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

October 16, 2012
Winnipeg, Manitoba

MINUTES

ATTENDANCE: In Person: Elder Stephen Augustine, Elder Charlie Nelson, Elder Violet Cabioset, Justice Leonard Mandamin (Chair), Justice Michael Phelan, Prothonotary Roger Lafrenière, Aimée Craft, Krista Robertson, Kathy Ring, Ron Stevenson, Koren Lightning-Earle
By teleconference: Chief Justice Paul Crampton, Andrew Baumberg

MORNING SESSION

Opening Prayer by Elder Stephen Augustine.

Welcome & Introductions by Justice Mandamin (Chair).
(a) Agenda - approved.
(b) Minutes of Past Meeting (June 13, 2012) – approved.

Justice Mandamin noted that paper copies of the final version of the Oral History Practice Guidelines and a new Notice to the Profession regarding the Triage Project have been circulated to members of the Committee.

Chief Justice Paul Crampton confirmed appointment of Justice Mandamin as Chair of the Committee. He then confirmed that the revised Practice Guidelines are being issued today, but recognizing that it is a living document that will continue to evolve. These are Guidelines, to be used as and when appropriate, rather a document to be seen as 'binding' or 'fettering' the Court. He further noted the issuance today of a Notice to the Public and Profession regarding the triage of First Nations governance disputes that are filed in Court. This process has been successfully used to mediate a number of disputes so far, with some examples given. There is an effort to promote greater recognition and appreciation of the different ways to resolve disputes that are available at the Federal Court.

Justice Mandamin noted that the oral history guidelines represent the fruition of a number of years work within the committee. On the triage project, he noted that this shows that the Court is taking the initiative to get involved in management of proceedings, and builds on the work of Justice Lemieux and Sheila Read's papers.

Prothonotary Lafreniere noted that early identification of suitable cases is particularly important. Once parties have become more established in their positions, and have spent more money on the litigation, sometimes they become more firm and less amenable to mediation. Parties and their counsel are asked to be proactive in identifying appropriate cases.

Koren Lightning-Earle encouraged continuation with this development, noting the need to compile examples of best practices.

Prothonotary Lafreniere agreed that examples would be helpful, though most parties maintain the confidentiality of their settlement – no publicity, no prejudice, no precedent.

Elder Stephen Augustine noted that as curator at the Museum of Civilization, he has received a number of requests for examples of mediated cases. He has provided the draft guidelines.

Justice Mandamin noted that the pilot project aims to promote First Nations using their own community's practices to resolve disputes, possibly with public recognition via Court order if requested by the parties. The norm for many First Nations communities is openness, and this might allow for a means to provide wider public access via the publicity surrounding Court decisions. At present, there are many cases involving mediation but very little jurisprudence.

Andrew Baumberg queried whether there is some value in proposing a Rule amendment that would require some publicity of mediated settlement in a manner that would not prejudice the parties.

Prothonotary Lafreniere agreed that the mediation process does not always require confidentiality. It may be possible to have counsel agree on a summary of mediation.

Ron Stevenson noted that a consent order or declaration could include facts in a preamble – this is a documentation of indigenous law.

Aimée Craft suggested this be discussed at the CBA conference in April 2013, possibly with a panel.

Krista Robertson noted that many First Nations might be pleased to describe their successful mediation of disputes.

Koren Lightning-Earle noted that there will be a panel in couple days at the IBA conference – this would be a good opportunity to highlight examples. There could be a 'best practices in Federal Court' workshop at each IBA conference.

Chief Justice Crampton suggested development of a settlements database with underlying facts and issues. It would be possible to remove some identifying facts that would allow the precedent to be public without disclosing confidential information.

Prothonotary Lafreniere suggested that the database should include the final order that sanctions the settlement, as this often discloses very useful information.

