Federal Court ~ Aboriginal Law Bar Liaison Committee

October 31, 2019 Ottawa (Ontario)

MINUTES

Court: Chief Justice Crampton, Justice Favel (Chair), Justice Lafrenière, Prothonotary Milczynski; Teleconference: Justice Strickland, Prothonotary Ring
Courts Administration Service - Legal Counsel / Law Clerks: Andrew Baumberg (Secretary), Ian McRobbie, Cheyenne Neszo, Isabelle St-Hilaire
Special Guests / Speakers: Prof. Aimée Craft (U. of Ottawa), Ross F. Earnshaw (President, Federation of Law Societies of Canada), Frederica Wilson (Deputy CEO and Policy Counsel, Federation of Law Societies of Canada), Malcolm M. Mercer (Law Society Treasurer of Ontario), Dianne Corbiere (Chair of the Ontario Law Society Equity and Indigenous Affairs Committee)
Indigenous Bar Association: Scott Robinson; Paul Seaman (by phone)
Canadian Bar Association: Gaylene Schellenberg; Robert Janes (by phone)
Advocates Society: Karey Brooks (by phone)
Department of Justice (Canada): Sheldon Massie, Paul Shenher, Eden Alexander, Eric Gingras.

1. Review Agenda

The Chief Justice thanked Justice Lafrenière for his work over many years as Chair, and Justice Favel for taking on the role at this meeting. The Chief Justice then made further comments:

- Strategic Plan: the Court has conducted a consultation process for the Court's next strategic plan. Comments, if any, should be submitted as soon as possible. The two key priorities for the previous strategic plan were access to justice and modernization, which of course have some overlap. Initial input on the 2020-25 plan would prioritize a shift to an electronic court, with e-hearings, full e-filing/records, e-scheduling, some online access to court records and online dispute resolution. It has also been suggested that we explore how, if at all, the Court might be able to use AI in appropriate cases (e.g., mediation).
- A new Court website was launched.
- Scheduling: 1-2 day hearings (early 2020); 3-5 day hearings (late Spring / Fall 2020), longer trials (Fall 2020).
- Judicial complement: Over the course of the last year, the first Associate Chief Justice was appointed (ACJ Gagné); as well as Justices Pamel, McHaffie and Fuhrer; Prothonotaries Molgat and Furlanetto. New positions were created in the federal budget; the Chief Justice encouraged leading members of the Aboriginal law bar to apply for judicial appointment.
- Rules Committee vacancies were recently filled, including Krista Robertson, a former CBA representative on this Committee.
- Quebec pilot: on consent, Quebec lawyers in an action will be able to use Quebec Rules of Civil Procedure.

Scott Robertson was encouraged by the publication of an indigenous language summary in a decision issued by Justice Grammond earlier this year.

The Chief Justice noted challenges in another recent case to find a translator.

Justice Lafrenière made reference to the many Notices to the Profession – the Court is working to review and rationalize these.

Mr. Earnshaw asked whether the Quebec pilot would extend to other provinces.

Chief Justice Crampton recognized that there are some counsel who are less comfortable with the Federal Courts Rules. However, these Rules are more similar to the Rules in common law provinces, so only Quebec Rules are included in the pilot for now. But the question is on the table.

Paul Seaman asked whether there is any engagement with DOJ on AI.

Chief Justice Crampton: we have had Professor Daly speak to this topic recently. There are many issues with administrative decision-making using AI, but for now, the Court is simply "blue-skying" the option.

Sheldon Massie agreed with Scott Robertson's remarks regarding the indigenous language summary and looks forward to seeing more feedback on this.

2. Adoption of Minutes of June 19, 2019

Add Prothonotary Milczynski to attendance list (under regrets).

3. How To Make Space for Indigenous Legal Traditions

Justice Favel noted that this item has been a recurring theme for the committee.

