Federal Court ~ Aboriginal Law Bar Liaison Committee

Wednesday May 4, 2016

Ottawa, Ontario

MINUTES

Attendance: Chief Justice Paul Crampton, Justice Michel Shore, Justice Michael Phelan, Justice Leonard Mandamin, Justice Cecily Strickland, Prothonotary Lafreniere (Chair), Scott Robertson, Bonnie Missens, Robert Janes, Diane Soroka, Krista Robertson, Aimée Craft, Sheldon Massie, Gaylene Schellenberg, Claire Truesdale, Drew Mildeon, Judy Charles, Manon Pitre, Martha Chertkow, Laurence Belanger; Phone: Paul Anderson, Koren Lightning-Earle

1. Opening - Review

The Chief Justice noted the work of Justice Mandamin, as well as Justice Lemieux before him, in setting a vision for the Committee's agenda and work over the last five years. He noted that most of the goals identified five years ago have now been realized, and that the time has come to embrace new strategic goals to guide the Committee's work in the coming years.

Review of agenda: Justice Shore suggested discussion regarding the situation with the Ontario Cree – are there ways to help?

Minutes of Oct. 17, 2015 – approved.

Sheldon Massie noted that he and Paul Anderson are the new Departmental representatives on the Committee.

2. Aboriginal Law Practice Guidelines

Prothonotary Lafreniere noted that the Guidelines are in force, but are not rules. It would be helpful for the Bar to assist in bringing them to the wider bar and public.

Robert Janes added that there are a number of organizations that provide regular Aboriginal law courses (e.g., PBLI, Affinity, Canadian Institute, CLE Institute of B.C.). The guidelines could be suggested as a topic for a presentation at one of these programs; there could be some outreach from the Court at the same time.

Krista Robertson noted that Prothonotary Lafreniere is speaking at a B.C. practice event later this year.

He added that the Court participates regularly in such events. If you want to organize a local event, contact A. Baumberg to make a request. The Court will try to participate.

Gaylene Schellenberg indicated that the guidelines have been shared on the CBA listserve of close to 200 CBA Aboriginal law members and will be posted on the CBA web site as well.

Sheldon Massie noted the department will also be looking at possible legal information sessions.

Prothonotary Lafreniere added that the web site is static.

Andrew Baumberg noted the plan to develop a twitter account – perhaps a hashtag for these comments related to these guidelines?

Robert Janes suggested that members of the Court note the guidelines when counsel don't appear to know about them.

Aimée Craft suggested that the Registry let litigants know about the Guidelines when a new Aboriginal law proceeding comes in.

Krista Robertson noted that the Guidelines will be put on the agenda for the section meeting, then to be communicated by sub-section chairs.

Prothonotary Lafreniere mentioned the case management committee, which is looking at the Guidelines as a foundation for CM across the court's jurisdiction.

Feedback Regarding Practice

Paul Anderson said that the Guidelines are being used and applied in the specific claims tribunal practice, especially with respect to Elder testimony.

Scott Robertson said that the guidelines were used in a recent Ontario superior court hearing that he attended.

Robert Janes added that the Guidelines need a little more time to get feedback.

The Chief Justice noted that the Court was hoping that the use of the Guidelines would extend beyond intra-band disputes.

Prothonotary Lafreniere reiterated that the Guidelines are meant to apply generally to Aboriginal law proceedings, whether an action or application. It is helpful to advise the registry that the proceeding is Aboriginal law – it is not always obvious to the registry, which does not necessarily read through the pleadings. The triage is always done, but the court does not always intervene. The triage project is now permanent – originally overseen by Justice Mandamin but now by Prothonotary Lafreniere. He gets about 5-6 sometimes in a week, and will then speak with counsel for both sides to discuss options. Many times, the respondent asks for case management (CM) but the applicant does not want it, thinking that it will slow down the proceeding. However, CM can either expedite or extend the time-lines, as necessary. An example might be to expedite the time-line to get to a hearing on the merits quickly rather than first have a motion for interim injunction, which would add considerable expense / time.

