the questions. The initial focus should be lawyers.

Prothonotary Ring: as for distribution, this will be done via each constituent group.

8. Innovative Approaches to Aboriginal Law Cases in Australia – Lessons for Canada?

Dr. Ron Stevenson noted that his main topic today is procedural innovation in Australia in native title cases. Some cases pose really good lessons for Canada. Some qualifiers are required:

First, this work is largely based on personal research and is not intended to reflect a position of the Government of Canada.

Second, comparison is always risky especially considering the significant differences between Canada and Australia.

But much is shared:

1. Common law tradition
2. Shared history of indigenous dispossession and displacement
3. Recent experience with landmark decisions on title

Several differences are particularly important:

1. Does Section 101 admit the possibility of a national court to deal with title issues?
2. Does the division of powers in Canada, based on exclusivity, operate in a similar fashion to the division of powers in Australia, which is based on concurrency?
3. Does Section 35 leave room for the kind of detailed statutory framework that is reflected in the Native Title Act?

He does not attempt to answer these questions, as the focus of the presentation is on procedure.

His thesis is that a series of structural features predispose the Australian approach to procedural innovation and high rates of settlement:

1. A single national court to deal with native title;
2. Conferral of exclusive jurisdiction to deal with all aspects of native title;
3. Great specificity in the terms used to confer jurisdiction;
4. All elements of the process, including Tribunal hearings and negotiations, placed under the general supervision of the Federal Court;
5. Creation of an interlocking regime and complementary roles for the Native Title Tribunal and the Federal Court;
6. Specific expectations have been established and processes developed to closely manage all aspects of the development of a title claim;
7. The entire process is geared towards achievement of consent orders;

Over 80 percent of native title determinations in Australia are resolved by consent determinations. Even among the 20 percent that are resolved by contested litigation, there is evidence of procedural

approaches that guide the parties towards narrowing of the issues and resolving as much as possible outside the courtroom.

8. Even where consent cannot be established, various procedural devices are used to narrow issues.
9. Technical issues such as the addition and removal of applicants and respondents are used to narrow and help determine native title claims.
10. Specific processes have been developed to deal with overlapping title claims.
11. All determinations are revisable if circumstances change – no final Orders.
12. Alternative approaches to mediation are available (Tribunal, court or private).
13. Off-ramps managed by state or territorial law have been set up to supplement the process established under the Native Title Act (Victorian legislation, Noongar settlement)

Three key provisions:

1. Native Title Act, Sections 13 (Approved determinations of title), Section 87 (Consent Determinations), Section 207A (Recognized State-Territorial Body), Section 223 (Native Title)
2. Native Title Practice Note (NT-1) JLB Allsop Chief Justice October 25, 2016
3. Central Practice Note: National Court Framework and Case Management (CPN-1) JLB Allsop Chief Justice, October 25, 2016

The practice regarding Elder testimony in Australia is far ahead of Canada, including:

- Joint expert testimony, held in front of a Registrar, and heavily managed
- Testimony is held on country, following indigenous protocols; whatever works, will happen; better integration of indigenous law for entire process

In Australia, native title was recognized only in the Mabo case in 1992. In 1993, the commonwealth government passed the Native Title Act, followed by major amendments in 1998 (including the requirement that all native title claims must be filed in the Federal Court and authorization determined by the Tribunal).

Named individuals assert a representative claim based on identification with a group or society. Native Title Tribunal determines whether the claim is properly authorized. The Federal Court then oversees the development of a "connection report." The bulk of the process is directed to determining whether the named applicants are linked to "apical ancestors" at the time of sovereignty. Occupation at sovereignty places no real role. Assessment of adherence to laws and customs is largely a contemporary assessment. The legislation requires that a declaration (whether by consent or contested litigation) be quite specific as to who holds title, precisely what rights are included in title, what are the incidents of these rights, the extent to which extinguishment has taken away title and how the recognized title rights interact with other interests in land. Once declared, a title must be held by a Prescribed Body Corporate.

Section 87 governs native title claims by consent. Roughly one decision per week. One example is Tex v. Western Australia 2018 FCA 1591, October 24, 2018. The Order covered:

- Existence
- Native title holders
- The Extent of native title rights
- Qualifications on those rights
- Nature and content of rights

- Relationship with other rights
- Area where rights are exercised
- Connection Material - continued connection to territory

The judge is not asked to make a ruling on the merits. There has to be an "air of reality."