(a) Where Bears and Rivers Speak

Aimée Craft, Assistant Professor (Faculty of Law, University of Ottawa)

There is an important historical context as well as evolving thinking on indigenous legal traditions, with many examples of First Nations developing and codifying laws, sometimes using common law frameworks, sometimes using more spiritual and ceremonial frameworks. One sees a wide spectrum of laws and modes of implementation, as well as development of institutions of indigenous law. In passing, note that the Department of Justice has a call for funding requests related to revitalization of indigenous legal institutions. [e.g., https://www.justice.gc.ca/eng/fund-fina/jsp-sjp/pfo-pfc.html] These laws and institutions are not static, historic entities frozen in time, but evolving systems.

All of this is an immense work that has been undertaken by indigenous communities for a very long time. The question then becomes: *what is intelligible and can be understood by other contexts, including a Western legal system and the Courts in Canada?*

Professor Craft proposes to focus on emerging trends – the idea of what at first may appear less intelligible to a Western eye but turns out to be essential in the development and recognition of indigenous legal orders.

The presentation today will focus on: legal responsibility to non-human beings, spiritual sources of law, the dependency on place, and indigenous legal jurisdiction. All of these trends are important in the recognition of indigenous legal orders.

There is a need to distinguish / understand substantive as well as procedural law – both are equally important. Substantive law is never separate from how you live your life.

Reference to the Yellowhead Institute, which just recently released its Land Back paper. [See: https://yellowheadinstitute.org/2019/10/24/preface-landback-redpaper/ and https://redpaper.yellowheadinstitute.org/] First Nations have reaffirmed their connection to land / territory regarding environmental protection.

When rivers and bears speak: when indigenous peoples speak their law, are courts able to engage with the spiritual dimension? Is there an ability to connect with indigenous peoples' dependency on place in the legal system? Which laws apply when there is a conflict? Which are privileged? What is the appropriate forum?

Modernization is important, but the other end of the spectrum is also important: get out of the courtroom and onto the land. Regarding revitalization of indigenous law and indigenous peoples' agency: will it be recognized?

Courts, judges, and administrative decision makers are "facilitators of law." Facilitation of the exercise of law and facilitation of indigenous process – these are more common in the criminal law context, such as sentencing circles, which also recognize the jurisdiction and authority of indigenous legal institutions.

True reconciliation will place equal value on both indigenous and non-indigenous law. *Delgamuukw v. British Columbia*[a] gave equal footing for evidence of the aboriginal perspective, even though it might not appear in the same form. The Truth and Reconciliation Commission Report requires revitalization of indigenous laws and institutions. However, the concept of reconciliation is problematic in law – it has actually been used to justify infringement. If it is to be used as a catalyst for balancing the indigenous legal perspective, then there is a need to explore the indigenous legal order -- there is treatment of this in the *Tsilhqot'in Nation v British Columbia*[b] decision.

The question then becomes the intelligibility of indigenous law and what it looks like. This can be challenging – an example from the field of health was provided: a review in Manitoba of health and wellness from the indigenous perspective showed very different criteria e.g., the western notion of wellness as lack of ill-health, whereas the indigenous perspective focusses on positive criteria. This displayed a paradigm shift, which is also needed in the legal field to understand the indigenous perspective (e.g., land relationship rather than ownership).

Example: the case involving the Standing Rock camp, in the context of a legal decision allowing a pipeline under the river rather than near a non-Indigenous urban area. The camp showed the exercise of jurisdiction by the Dakota peoples – there were protocols regarding their role as water protectors, and inter-nation law was applied in the territory. Western values and legal orders (e.g., trespass) were used against the people on their land. Two sets of laws applied in the territory, resulting in a conflict – the people cannot abide by both sets of laws. Question: how to articulate indigenous law externally?

Example: the case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*[c] – this is a recent engagement with indigenous laws, but it is not explicit. Indigenous laws are not mentioned. It shows the inability of western legal systems properly to engage with the indigenous legal order and its spiritual dimension. The importance of the Grizzly Bear Spirit was raised only late in the consultative process, but the reasons for this were not clearly explored. There are underlying reasons – the timing, content, and process for disclosure related to the Grizzly Bear spirit are part of the indigenous legal order. The Ktunaxa may have had good reasons for limiting their disclosure on the issue.

The case raises important substantive and procedural questions regarding the test – the strict Canadian test for freedom of religion was applied in an indigenous context, even though there is a problem with equating religion and spirituality. The Court completely set aside Ktunaxa law and concepts, including the timing of the Ktunaxa decision that accommodation was not possible, in favour of a western legal understanding, without doing so explicitly.

