Federal Court ~ Aboriginal Law Bar Liaison Committee Meeting	Cour fédérale ~ Barreau - droit des autochtones Réunion du comité de liaison

Wednesday, September 28, 2011
Ottawa, Ontario (with Teleconference access)

MINUTES

ATTENDANCE

In Person

1. Elder Stephen Augustine (Curator, Museum of Civilization)
2. Virginia Sarrazin (Legal Counsel, Museum of Civilization)
3. Chief Justice Lutfy (Federal Court)
4. Acting Chief Justice Noël (Federal Court)
5. Justice Lemieux (Federal Court)
6. Justice de Montigny (Federal Court)
7. Justice Mandamin (Federal Court)
8. Justice Crampton (Federal Court)
9. Prothonotary Lafreniere (Federal Court)
10. Aimée Craft (CBA - Manitoba)
11. Gaylene Schellenberg (CBA HQ)
12. Kathy Ring (Department of Justice)
13. Ron Stevenson (Department of Justice)
14. Sheila Read (Department of Justice)
15. Julie Blackhawk (Department of Justice)
16. Andrew Baumberg (Executive Officer, Federal Court)
17. David Peltier, Law Clerk to Justice Mandamin

By Teleconference

18. Diane Soroka (CBA - QC)

MORNING SESSION

An opening Prayer was offered by **Elder Stephen Augustine**. He offered a remembrance for Elder Marge Friedel, an active member of the advisory committee, who passed away on September 6, 2011.

Justice Lemieux welcomed participants. The agenda and minutes of April 27, 2011, were approved.

Revised Judicial Review Guidelines / ADR Project

Justice Lemieux provided background on the draft paper and a summary of comments received from the Canadian Bar Association (CBA). He noted, in particular, a suggestion that the guidelines should also apply to disputes involving non-aboriginal parties. However, upon consideration, the focus of the practice guidelines (i.e., community involvement in dispute resolution relying on indigenous laws and traditions) would not necessarily apply in such cases.

The IBA has not commented yet on the guidelines, pending a consultative meeting of aboriginal Elders. The Court has confirmed funding to allow for this consultation.

Ms. Read has been monitoring the Court's caseload, noting consistent levels of new proceedings relating

to governance disputes. In response to one comment from the CBA re instituting a stay of proceedings to allow traditional dispute resolution bodies to engage the issue, she took the view that these mechanisms were usually in play before the dispute arrived in Federal Court.

Justice Lemieux provided an example where an adequate alternate dispute resolution body did exist. In such a case, any judicial review (if necessary) could be from this other decision-making body, rather than from the first-level decision. Similarly, in election disputes, there is an appeal body that usual exists under the election code adopted by a First Nation (e.g., Elections Appeal Board). These existing dispute resolution bodies should be engaged before a proceeding is brought to the Federal Court.

Ms. Craft noted that wherever such mechanisms are available, they should be engaged, even if they are not specifically mandated to address the dispute.

Ms. Read questioned how a dispute involving a non-aboriginal party could be mediated by a mediator from the community involved.

Justice Mandamin noted an example of a Siksika mediation training program that allowed for accredited mediators. They have also trained a group of senior members of the community to act as arbitrators, whether the dispute involves members of the community or is mixed. As long as the mediator is neutral to the cause, this is acceptable. He added that there is a need to have on-going training and recognition of First Nations election codes. Judicial review proceedings that occur in the community serve this purpose: to increase the long-term adherence by community members to their own laws. The First Nation's process for reaching a decision would include all those who are affected.

Prothonotary Lafreniere added that an agreement in the community has much more value for community members.

Justice de Montigny questioned how mediators from the community could be directly involved in disputes such as 'duty to consult' cases, which typically involve complex legal issues.

Justice Lemieux noted that usually a prothonotary or judge would be involved in such disputes between the Crown and a First Nation.

Elder Stephen Augustine noted that the typical alternate dispute resolution process is developed by lawyers and is still quite foreign to First Nations. Existing First Nations processes include circles, where participants talk to the fire rather than directly at each other.

Prothonotary Lafreniere noted that we simply want to ensure that all alternate dispute resolution processes are explored before going to a full adjudication by the Court. Rule 390 specifies that a matter can be stayed if the parties agree.

Justice Mandamin noted that governance disputes serve as a starting point, but there are other types of cases that exist. The Court can stay the matter pending discussions and community-based dispute resolution, or it can remain involved to assist with these processes. He gave an example of the Siksika provincial court family disputes, which he described as 'judicial dispute resolution,' in which the judge attended, gowned, along with the traditional community mediator. If there was an agreement acceptable to the Court, the judge would then endorse it by a Court order. Although not a primary player in the mediation, the judge could provide an evaluation of the merits of the different positions to assist the parties in understanding how it might be adjudicated if it were to go to Court.