Justice Shore noted that the Guidelines help create a climate of confidence. It is important to have a cultural dialogue, relying on indigenous legal traditions as well. The Guidelines are designed to encourage people to think outside the box, with flexibility. The Court is available, but needs to have its jurisdiction triggered by the parties to start the process so that they can together help to resolve a dispute that may have been festering for some time. Key is to create an atmosphere of trust.

Chief Justice Crampton endorsed the comments of Justice Shore. We see the Guidelines as part of the overall process of reconciliation – this message was also noted in his initial discussion with the Minister, who is very interested in the Committee's work and what the Court is doing more broadly in the area of Aboriginal law. In exchanges at past meetings with Elders, some have mentioned their reluctance to come to the court. The Guidelines are meant to increase the confidence in the Court. He added that a key challenge with prior Guidelines was lack of awareness. With this 3rd edition, it is important to bring the Guidelines to a wider audience. We would like to develop an inventory of best practices that could be available via the web site.

On the idea of 'skipping the injunctions' and getting directly to the hearing on the merits, he noted that the Court is now at full complement and so is able to schedule 1 or 2 day hearings within a couple months. Please share this message with colleagues – it is possible to get to the full hearing quickly.

Robert Janes noted that in B.C. courts, litigants categorize cases (i.e., IP, Aboriginal law) as well as a short summary of what the case is about and how urgent it is. The number of practitioners in this area has grown

considerably, so a tick-box on the front of the application might be helpful, followed by a note from the Registry highlighting relevant practice notices.

Manon Pitre suggested an extra paragraph or a few lines in the application.

Prothonotary Lafreniere suggested a cover letter. He regularly gets such letters asking for CM according to the Guidelines. Many complex or contentious proceedings are case-managed because it is difficult for them to follow the standard time-lines. Flag the issue with the registry when filing a document – either by cover letter or even orally.

Diane Soroka suggested, in particular for self-represented litigants, that a simple form with a box to tick might be easier than drafting a cover letter.

Prothonotary Lafreniere responded that there are few Aboriginal law cases by self-represented litigants.

Krista Robertston added that the forms in BC include the boxes to tick.

Robert Janes indicated that part of the problem is that there are many practitioners who have one-off Aboriginal law proceedings, or are rarely in Federal Court. The regular practitioners in this area are generally more aware of the options.

Paul Anderson asked if there has been any consideration of the increase in class action cases in Aboriginal law, and how to apply the Guidelines? He added that on the topic of building trust / confidence, the Specific Claims Tribunal regularly goes out to communities, an effort that is well-received.

Aimée Craft noted that the discussion has a long history in the Committee, including with the Elders. There are particular challenges with community-based hearings, but significant benefits.

Justice Phelan mentioned that this is key to the Court's approach -- for example, Justice Zinn is in a community-based hearing right now.

Prothonotary Lafreniere reiterated the section of the Guidelines related to location of hearing. This is a starting point for consideration in CM to address practical issues early. He often asks: Why is the case not being heard in the community?

The Chief Justice noted an example of a case he heard where many community members preferred to come down to Winnipeg for the hearing, rather than stay in their community 800 kilometers to the north

Aimée Craft reiterated the need to consider the various factors – is a hearing in the community in their best interest?

Prothonotary Lafreniere noted that the Court can sit anywhere in Canada. Lawyers sometimes don't think of other hearing options than a standard courtroom in a major city.

Justice Shore noted the importance of recognizing the place of a hearing – 'we are in your house.' He mentioned the online TED talk by Mr. William Ury ("Getting to yes.") – it is important to journey to where the conflict is.

Koren Lightning-Earle notes that the IBA has and continues to support the Guidelines. She has spoken about them recently at a public safety conference. Increasing awareness of them is key. More promotion provincially is needed. One party told her that the lawyer didn't mention them, and the party heard about the Guidelines only at the conference. Perhaps at the Fall IBA conference the Guidelines could be presented. She will issue an email distribution about Federal Court practice and will include this.

The Chief Justice thanked her for the suggestions – he confirmed that the Court is open to collaborating with the IBA on a possible presentation at the Fall IBA conference.

Robert Janes noted that B.C. appears to be well aware of the Guidelines. He suggested that the *Daniels* case may bring up new cases that are outside the norm.

Sheldon Massie noted that feedback from the Department is generally positive.