The Court is effectively saying that there is no positive obligation to protect the indigenous spiritual connection to land. This has important ramifications for the application of indigenous laws, which are so closely connected to land and water. This appears to conflict with how Canadian constitutional law has developed regarding consultation and title. Normally, in spaces that have a particularly important spiritual and sacred connection, they are given special protection. Here, it is the absolute reverse. There are limitations to what Canadian law can do. Here it is applying something that deeply betrays the indigenous legal order and undermines the broader reconciliation goal.

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[a] [1997] 3 SCR 1010
[b] 2014 SCC 44
[c] 2017 SCC 54

Water

It is unclear who has jurisdiction over water, in part due to historic arrangements, in part due to the inability to control it. e.g., the Lake Winnipeg watershed traverses 4 provinces and 4 states. Indigenous thinking is that water has jurisdiction and defines itself.

There is a significant difference between the indigenous and western legal traditions. The Western legal tradition gives priority to individualism and property. The process of decision-making will be a function of underlying system. The Ojibwe word inaakonigewin signifies pointing toward something that has meaning, and the legal tradition focuses on a complex system of relationships. The relationships in inaakonigewin are not limited to those between "persons". Legal relationships between beings are structured on the basis of spirit. Spirit and life exist beyond the human indicators of breathing entities, and far beyond the human realm. For example, rocks, trees and water are all beings with whom Anishinaabe are in legal relationships. We need to think about how responsibilities are engaged in cases involving these relationships, though the style of case can be complicated – e.g., litigation guardians etc.

We also need to understand laws that come from different sources. Anishinaabe inaakonigewin has four layers: Spiritual law, Laws of Nature, Customary law, and Human & Deliberative law (on the outer shell). However, in the Western system, that shell is the core of the legal system.

UNDRIP article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The rights of water (in the forms of water bodies, waterways and nature as a whole) and/or the legal personhood of water have been recognized in various contexts internationally. Such recognition includes legislation, court rulings (and ongoing claims) and constitutional affirmations.

- Whanganui River, Aotearoa (New Zealand) – Act of Parliament (2017)
- Ganges and Yamuna Rivers (India) – High Court ruling (2017) requires application of human rights to the Ganges River
- Atrato River (Colombia) - Constitutional Court (2016)
- Colorado River – claim in Colorado District Court (USA) (Fall 2017)
- Colombian Amazon – Colombia Supreme Court (January 2018)
- Rights of Nature in Constitution (Ecuador) (2008)
- Rights of Mother Earth Law (Bolivia) (2010)
- Te Urewera (2014)
- Bangladesh – Supreme Court (2019)
- Lake Erie – city of Toledo vote (2019)
- Klamath River – Yurok Tribe resolution (2019)

There was reference to a CEC report highlighting the different approaches to environmental assessment related to water: "Given that a WSK environmental assessment seeks to find no residual effects after mitigation on individual VECs, when viewed from a global ecosystem perspective, this can be seen as a flawed process. ATK, on the other hand, places paramount importance on protecting the whole of the ecosystem. Incorporating the two approaches could well provide great benefits to our environment."

Closing question: *is it appropriate for indigenous laws to be applied or simply recognized by the Courts?* Indigenous laws are alive and dynamic. They must be applied. In some cases those laws will be argued in the courts, raising questions of interpretation, evidence, conflict of laws. Ermine and Crowshoe speak about the "ethical space" between two conflicting legal systems. *Where is that ethical space?*

The Chief Justice referred to the earlier comments regarding "facilitating indigenous processes" and, in particular, the religious component: how is one to distinguish between the traditional concept of separation of Church / state and these notions?

Professor Craft: there is a difference between religion and spirituality, though it is a complex discussion. This is part of the reason why these need to be engaged and addressed by indigenous peoples themselves, rather than decided externally. It is questionable whether this can be brought to an outside forum.

The Chief Justice asked whether these issues can be framed in a way that distinguishes them from other groups' connection and claims to land. In this regard he mentioned some notorious disputes abroad that have land claims and religion at their heart.