Justice de Montigny asked how the judge would respond to a situation if the agreement proposed by the parties was considered to be unacceptable.

Justice Mandamin noted in 11 years of Native Youth Justice Committee's recommendations there were only two examples of cases that were not accepted by the judge.

Ms. Read questioned the guideline's "encouragement" of dispute resolution processes in cases involving both Crown and aboriginal parties. There was concern with slowing down these guidelines pending drafting of specific guidelines tailored to disputes involving the Crown and First Nations.

Ms. Craft noted that use of mediation techniques is at the discretion of parties. She sees no problem.

Mr. Baumberg added that, similar to the Phase I practice guidelines, the phrase at page 2 par 6 could be qualified that, to the degree they are useful, the principles and procedures available in these guidelines could be considered by parties. Specific procedures can be included in the guidelines at a later date.

Justice Lemieux added that wherever it appears that dispute resolution mechanisms have not been fully explored, if appropriate the Court should refer it back to the community.

Ms. Read expressed concern with specific reference to the Crown as a party.

Ms. Ring noted the Department's strong support for ADR. The only concern is that the guideline recommends use of the specific ADR practices set out even in cases involving the Crown. Given that the specific practices focus on mediators from the community, this raises questions re apprehension of bias and independence of the mediator.

Mr. Augustine noted that concerns re apprehension of bias work both ways. He added that the Elders are to meet later this Fall to consider the guidelines, so there is still time.

Justice Lemieux offered to make further revisions to the guidelines to address some of the concerns expressed. However, the settlement process is generally on consent in any event.

Mr. Baumberg noted the mandate of the committee to develop "best practices." It is useful to develop such practices for the guidelines, both for aboriginal and non-aboriginal litigants.

Prothonotary Lafreniere noted that in some cases, neither party wants to propose settlement talks. However, sometimes they thank the Prothonotary for doing so.

Mr. Baumberg asked re automatic case management. How do we implement these guidelines unless the Court takes some initiative to push case management in these cases?

Prothonotary Lafreniere gave the example of NOC cases, which must be heard within 2 years. The Registry does a triage on these cases to refer them to the Court for case management.

Ms. Ring noted that in cases involving the crown, generally the Crown asks for case management. There are usually 3 parties: the Crown, the First Nation, and the developer. The latter two parties usually end up in settlement talks without the Court and Crown being involved.

Mr. Stevenson suggested that application of the guidelines to the Crown should be put in a preamble:

- the guidelines build on the Court's existing rules and practices re ADR

- the Bar Liaison Committee recommends a focus on governance disputes
- there is a hope that all parties will benefit from the experience that develops

Re residual authority of the Court, it is appropriate for the Court to give room for parties to apply indigenous law. However, in some cases (e.g., *Corbierre* re voting rights on reserve) that involve broader Canadian law, the Court may need to be involved.

Mr. Baumberg suggested that the Bar consider the best way to implement the practice guidelines, including the question of automatic case management and marketing in the bar, pilot cases, etc.

Justice Mandamin noted that in response to the suggestion that the Crown ought not be referenced, we should not be shy to refer to the Crown. There is a precedent from the Supreme Court which references the Crown's role in negotiating settlements.

Mr. Augustine noted a reference on page 5, step 5, regarding a prothonotary conducting dispute resolution. There is no indication of funding to help develop appropriate dispute resolution mechanism.

Justice Lemieux responded that usually each party bears its own costs.

Ms. Craft set out a checklist of elements for consideration by parties developing a dispute resolution conference, which are included at the end of the draft.

Mr. Stevenson suggested that these could be incorporated in paragraph 7, top of page 3, or paragraph 8.

Complex Judicial Review Proceedings

Justice Lemieux referred to the paper by Ms. Read, noting that the standard process in the Federal Courts Rules for judicial review applications has very strict time-lines. Prothonotaries are usually involved in complex proceedings that require flexibility with respect to the timelines.

Ms. Read noted that the purpose of the paper was to encourage the committee to begin thinking about the proposal and possibly develop practices for such complex proceedings.

Justice Lemieux recommended that for complex aboriginal law judicial review proceedings, case management should be automatic. He referred to comments by the Chief Justice re moving directly to the merits of the case on an expedited basis and avoiding interim injunctions.