Aimée Craft noted the TRC recommendations (#27 and 28) related to legal education, both within the bar but also including law faculties. The Guidelines could be used as a teaching tool.

The Chief Justice noted that the Court has a 'twinning judge' with each law faculty. The CBA and IBA could perhaps consider designating a twinned person with each law faculty as well to collaborate. The judge participates in classes and sometimes holds a court hearing. This could be arranged in the Aboriginal law field.

Andrew Baumberg noted that the CBA recorded a court hearing by J. Phelan in IMM law for presentation – something similar could be done for an Aboriginal law proceeding.

Paul Anderson noted that there is sometimes a gap in the understanding of the plaintiffs regarding the Department's mandate for settlement discussions.

Andrew Baumberg noted that an earlier draft did include a description of obstacles to DOJ getting a settlement mandate, but the text did not address the similar obstacles for Aboriginal parties, and was therefore taken out. Perhaps the solution is to put it back in, but with complete coverage of all sides.

Sheldon Massie noted that there is still some coverage of the topic in the guidelines, and perhaps it is simply an awareness issue.

Chief Justice Crampton mentioned relevant aspects of the Minister's mandate letter – asking if there is anything of note in practice.

Paul Anderson responded that there have been no changes so far – it is still too soon.

Prothonotary Lafreniere added that this topic has been discussed in the past. It is really a matter of making clear from the start what the mandate is – there need to be good-faith discussions.

Justice Shore noted that when he was at the Department, lawyers prepared position papers on cases that would eventually get up to the Ministerial level so that a decision could be made more quickly regarding a settlement mandate.

3. Practice Direction - Judicial Review of First Nations Governance Disputes

Discussed above

4. Case Management of Aboriginal Law Proceedings

Discussion regarding Notice to the Profession (June 24, 2015) Case management: Increased Proportionality in Complex Litigation before the Federal Court

Prothonotary Lafreniere asked for feedback, and in particular, whether there were any issues of concern.

Robert Janes noted that many of the Aboriginal law cases come up in the context of small issues, but with a much larger issue behind. It is hoped that the proportionality principle would not prevent such proceedings from going forward appropriately. At the same time, many cases are not able to proceed due to the excessive procedure.

Scott Robertson raised the importance of taking evidence from Elders early (*de bene* evidence).

Sheldon Massie added that it is important to address written interrogatories. The initial statement or notice does not always reflect everything that is in play. The time-frames for trial length may not reflect the range in Aboriginal law, which sometimes has very long proceedings.

Prothonotary Lafreniere noted that he was not aware of any abuse of written interrogatories.

Paul Anderson agreed. He has encouraged counsel over the years to use written discovery questions as an effective measure. This can be both efficient and proportional, and avoids long oral discoveries that simply end up with many undertakings. One benefit of discovery is to identify the real issues for adjudication and 'park' the others.

Robert Janes added that the reason for there being 'no complaints' is that in the past, there was a lot of litigation around the 'discovery issue.' The investment in fighting is not worth the outcome. It is easier to answer the questions on discovery than fight, even if few of the answers are actually used. It would take 6 months to fight, with only a partial reduction in the number of question.

Prothonotary Lafreniere noted that he will raise the matter with the CM working group.

Aimée Craft mentioned point 3 (no new demonstrative evidence at trial). It would be useful to have a less prescriptive wording – at present, it seems to conflict with the Aboriginal Law Guidelines, which allow for a more flexible approach regarding oral evidence by an Elder.

Prothonotary Lafreniere noted that the main point is to prevent surprises.

5. Development of Seminar on Alternative Dispute Resolution

Faculty / Resources

Justice Mandamin suggested that a key question is how to get people to start thinking about dispute resolution. It is difficult to develop a major conference, but a simpler approach would be to develop a small session – to arrange a knowledgeable panel regarding dispute resolution to do a presentation for the Federal Court when it meets, as well as for other groups (CBA, IBA, DOJ) according to their own needs and time-frame. There may be different questions and discussion according to the group. The panel would be made up of 4-5 members, with input from an experienced mediator, someone from the indigenous community, from academia, from legal practice, and with help from someone experienced with planning education programs. He described a voluntary dispute resolution process and an arbitration process, developed for a wide range of disputes that came before the Alberta Provincial Court.