Professor Craft: there is a valid distinction based on s.35 and the honour of the crown. If evidence is to be given equal weight, then there is a need to explore indigenous legal orders themselves that are directly relevant to the context of the case.

Scott Robertson: the Ktunaxa case is a cautionary tale for counsel.

Professor Craft: it is an example of what has to be kept out of an administrative decision-making process. The procedural aspect of the Ktunaxa legal order was not properly understood or considered.

Cheyenne Neszo referred to the Quebec pilot project, which is open only to parties represented by counsel who are members of the Quebec Bar. For cases that raise issues regarding indigenous law, is it an obligation for counsel to be well-versed in the indigenous law?

Professor Craft: each grouping of nations in each tribal region will have different decision-making process. There are also major issues regarding impediments of resources, time, cost. Legal counsel are now expected to be multi-juridical – this is a lot to ask of someone who is running a legal practice. However, there is a changing legal landscape – e.g., BC law is now recognizing UNDRIP.

Eden Alexander referred to the metaphysics of law per Borrows and others; is there an obligation on Courts to understand the metaphysics of common and civil law?

Professor Craft: what is more important is to understand the ethical spaces *between* indigenous and non-indigenous law – e.g., the work of Leroy Littlebear regarding the theory of flux, how everything is changing. It is important to understand the places of connection.

Justice Favel proposed the creation of a sub-committee to review the spectrum of issues and scope out concrete recommendations to move forward.

Scott Robertson endorsed this proposal and volunteered to participate.

Karey Brooks volunteered to participate.

Paul Shenher would like to review this within DOJ but should have an answer later today.

Andrew Baumberg: perhaps an academic member?

Professor Craft volunteered to participate.

Gaylene Schellenberg will canvass the CBA.

Robert Janes agreed with this proposal.

> **Action:** creation of an Indigenous Law sub-Committee mandated to develop recommendations for the Committee. Participants include Scott Robertson (IBA), Karey Brooks (Advocates Society), Eden Alexander (DOJ), CBA (participant to be confirmed), Professor Aimée Craft (academic), Andrew Baumberg (Secretary).

(b) Outreach Discussion

Ross F. Earnshaw, President, Federation of Law Societies of Canada
Malcolm M. Mercer, Law Society Treasurer of Ontario
Dianne Corbiere, Chair of the Ontario Law Society Equity and Indigenous Affairs Committee

Justice Favel noted a preparatory call to invite ideas from other organizations to get wider involvement.

Scott Robertson acknowledged the discussion over many years. The Practice Guidelines are a good step, but we are somewhat isolated. There are other institutions and parts of the justice system that need to be engaged.

We are looking for ideas about what can be done – together, much more can be created. We can improve the justice system, but want to focus on the people who use it.

Mr. Earnshaw: the law societies are regulators, so different from the CBA, IBA etc. The Federation works by consensus – it coordinates among the law societies to further common principles. He referred to TRC Calls to Action (CTA) 27 and 28 regarding cultural competency training in institutions and continuing legal education programs. The Federation created a TRC Advisory Committee, which continues its work. We are on a learning curve and have engaged with law societies to see what they have been doing – more work is needed. The Federation can best assist via communication inroads across the country – e.g., provision of statistics etc. There have been challenge related to creation and operation of the Advisory Committee. There is also an ongoing issue related to approval of the common law school curriculum, and a possible requirement for cultural competency. This needs consultation. A possible focus of Advisory Committee is on the work of the law societies.

Cheyenne Nezco: in law school, there is a need to distinguish between Canadian Aboriginal law and Indigenous law in the curricula.

Mr. Earnshaw: the Federation does not dictate what is included in law school programs. An early suggestion in this direction was met with resistance. A collaborative process is needed.

Mr. Mercer: the Law Society does not micro-manage law degrees. Academic freedom allows experimentation / evolution. However, the Law Society accredits law schools. For practicing lawyers, LSO focuses on competency and conduct. This includes continuing professional development as well as certified specialists. On the conduct side, there is a help line and Rules of professional conduct. There has been outreach and advocacy on the rule of law, an indigenous framework has been adopted, and following one particular disciplinary panel, the review panel re-assessed its processes related to lawyers' relationship with indigenous clients.