(short break in recording)

Prothonotary Lafreniere noted that the decision to 'relax' the time-frame should not be automatic – it requires consideration of the issues in play. In some cases, the issues in play require that the time frame be abridged, whereas in others it can be expanded. It depends on the issues. Parties should request case management to establish a schedule rather than requesting changes on an ad hoc basis.

Justice Lemieux noted that the recommendations in the paper can be accomplished in case management. The paper could simply be circulated to members of the Bar for possible use in specific proceedings.

AFTERNOON SESSION

Justice Lemieux paid tribute to Chief Justice Lutfy's support of this Committee.

Chief Justice Lutfy recognized the involvement of his colleagues in the Committee's work, as well as that of public and private practitioners.

Justice Lemieux noted the request from the CBA that the Court develop a group of judges who have specific training in aboriginal law and perspectives for involvement in ADR work. This request was discussed within the Court recently.

Acting Chief Justice Noël spoke of the challenges in litigation in the Courts, and the Court's receptiveness to the proposal.

Mr. Augustine, on behalf of the Elders, recognized the commitment of Chief Justice Lutfy and his involvement in the community. They are sorry to see him go.

Mr. Stevenson paid tribute to Chief Justice Lutfy and his efforts to recognize the multi-jural nature of the Canadian legal landscape that embraces legal cultures beyond simply the common and civil law, and in particular, the indigenous legal perspective.

Justice Mandamin noted that the Chief Justice's reference to a "tri-jural" legal approach at Turtle Lodge was very well received by the Elders.

Ms. Craft noted the Elders' position – respect is core to indigenous law. It is clear that the Chief Justice has practiced this over the years.

Ms. Ring expressed appreciation to the Chief Justice for his continued commitment to the Committee. He has always attended meetings despite a busy schedule.

Revised Phase II Practice Guidelines on Oral History ("Toolbox") and Education Project
Justice Mandamin provided background to the various practice guidelines, which describe a process by which Elders and oral history can be heard, rather than describing the law. The draft guidelines have been circulated to the Bar as well as within the Court for comment.

Ms. Ring noted that the Department of Justice has already provided comments on the previous draft in detail. She noted that this second draft is definitely going in the right direction – the Department is generally happy with this draft. Some key comments and suggestions:

- these are guidelines, not mandatory rules – not intended to supplant the Rules, but instead are for assistance
- helpful to have clarity re status of guidelines – first place to go when there are issues of oral history, but what to do when there is disagreement among parties – the guidelines should indicate how to address this, perhaps as an overall introductory paragraph
- pg 4 re pre-trial disclosure – timing of disclosure does not necessarily occur at the same time as document disclosure – it may be useful to provide guidance as to when it should occur – basically, at a time that is useful for the parties to prepare – if it is too late, it may not be useful
- summary of elders' evidence – this can undermine the purpose of disclosure, which is to understand what the other party's case is – there needs to be a balance that provides sufficient detail to be useful – it would be useful to increased specificity in Elders' evidence when it is going to prove a specific fact – if it is to present a general world view, less specificity is needed, and a general statement is sufficient
- the Department supports the request by the Elders to have an opportunity to review the guidelines

Justice Mandamin noted his experience with Elders testifying, in that often additional elements arise at the moment of providing direct evidence to the Court that might not have been raised in preparation. This

should not be held against the Elder if it was not included in a detailed will-say statement.

Justice de Montigny recognized the concern of the Crown not to be taken by surprise. Is an answer not simply to provide time for the Crown to respond?

Justice Mandamin agreed, though noting that it is important not to split the testimony. It should be allowed to run through to completion, with time offered later for response.

Mr. Stevenson noted that it is not possible to develop a strict checklist for the level of detail of disclosure – instead, it might be useful to set out the general principles for disclosure to inform all those participating in the process – any concerns regarding the sufficiency of disclosure can be addressed by the case management judge.

Prothonotary Lafreniere noted that the guidelines do not represent a decision of the Court regarding the sufficiency of the summary.

Elder Stephen Augustine noted that oral history often requires interpretation by the Court. Generally, the Court is more sensitive to the nuances than the lawyers who are involved, who often miss the mark. Counsel may not adequately understand what they are advocating, and do not properly prepare the Elders for the hearing. He described how Elders may provide a story that has different levels, some which are difficult to understand, but parts which address basic historic facts. These stories may require interpretation by someone knowledgeable of oral traditions. He added that the different levels where Elders' presentation of oral history is questioned / cross-examined lead to a situation where Elders feel that the oral history is being challenged and undermined. They may therefore decide that it is not appropriate to continue presenting their evidence.

Justice Mandamin noted that there will be an opportunity for the Elders to meet face-to-face to discuss the draft guidelines.