Judicial Review Practice Guidelines – *Alternate Dispute Resolution*

- Disputes within First Nations

Justice Mandamin noted that the confidence of First Nations in their own dispute resolution processes has been eroded by intervention of outside bodies. The tendency is often now to go to outside bodies to resolve disputes, rather than resolve them internally. The Court has inherited this situation. Some types of disputes, such as pure legal questions, may require the Court to be involved, whereas others could be resolved without the Court. If disputes are resolved by the community, with recognition and respect of their dispute-resolution bodies by the Court, this serves to strengthen the community's internal process. A key challenge is that disputes that arise in one community are unlikely to be accessible in another elsewhere in the country.

Justice Phelan questioned whether the essence of many disputes is really confidential. Many individuals in the community probably know what has happened.

There was some discussion whether individuals / families / communities would be open to disclosure. Each case is different.

Koren Lightning-Earle noted that many communities do not have formal dispute resolution processes.

There was a comment that the Court's involvement in the dispute-resolution process could assist in finding ways to make the results more accessible. In terms of long-term benefit, the Court's direct involvement may have tangible benefits for the community even if not immediately accessible to other communities. This type of involvement may promote the creation of new dispute-resolution processes. This initiative can foster the processes that are already there, including traditional processes, and developing dispute-resolution skills. It was noted that these disputes are not restricted to First Nations, but should include Métis, Inuit, and other groups as well.

Stephen Augustine noted that some disputes are perceived as such from the outside, but processes already exist to allow for resolution, such as talking circles, pow-wows, etc. It is more about complementarity, incorporating everyone's opinion, rather than looking at matters in oppositional terms.

- Disputes between First Nations and the Crown

Kathy Ring noted that the Crown does not have concern with many of the concepts in the existing draft, such as putting the matter early on in case management and exploring mediation, where appropriate. The concern arises if there is a desire to have a mediator from within the community involved in First Nation-Crown disputes because they may not be perceived as being impartial or neutral to the cause.

Andrew Baumberg questioned whether the mediator has any formal, binding authority that could be prejudicial to the Crown.

Prothonotary Lafreniere noted the 3 types of processes within the Court for dispute resolution, but there is no arbitration. He has ordered parties in the past to sit down for mediation.

There was a comment that the result is not binding. The feature of mediation is that if a party is not willing to participate, they can ultimately refuse to settle.

There was a comment that these best practices should encourage resolution and promote access to justice, rather than increase expenses for parties if they are resisting the process.

Prothonotary Lafreniere noted that the Court has considerable experience with parties and their counsel, and it has a responsibility to be forceful enough to promote mediation processes that appear promising.

Koren Lightning-Earle noted that it would be useful to recognize the mediators who are appearing more and more within communities, many of them formally trained and not biased.

Often, First Nations are not comfortable with the adjudication model – *the Federal Court* – set up by the government.

Justice Mandamin noted that in First Nations, it is more important to have someone who is "fair" to settle a dispute rather than someone who is a "stranger". This paradigm – looking at someone who is fair – is different from the Euro-Canadian paradigm of impartiality, where the decision-maker has no knowledge of the people who have a dispute. From the First Nations perspective, the mediator *should* know the people in the dispute. He also gave an example of a case involving Justice Lemieux with the Akwesasne Mohawks and the Crown, which was more suitable for a mediated result than many First

Nation disputes.

Ron Stevenson noted that the Crown is often involved in mediation processes, typically after an action is filed. He reiterated the concern raised by Kathy Ring about extending the use of community mediators to other classes of litigation, including when third parties are involved.

Justice Phelan noted that in arbitration, each party picks an arbitrator and then the two arbitrators together pick a third. Could this not work in mediation, for which the stakes are not as high as arbitration?

Aimée Craft noted that First Nations have felt "discomfort" for years with the decision-maker. The judges of the Court include many former justice lawyers, who swear an oath. However, First Nations must nonetheless work within this system.

Chief Justice Crampton encouraged members of the indigenous bar to apply – the Court is looking for additional members of the Court.

Justice Mandamin asked the Department of Justice to propose a process that would allow the Crown and an Aboriginal party to engage in mediation.

