Federal Court ~ Aboriginal Law Bar
Liaison Committee Meeting

Saturday, October 17, 2015

Toronto, Ontario

Attendance: Chief Justice Paul Crampton, Justice Leonard Mandamin, Justice Cecily Strickland, Justice Douglas Campbell, Andrew Baumberg (Federal Court); Professor Brenda Gunn, Scott Robertson, and David Nahwegahbow (Indigenous Bar Association); Gaylene Schellenberg and Krista Robertson (CBA); **By Phone:** Prothonotary Lafreniere (Federal Court); Julie Blackhawk, Sheldon Massie, and Paul Anderson (Department of Justice)

MINUTES

1. Welcome & Introductions

Justice Mandamin opened the meeting.

2. Review

- Approval of Agenda – approved subject to minor revision
- Approval of Minutes of Last Meeting (June 10, 2015) – approved subject to further comments in writing following the meeting.

3. Practice Guidelines

- Feedback on current Practice Direction (Judicial Review of First Nations Governance Disputes)

Paul Anderson asked for clarification regarding the scope of the Practice Direction.

J. Mandamin responded that initially it applied to disputes with bands under custom election codes. The Committee thought that it should be broader. No cases were identified involving judicial review related to Indian Act Election Regulations.

Krista Robertson noted that at the last meeting, it was agreed that this was no longer a pilot. The CBA takes the position that judicial review applications involving the Crown should be included. She recommended keeping the Practice Direction as a separate document even if it was also folded into the general practice guidelines.

J. Mandamin noted that the intention is to fold it into the guidelines to have a single point of reference. Perhaps one or two examples could be included in the annex.

Julie Blackhawk thinks the Practice Direction should be updated.

J. Mandamin noted that the Practice Direction has served to help resolve several custom election disputes.

Prothonotary Lafreniere agreed that the Practice Direction had helped get matters resolved much more quickly.

CJ Crampton noted that the item was on the agenda to hear from Aboriginal groups to see what their experience has been.

Andrew Baumberg noted that it may be a little confusing to have 2 different Practice Directions addressing the same issue. *Possibly a 'Ferguson' guide?*

CJ Crampton noted the Rules Committee initiative to rationalize practice guidelines.

David Nahwegahbow used the Practice Guidelines in the Canadian Human Rights Tribunal context for the hearing of an Elder. It worked very well, with collaboration from Department of Justice counsel. Also, he presented it for use in a Superior Court proceeding and also used it in a Federal Court proceeding – with a very positive experience. The Federal Court is leading the way in this regard.

J. Mandamin then presented the draft revised guidelines.

Julie Blackhawk noted that most of her comments from June are reflected in the new guidelines. One concern arises though, with respect to the new text:

> "The Court intends to expand the initial assessment process, *in a flexible manne*r, to extend this process to include all Federal Court proceedings that involve at least one Aboriginal party."

She would like to understand how this will be implemented in practice. Sheldon Massie expressed similar concern. The Practice Guidelines are unclear.

J. Mandamin responded that the current practice is consent based – parties may consent to enter a settlement discussion.

Andrew Baumberg noted that the triage process in the Guidelines is consent based. The Guidelines simply explain and reiterate processes that are already available via the Rules.

Aimee Craft noted that she has drafted a paper related to these guidelines, which provide valuable tools. She noted the value of having a core group of judges with experience and training in this area. She reiterated the non-prescriptive nature of the guidelines.

Sheldon Massie asked further – what is the purpose of the assessment by the Court? Is it simply to put the case into special case management to allow alternate dispute resolution?

J. Mandamin responded that putting a file into case management simply triggers a set of options for a judge to be involved, but does not in itself set a prescriptive time-line.

Prothonotary Lafreniere noted that the Court manages its cases in all areas. The court flags cases that may raise complex issues. It may be that there are inexperienced counsel or issues that are likely to occur. It is the court's responsibility to manage its caseload.