Ms. Craft noted that this is an excellent piece of work. Some small comments:

- some comments in the guidelines regarding the diversity of indigenous legal traditions
- clarification of the role of Elders within the litigation process – who will be consulting with the Elders before the hearing to ensure that they have sufficient background for the hearing?
- examples and best practices could perhaps be included (e.g., the tool-box approach) – this would be helpful for practitioners who will be using the guidelines

Justice Mandamin noted that it is difficult to compile best practices – they are often unreported.
Regarding the manner of presenting evidence and cross-examination, he described his experience with different tribunals (inquiry models) where independent counsel were designated to lead the examination, leaving an opportunity at the end for other counsel to participate.

Justice de Montigny recognized the value of Mr. Augustine's comments. Often, judges and lawyers are not well-equipped to deal with oral history. It is necessary to find the right interpreter.

Justice Lemieux recognized the challenge of interpreting oral history. How do you find the proper interpreter – there may be multiple interpretations.

Mr. Augustine answered that it is a question whether the interpreter is qualified to interpret such stories.

Justice Mandamin noted that the reference to 'consultation with Elders' flowed from previous comments by Elders to the Committee: if they are going to be called as a witness, there should be advance discussion with them, possibly by either counsel or the court depending on the specifics of the case. This could be addressed in case management.

Ms. Ring preferred that the current version of the guidelines remain, without including the cross-examination practice adopted by the Indian Specific Claims Commission. The new Specific Claims Tribunal legislation recognizes the right of the government to cross-examine an Elder. This cross-examination must be handled properly, but should be available to the Crown.

Ms. Blackhawk responded to the risk of the Elders' testimony at a preliminary inquiry being undermined later in the hearing. In her experience with the Williams case, the preliminary inquiry was used simply to address the threshold question whether the Elders' evidence was admissible and reasonably reliable (criteria under the hearsay jurisprudence for admission). The Elders were not qualified formally as expert witnesses. The primary oral history evidence was heard only later. This process was not used to impeach the Elders' testimony later in the proceeding. She noted that Justice Vickers considered oral history as a form of hearsay, not a form of expert opinion. She will provide to the committee a suggested re-wording of the section of the guidelines.

Justice Lemieux added that if the Elder is qualified as an expert, he can then give opinions. He added that there will be some amendments to the guidelines based on the current feedback, and the Elders will have an opportunity to discuss the issues.

Mr. Augustine hoped that a member of the Bar would be present to assist with the examination of the practice guidelines, given that none of the Elders are lawyers.

Mr. Baumberg offered to arrange a teleconference amongst the Elders to prepare for the face-to-face meeting and determine the best way to meet their needs.

Education Project

Justice Mandamin provided background concerning this project, noting the meeting in April with some of the Elders, judges and representatives of the National Judicial Institute. There was some discussion at the April meeting of possible elements of an education program and options for funding via a proposal to the Canadian Judicial Council.

Miscellaneous Issues

- **First Nations Tax Commission procedure**

Justice Lemieux provided background. Basically, federal legislation empowers each First Nation to enact real property taxes on reserve, subject to the requirement that they provide an appeal procedure, as set out by regulation, from decisions of an intermediate tax review board. The statute does not specifically give the Federal Court jurisdiction on appeal. None of the by-laws setting up this procedure names the Federal Court for the purposes of an appeal. These appeals may go to the provincial courts, given that the taxing authority is analogous to the provincial taxing authority. Justice Lemieux will work on this file.

- **Rule 114 Representative Proceedings – Style of Cause**

Ms. Ring provided a listing to the Court, which is monitoring such cases via the Registry.

- **Updates to Common List of Authorities**

Mr. Baumberg noted that updates will be posted with amendments to the List for other practice groups.

Prothonotary Lafreniere made a proposal: any case available in CANLII should be exempted, or

counsel could provide a USB stick with all their authorities.

Ms. Read noted that this depends on the particular judge involved.

> **Action:** Mr. Baumberg to raise with the national bar liaison committee and the rules sub-committee re technology.

- **Settlement talks vs. fixed Court schedule**

Tabled.

- **Planning for Spring 2012 Meeting**

The CBA meeting is June 14-15 in Saskatoon.
Date: June 13, 2012, is set as the tentative date for next meeting, as needed.
Agenda: There is a need to develop an agenda for the Committee, possibly including a teleconference in December after the Elders provide their report. Send agenda items to Mr. Baumberg to decide whether a meeting is required June 13.

Justice Mandamin noted that there will be a reception on **September 30** in honour of Indigenous Judges from across Canada.

Elder Stephen Augustine provided a closing prayer.