Dianne Corbiere: the LSO Committee looked at the Federal Court Aboriginal Litigation Guidelines regarding treatment of Elders, and promotes the Federal Court's work as an example of how to do things better. She encourages continued work of this Liaison Committee on indigenous legal orders. She has used effectively the Guidelines twice in Ontario Superior Court regarding the role of Elders in the judicial process – one case in Sudbury and one in Thunder Bay.

There has always been reliance on indigenous law, including the ceremonial aspect. This is not prescriptive in the sense of being preached to. Indigenous peoples would never have entered treaty without indigenous law.

Regarding CTA 27 and 28: the goal is to ensure that students are taught indigenous law. There was ceremony in the Ontario Superior Court, both outside and inside the Courtroom. At first, there was discomfort, but the process evolved. An eagle staff was in the courtroom throughout. There were songs

and ceremony outside at first, then inside. It is important to have both common law and indigenous law *inside* the courtroom.

Chief Justice Crampton: Requested that we be provided with the details of these examples from other courts for discussion within the Federal Court. Also, please advise on how important the timing / location of such ceremonies is for parties.

Dianne Corbiere: at the treaty talks and signing, sacred indigenous laws were present. We would never have entered treaty without our laws. We tried to do this at the Ontario Court of Appeal, which allowed a flag but nothing else, with no reasons provided. We look to the Federal Court to engage this issue.

Chief Justice Crampton raised a question regarding the potential of precedents from the indigenous context being argued by others in a non-indigenous context. Could res judicata be applied in respect of a prior determination by an indigenous decision-making body, such as might be contemplated by a customary band code?

Professor Craft: according to the SCC, indigenous laws are part of the indigenous perspective that needs to be recognized. Also, they are protected by section 35.

Scott Robertson made reference to the Ontario trial, which moved around four different locations, including two within the First Nation. Over the course of one week, there were feasts that included Crown lawyers – this is justice in a non-adversarial setting that includes full community and indigenous law.

Eric Gingras: in response to the earlier question as to how / why indigenous precedents would be treated differently than others, the answer is s 35. Indigenous peoples were here first, and s 35 provides protection for the indigenous way of thinking. Reference was made to the "principles" that have been adopted regarding the nation-to-nation relationship. When Courts are dealing with these parties, it is trying to resolve a dispute between two nations. If you send a diplomat to another country, he/she will first learn the culture of the other country before bringing issues for resolution. We need to remember that there are two different nations in the dispute. Substantive law is relevant, of course, but procedure is also very important – it brings forward the relationship between two nations – how to present evidence, but also how to frame the relationship.

Justice Favel gave two examples: one in Charlottetown, with smudging (an internal dispute, so everyone agreed); the second case was in an Inuit community. It is preferable if counsel can work out the proposal jointly and then present it to the Court.

Chief Justice Crampton: the Court has found it to be much easier to make space on procedure than the substantive side, which requires further engagement and clarification of the substantive content in question.

Dianne Corbiere: there are many people who are trained in common and indigenous law, but few are able to articulate this before the courts. This is part of the reason why law schools are hesitant. We still need trainers for cultural competency.

(c) Report of Communications sub-Committee

Paul Shenher reviewed sub-Ct discussions, which have generated some good ideas, and the proposed communications plan. A key challenge: what is it that the Committee wants to communicate? There are many big ideas, areas to improve regarding knowledge of guidelines, and other opportunities to engage and incorporate indigenous law. It is a big topic, so we need to check in with the Committee to get goals / vision for a project management plan.

Chief Justice Crampton: a number of things keep coming up in the Committee, including the lack of wider awareness of its work. We have many different options and resources available within the Court,

but there are many examples of options that are not well known. Public awareness is therefore a key plank in the Committee's mandate, but also to get more input from a broader spectrum of stake-holders.

Paul Shenher: the Chief Justice's goal is a little broader than the items in today's agenda, but this is helpful feedback. He added that his colleague Pamela Large-Moran has prepared a draft presentation.

Andrew Baumberg: there are many concrete proposals from the sub-Committee. [A draft list was circulated on-site.]

Sheldon Massie noted the connection between the Federation / LSO presentation and the work of this sub-Committee.