Krista Robertson noted that the CBA has discussed this – members of the CBA are very supportive. If she was aware of these options, she would have more to offer her clients.

Prothonotary Lafreniere asked the question regarding a planning group and the need to address costs. He asked for a volunteer from CBA, IBA, DOJ.

Scott Robertson will put this forward to the IBA. The law foundation is currently looking for funding proposals for grants.

The Chief Justice reiterated the availability of a Federal Court judge to assist with any other panels that may be organized on this issue, whether at CBA, IBA or other events.

Sheldon Massie offered the Department's assistance for the faculty seminar proposal.

Prothonotary Lafreniere noted that the Rules allow the court to stay a proceeding pending mediation, but the goal here is to raise awareness regarding options for parties to pursue themselves.

6. Development of Long-term Committee Agenda

Prothonotary Lafreniere asked for suggestions regarding the longer-term agenda for the committee.

CJ Crampton noted the publication of the 3rd edition of the Guidelines and implementation of the triage project. With these completed, a change of Committee chair, and new issues related to the TRC and other matters, it is appropriate to take stock regarding the work of the committee.

Scott Robertson noted that the LSUC is developing a specialization in Aboriginal law. He mentioned that many lawyers do a single case in Aboriginal law but without background either in the law or culture. It is incredibly important to have specialization, both for lawyers but also for members of the Court. The TRC, mandate letter, and UNDRIP all talk about education for everyone in the courtroom about these issues.

The Chief Justice noted that the Court has been thinking about this issue as well – he has been focusing on people on the Court with a litigation background, who are perhaps best positioned to understand the complexities of this area of the law.

Prothonotary Lafreniere noted that this is not the only bar asking for specialized judges. Maritime lawyers and IP lawyers are also asking for judges with a background in their area of law. In case management, the prothonotary often recommends that a judge with a background in the area be assigned. The court has had a couple courses recently on mediation. There is a clear benefit to the Court to having a specialized group – it makes a significant difference for hearing time if the judge is already very familiar with the specific area of law.

The Chief Justice noted that a number of senior judges are eligible for supernumerary status in the next few years – new appointments will then be needed. So the process of identifying potential candidates for appointment and encouraging them to submit their applications to the Commissioner for Federal Judicial Affairs needs to begin now.

Robert Janes raised the issue of procedural and substantive aspects of indigenous law: how will the courts deal with this? This comes up in the TRC and in academia – there is a lot of theoretical thinking and procedural thinking that is needed, rather than having an improvisation one case at a time.

Prothonotary Lafreniere noted the focus on criminal law in the mandate letter.

Robert Janes gave an example in an NEB hearing regarding use of traditional areas – witnesses could only speak to their house groups. They used panel presentations to allow a back-and-forth between different witnesses, allowing support for the Aboriginal approach. Another example was that certain things could only be spoken in front of certain witnesses, who would ensure that what was said was correct. Solutions will vary from region to region. At the substantive level, there may also be questions: what is the traditional law? Would it be treated as foreign law, as domestic law, or some other way? Perhaps the maritime law approach (ref.: assessors) could be adopted. There will be situations where the judge will need to understand indigenous law, and potentially make a ruling according to indigenous law, which itself raises many concerns. The alternative, though, is to make rulings without considering indigenous law.

Justice Shore noted that rather than only adjudicating according to indigenous laws, it is also important to look at the possibility of mediation based on indigenous laws.

*** Break for lunch ***

Paul Anderson raised a question regarding incorporation of indigenous law into the court process: is the work of this committee going to turn to development of indigenous law within the common law?

Prothonotary Lafreniere noted that there had been a dispute years ago in the committee regarding evidentiary issues. It is not the role of the committee to impose an approach on a trial judge regarding admissibility or weight to be given evidence. But we can explore issues related to procedure.

Sheldon Massie agreed with the mandate of the committee as a discussion forum with a focus on practice issues.

Andrew Baumberg noted the *legislative* reform sub-Committee of the Rules Committee, which provided a forum for discussion of 'practice issues' even if it was possible, or likely, that the solution would require a legislative amendment. Similarly, this Liaison Committee is meant to be forum to discuss practice issues even if they may require a legislative solution.