A number of cases are available in the reference notes, which show, for instance, how procedure is used to manage overlap issues. *Finley v. Western Australia* 2018 FCA 548: good source for disclosing detailed procedural history. See also: *Agius v. South Australia* 2018 FCA 38.

There is a process managed by the Court, governed by statute, and national in scope.

Reality check:

- Often used in the more remote parts of the country
- The rights that are confirmed are often quite narrow

Contested determinations (20%)

The decisions project the same sense of careful management. Cases are typically less than half the length of cases in Canada. See, regarding adoption of community solutions: *Akiba v. Queensland* 2017 FCA 1560.

Judges in Australia were actively involved in native law reform and commentary on the progress of native title cases. It is quite common for sitting judges to offer commentary on law reform:

- Justice JA Dowsett, Federal Court of Australia, Beyond Mabo: Understanding Native Title Litigation Through the Decisions of the Federal Court
- Justice John Gilmour- "Native Title: Reform and Why? 2011 FedJSchol 8
- Ceremonial Sitting of the Full Court to farewell the Honourable Justice Gray, May 17, 2013
- Justice Michael Barker- "Zen and the Art of Native Title Negotiation" 2015 FedJSchol 9
- Paul Finn, "A Judge's Reflection on Native Title", in Brennan et al, Native Title from Mabo to Akiba, 2015

These include both critiques as well as recommendations for procedural innovation.

Finally, there appears to be substantive convergence between Australia and Canada. While the focus of this presentation has not been on substance, it is worthwhile to close with some recent developments that may usher a closing of the gap in the substantive law. Recent decisions of the Federal Court have opened up new avenues for consideration of exclusive titles that look rather more like aboriginal title as the concept is understood in Canada. See especially: Warrie v. Western Australia 2017 FCA 803.

Several High Court decisions have moderated the approach to extinguishment leaving more potential room for the survival of native title.

The High Court heard argument in the first case about compensation under the Native Title Act last month (Northern Territory v. Griffiths).

Constitutional recognition continues to be discussed in Australia with academics frequently drawing of Section 35 as a potential model for consideration.

There is potentially much to learn from Australian practice in the role of the Federal Court in supervising and managing the native title determination process. Not all aspects could be applied in Canada but a serious examination of those that can be applied might assist in streamlining the complex task of fully implementing Section 35.

Robert Janes: how much arises from statutory process versus practice directions?

Ron Stevenson: the statute is very specific; secondly, there is a different legal personality in Australia; a major factor is that the native title judges, who are specialist judges, have deep experience, with a particular stake in the process. There is an intelligent mix of willingness to intervene along with deference to the parties.

There is also oral discovery, under the preservation process. The Elders are always seen as being in the drivers' seat.

Justice Mandamin noted a presentation by Justice Tony North, an Australian judge who had difficulty with hearing certain evidence within a courtroom, but which became very clear when it was heard on the land (at Alice Springs). In his own experience, in *Alderville*, took a view of the land. An Elder found it much better to speak on the land than in a Band Hall.

Ron Stevenson added that the Australian approach is not entirely positive. For example, if there is any break in connection, even for a single generation, no native title can be claimed. However, there is a more culturally appropriate process.

Justice Shore suggested that Justice Tony North, now retired, be invited to participate remotely in the next meeting.

Action: Andrew Baumberg to circulate Dr. Stevenson's speaking notes and email address to allow follow-up questions.

9. Electronic Trials

Prothonotary Ring suggested, for the long-term agenda, an information exchange session regarding electronic trials, including discussion regarding trials in the provincial courts. Suggestion to put this over to the next meeting

Action: Prothonotary Ring to consider options and make suggestions in due course.

10. Varia

a) Truth & Reconciliation Commission of Canada

No update.

b) Spring 2019 Meeting

The next meeting will be held in conjunction with the CBA conference, June 19-21, 2019, in Banff, Alta. The Committee meeting will therefore be held on June 19.

c) Justice Mandamin

Justice Mandamin noted that he will be sending a letter to the Chief Justice advising him that he is stepping down from the Committee.

Justice Lafrenière commended Justice Mandamin on his work and considerable accomplishments on this Committee.

Scott Robertson acknowledged the tremendous work that Justice Mandamin accomplished on the bench and leadership that he provided.

END OF MEETING