Justice Favel noted the proposal to develop a town hall session similar to that in the IP bar.

Chief Justice Crampton: the Court would like to do that type of session with the Aboriginal law bar, which provides unique opportunities for members of the bar to raise new issues and for the court to respond to questions.

Paul Shenher suggested a presentation to the Bar with an overview of the Committee's work.

Justice Favel: there is a challenging travel component, as it depends in part on judicial assignments, which sometimes settle at the last minute.

Chief Justice Crampton: ideally, the town hall would be on the margins of a conference.

Gaylene Schellenberg: the CBA has a Section webpage and newsletter, which reach all section members (1400). There are periodic blast emails. At a conference, we could provide information / materials about the Committee at the registration table.

Chief Justice Crampton: perhaps a USB key could be provided with resources?

Paul Shenher: we need key messages across different media, some for email distribution and more detailed presentations for a conference setting.

Sheldon Massie: the Department can assist, though if there is a town hall, early notice is helpful.

Scott Robertson made reference to DOJ training days – this could be considered.

Eden Alexander: there was a proposal for a webinar panel discussion in November on indigenous legal traditions. The panel webcast is now targeting February, which will touch on the work of the Committee, bringing in the internal training process.

Paul Shenher: the sub-Committee can continue to work on this range of "push-pull" materials before year end so as to target the various upcoming events.

Andrew Baumberg agreed, though suggesting a need also to focus on identifying local members of the Bar to help organize CLE events.

Gaylene Schellenberg noted that the CBA has members in every province.

> **Action:** the Communications sub-Committee is to hold a follow-up meeting and continue its mandate.

(d) Decision Summary in Indigenous Language

Justice Favel: this is now included in a proposed revision to the Practice Guidelines.

> **Action:** Indigenous Language Summary (Practice Guidelines) at point (c) -- remove "optional" from the entry. Simply indicate that the Court will make arrangements through the Translation Bureau in the absence of any suggestions from parties.

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

Andrew Baumberg: the framework endorsed by the Committee is now included in the revised draft

Practice Guidelines.

Action: assessor framework -- add "or traditions."

Karey Brooks: Robert Janes has done a follow-up with members of the advisory group. There has already been a positive response from many of the members.

Sheldon Massie: please circulate the list of names of Advisory Committee members.

Action: Andrew Baumberg to circulate the list of names of Advisory Committee members to the Committee.

5. Framework for Receiving Oral History evidence

Paul Shenher provided background on the Oral History Protocol. He reviewed the new section "Terms and scope" which is not meant to be prescriptive, but to remain flexible. Also, the word "Indigenous" is used regarding the Indigenous group, rather than "Aboriginal," which is used to refer to the body of Canadian Aboriginal law. He closed by acknowledging the excellent work of the Federal Court clerks last year to develop this draft. He would like to review this one last time within the Department of Justice before it is finalized by the Committee.

Cheyenne Neszo suggested a review of B.C. indigenous tribunals.

Paul Shenher referred to Dianne Corbiere's mention of recent Ontario cases, which raises the question as to timing for updating the Protocol.

Andrew Baumberg: there is no set time-line for updates to the Practice Guidelines, which can be updated from time to time when useful.

Prothonotary Ring congratulated the sub-Committee – this is a significant improvement over the initial approach, which attempted to get a consensus on a fixed set of guidelines. This flexible model, which provides a set of options, is preferable. It also provides good knowledge capture of protocols that have been agreed upon by parties.

Chief Justice Crampton: the purpose section may need some minor wordsmithing.

Paul Shenher: the Department needs about 2-3 months, but should be ready by end of January.

Justice Favel agreed with the time-line, and noted that any further feedback can be reviewed by Committee at that time.

Paul Seaman: regarding nomenclature, is there a meaningful distinction between oral history and oral tradition evidence? He referred to Justice Vickers' decision. Also, regarding the reference to a deposition protocol for a panel of Elders giving evidence, see 2019 BCSC 10.

Paul Shenher: we tried to capture both terms (oral history and tradition) in the Terms and Scope section. Those distinctions can be tracked case by case. He will review these comments and provide further feedback. On the second point, he will review the issue with Robert Janes – we can explore the option for a panel of Elders.