Sheldon Massie referred to the possibility of special rules – the Department is open to pursuing discussions related to the topic. There are special rules related to immigration and admiralty, each with their own history.

Robert Janes noted that the discussion regarding rules is timely. The jurisprudence is itself creating special approaches. Aboriginal law is becoming a little bit like admiralty in this sense.

Scott Robertson responded to the previous comments related to absorption of indigenous law into the common law. The history on treatment of indigenous law is not good. There needs to be a much more substantial re-think.

Sheldon Massie noted simply that this forum has limits to what it can do according to the existing statutory framework.

Andrew Baumberg referred to the background about 7 years ago from the Expert Evidence Rules sub-Committee (part of the statutory Rules Committee), and in particular the CBA aboriginal law section submissions suggesting the need for special expert evidence rules appropriate for Aboriginal law proceedings. The sub-Committee developed general rules but referred the suggestion to the Aboriginal Law Bar Liaison Committee to bring forward more concrete recommendations.

Krista Robertson referred to the assessor rule (Rule 263) as a possible avenue to explore and make a formal proposal.

Prothonotary Lafreniere noted that the assessor has traditionally been used in the maritime law field. Assessors are paid by the court.

Justice Mandamin suggested that we also consider a reference to be decided by a referee – Rule 153.

There was agreement that this committee discuss the feasibility of using these rules in Aboriginal law proceedings.

Prothonotary Lafreniere asked for concrete proposals in advance of the next meeting.

Aimée Craft proposed a discussion paper on questions of indigenous law. There are procedural court rules and similar procedural rules in indigenous traditions. We need to understand how to deal with conflicts. There may be questions as well regarding forum – what is the appropriate adjudicative forum? She thinks these questions would be well worth discussing.

Prothonotary Lafreniere added a further question: is an inquisitorial model more appropriate in some cases? Regarding class action rules, he noted that most Aboriginal law proceedings are by way of representative proceedings.

Paul Anderson referred to class action proceedings other than by representative proceeding (e.g., Horse Lake case).

The Chief Justice raised the question whether there is a constitutional basis to amend the Act to provide the Federal Court with a broader jurisdiction to enable it to assist in addressing, in a more efficient fashion, the proliferation of competing class actions that are arising across the country.

Sheldon Massie added the question regarding jurisdiction under section 17, which is limited to the Crown in right of Canada as opposed to the Crown writ large.

Justice Shore noted an example of a dispute on reserve which really was related to a much larger dispute in the community.

Prothonotary Lafreniere noted that the Federal Court is quite successful in resolving disputes through case management and mediation even in areas where the Court does not formally have jurisdiction over one of the parties.

Andrew Baumberg suggested the idea of inviting a speaker to address one or more of these topics.

Robert Janes suggested Professor Borrows, and perhaps someone who has worked with Maori indigenous law.

Andrew Baumberg noted a judicial visit many years ago from a group of judges from Ghana, who spoke to members of the Federal Court regarding reconciliation of indigenous and non-indigenous law.

Prothonotary Lafreniere reiterated the need for a concrete paper / presentation.

Chief Justice Crampton noted the discussion within the Court some years ago related to the bi-jural versus tri-jural jurisdiction of the Court. It was useful to have the discussion outside the context of a specific case.

Prothonotary Lafreniere concluded: please send short-term agenda suggestions by end of August.

In meantime, we could invite Dr. Borrows and possibly others to speak to the Committee.

Sheldon Massie suggested Professor Val Napolean be invited.

Justice Shore suggested we invite Justice North, formerly of the Federal Court of Australia, by video-conference.

Fall 2016 Meeting

Scott Robertson noted that the next meeting of the IBA is October 13 to 15 in Vancouver, with the theme "With or without them (moving forward with indigenous legal traditions)"

After some discussion, it was proposed that the next meeting be October 13 at 4 pm for an evening meeting in Vancouver. [Following the meeting, the date was subsequently changed to October 12, for a full day.]

The Chief Justice summarized Justice Mandamin's considerable contribution to the vision and work of the Committee over the last several years; and thanked him for that contribution.