CJ Crampton added that the court must manage its scarce resources. If it can assist in bringing about an amicable resolution in a way that is sustainable, then that is a better outcome. The idea is to make an initial assessment to identify cases that are potentially amenable to such outcomes. Otherwise, they can continue down the conventional litigation path.

Julie Blackhawk noted that in some cases, ADR has been imposed in an inflexible manner.

Sometimes, the counsel is simply unable to comply.

Krista Robertson has used court assisted mediation twice – it has worked very well. In both cases, a day was set aside but was not enough time. As for the guidelines, she thought that the last phase of comments was the final polish.

CJ Crampton asked for any further comments in the next 2-3 weeks.

Sheldon Massie indicated that he could provide editorial comments in that time frame, but added that he agrees with the overall framework of the Guidelines.

Andrew Baumberg then referred to the June 2015 Practice Direction regarding complex litigation, which appears to be overlap with the Aboriginal Litigation Practice Guidelines.

J. Campbell noted that a general principle in issues around Aboriginal law is consultation.

CJ Crampton noted that the working group's mandate was to consult with the bar before preparing the complex litigation guidelines. That said, he welcomed any further input that members of the Committee may have.

Prothonotary Lafreniere added that the intellectual property bar was the initial focus of the Practice Direction, which had a very specific set of issues. The purpose of the Practice Direction was to send a message that the court would ensure that proceedings use resources efficiently and are proportional to the issues at stake. If there are concerns with elements in the Practice Direction, then exceptions can be made.

J. Mandamin recommended that the Bar take this issue back to their respective groups for consideration at the next meeting.

4. Business Arising from Last Meeting

As discussed at the last meeting, the idea was to identify faculty to speak at a seminar for the Court, and this faculty group could then be available for other external groups (such as the Department of Justice, CBA, and IBA) to provide them training and discussions sessions on the same topic. This way, each group can have its own discussions. The goal is to identify individuals who have hands-on experience with dispute resolution. Justice Mandamin asked for suggestions.

Action: Committee members are asked to contribute suggestions for this project.
Some initial suggestions: CJ Yazzie, Kathleen Lickers
Krista Robertson will follow-up regarding the Canadian Human Rights Commission case studies

Aimee Craft has a student who has done some initial research of internal ADR that is indigenous-lead. It might also be useful to have a review of cases of dispute resolution involving indigenous parties that may be Court-lead.

5. New Matters

Long-term committee agenda

J. Mandamin noted that he will be stepping down as Committee chair to focus on a major trial. A new Chair is proposed to take over the leadership role. Prothonotary Lafreniere is proposed: he has been involved in the Committee for as long as anyone, and prothonotaries have the most experience in case management and dispute resolution work.

CJ Crampton provided some background to Justice Mandamin's work on the Committee and noted that the vision he helped to develop five or six years ago had now largely come to fruition. As noted at the Iqaluit meeting last year, we now need to set a new long-term committee agenda. Oftentimes, litigants come to the Court as a matter of last-resort, leaving the perception that many potential litigants are unable to access the justice system. How can the Court assist with access to justice for Aboriginal litigants? Participants should come to the next meeting with suggested agenda items: what we should be doing, committee membership, etc.

Krista Robertson agrees that it would be useful to step back to consider the long term committee agenda as we complete a major milestone. She proposed to be more proactive with the CBA section.

Sheldon Massie responded that the request for agenda suggestions is welcome.

Aimee Craft noted a previous format of the Committee to solicit papers or presenters to engage the discussion. This is a positive model that we might want to revive. This committee was created in part out of the tension that exists between the Crown and First Nations in legal proceedings. She referred to the Truth and Reconciliation Commission recommendations that should be kept in mind, in particular regarding cross-cultural education, which is relevant to both lawyers and judges. She also referred to the recommendation to develop indigenous dispute resolution institutions.

Paul Anderson asked if Aimee Craft could provide instructive example of ongoing points of tension in Crown – First Nations practice.

Scott Robertson will also canvas IBA membership for examples.

*** The meeting ended early due to a fire alarm in the hotel. ***