Scott Robertson: both individual or panel options should be available.

Paul Shenher: we will lean towards being open and broad in interpretation.

Scott Robertson will review this within the IBA.

6. Scope and Cost of Aboriginal Litigation

Prothonotary Kathleen Ring provided background on the development of the survey, citing Robert Janes, who had indicated at one Committee meeting that one of the biggest challenges for litigants is the scope and cost of Aboriginal litigation. She noted the feedback so far is that this draft survey is too long, with

which she agrees. It might need to be scaled back. She noted Robert Janes' recommendation at the last meeting to keep a focus on the volume of historic documents.

Sheldon Massie agreed that it is still too long. He added that if there is another item to raise, it would be bifurcation.

From a process management perspective, Paul Shenher would be interested in the information (ranking from 1-5 regarding parties in action, etc.), but did the sub-Committee consider options for a more abbreviated survey that might be more accessible? Perhaps include fewer factors and simply an opportunity to comment?

Eric Gingras: depending on the level of experience, it will be hard to provide useful feedback on all issues. For those with detailed experience, and who face challenges in this practice area, there will be an incentive to provide comprehensive feedback so that practice issues can then be fixed.

Justice Favel asked the sub-Committee to assess the Committee's feedback and take another look at the survey.

Prothonotary Ring asked for specific feedback within three weeks.

Andrew Baumberg could circulate a request to Committee members asking for handwritten notes, or an electronic version with highlighted sections that could perhaps be removed.

Prothonotary Milczynski: what is the purpose / who is audience?

Sheldon Massie suggested a possible distinction in the scope of the survey according to the experience of the lawyer filling it out.

Ian McRobbie: there are options to allow survey takers to select which parts to complete.

Andrew Baumberg: if pursued, should this change the proposal to cut the survey back?

Paul Shenher: perhaps we could focus on a limited number of lead and sub-questions?

Ian McRobbie: there is a need for a higher-level graphic of all the sections so that users can then select what they want.

Andrew Baumberg proposed a call with Susan McDonald to explore options for high-level overview, completing only some of the categories, etc.

Prothonotary Ring agreed. Set up a call shortly after the 3-week timeline for comments. Many practitioners only focus on trials or on judicial review, and should have the option to focus on just one section.

> **Action:** Andrew Baumberg to arrange follow-up call to explore new options for the completion of the survey.

7. Electronic Trials

Justice Favel noted the new reference to webcasting in the draft Practice Guidelines.

Andrew Baumberg: an e-trial Practice Direction is under development. Might there be interest in pilot cases for hearings on judicial review applications? For example, the Immigration Bar has an e-process pilot, which has uncovered a key challenge for the IMM bar: it needs e-process training / transition for single practitioners / small firms. They need support / training programs. Also, there is an issue with the legal aid tariff, which appears to favour paper-based processes.

A key question: the Court is in year one of its five-year project to replace its records management system. As it shifts to e-processes, is the Bar ready? Are there special issues that need to be addressed that are particular to the Aboriginal law practice area?

Paul Shenher will bring this to the Department's evidence management group.

Eden Alexander: this raises a question for Northern communities – do they have the infrastructure?

Andrew Baumberg: there is no need for major infrastructure to e-file documents or to conduct at least smaller electronic hearings.

8. Common list of authorities

Andrew Baumberg provided the background regarding the original Common List, which is now out of date. Although initially meant to avoid the repeated copying of common cases, this will soon be addressed by a Rule amendment providing a blanket exemption for any decision that is available in a free online database. Is there interest in maintaining the list for some other purpose, as some other Liaison Committees have done?

Eric Gingras – yes, there are self-represented litigants who could benefit from this type of resource.

> **Action:** each member of the Committee is to inquire within their sections regarding interest and volunteers for updating / re-organizing the Common List of Authorities.

Justice Favel: we will inquire within the Court.

9. Varia

Eden Alexander volunteered for the new sub-Committee (indigenous legal traditions).

10. Spring 2020 Meeting

Next in-person meeting: June 24 – Halifax.

> **Action:** Andrew Baumberg to survey members regarding a possible teleconference in early 2020.