Close of Morning Session

AFTERNOON SESSION

Local Elders Charlie Nelson and **Violet Cabioset** from Treaty One were introduced by Aimée Craft and welcomed by the Chair, who offered each a gift of tobacco. Elder Charlie Nelson offered thanks for the gift and welcomed those present to their traditional territory. He stressed the need for dialogue. Elder Violet Cabioset spoke about the importance of the IBA conference, which focuses on protection of water.

- Disputes between First Nations and a Third Party

Justice Mandamin noted that the third branch of the discussion from the morning session involves disputes between Aboriginal communities and third parties.

The Navaho approach to peace-making would be to refer the matter to an individual in the community, with the assistance of an Elder. He gave an example of a dispute involving the death of a member of the community employed by a corporation, with the insurance company defending the corporation. The Court referred the matter to the Navaho peace-making process, which settled the matter. As it turned out, the key request by the family was to have an apology.

Stephen Augustine noted that it depends on the circumstances of the case. For instance, for land disputes, the rights might be subject to the specific claims process. He pointed out that members of the community don't always agree with the position of their own leaders in a given case or the decision of the Court. There needs to be more dialogue with the community affected.

There was a comment that usually the Crown *and* a third party are involved, and many times the Crown will take the lead. The *Federal Courts Rules* state that the applicant must name all the parties involved.

Ron Stevenson indicated that the Department of Justice would take the pen to prepare an initial piece that provides input on the proposal to expand the pilot project to First Nation-Crown disputes. He noted that in nearly all cases, the Crown is involved whenever a third party is named. However, there is no representative at this Committee for third-party perspectives.

Elder Violet Cabioset commented on a process in which Walmart and the province were involved in a legal proceeding. It was important to have a lawyer who could ensure that the Aboriginal perspective be heard at the hearing, to speak for the Spirit of the land and the water, which are so important for life. It is important to learn to work together.

Elder Stephen Augustine reiterated the need to have a collective approach to resolving disputes. Just as this Committee included the voices of judges, lawyers, and Elders, so should these many voices be heard to resolve disputes between Aboriginal communities and others.

Elder Charlie Nelson spoke about the role of a care-taker of a site on the land.

The common theme is to create an open space for different perspectives to be shared. This space does not exist within the formal Courtroom. Moreover, it is clear that the focus should be opened up beyond internal First Nations disputes, to include disputes outside First Nations.

Elder Charlie Nelson spoke about an initiative involving "wounded warrior rock", from the Dakota tradition. He noted that Aboriginal Elders have their own justice system that can be shared with the Court.

- Practice Guidelines - Development of Best Practice Compendium

Justice Mandamin suggested some key information, such as case name, head note, what was unique, whether it was cited in the judgment, etc.

Stephen Augustine noted that at the Victoria meeting, they focused on Justice Mandamin's experience with dispute resolution in Siksika.

Prothonotary Lafreniere agreed that there needs to be a standard format that ensures that only necessary information is included, with page limits and possible links to files, allowing for key-word searches. It is useful to focus on matters that are different, and what stands out as a best practice.

Kathy Ring pointed to the Case Studies of Best Practices to Accommodate Elders' Testimony presented by DOJ to the Committee at its June 2010 meeting. Was there pre-trial disclosure? Was commission evidence taken? How was interpretation handled? Was there a special process for objections or otherwise for cross-examination? Was there a special process for hearing the Elder?

Justice Mandamin noted that the best practices are not always in the final decision, but may be in an interlocutory order. He asked that the IBA, CBA, and DOJ each take one key case based on a rough template / summary to be developed by Justice Mandamin, Prothonotary Lafreniere, and Andrew Baumberg.

DOJ – *Montana* case
IBA – will canvas practitioners for a suitable case
CBA – will canvas practitioners for a suitable case

There was some discussion as to the scope of the compendium and possible annexes that cover issues and examples from actual cases. The compendium would be used as a reference guideline, as opposed to being used as an evaluative tool.

The goal is to have a draft complete by April 2013.

Miscellaneous Issues

- *First Nations Elections Act*

This Senate Bill, sponsored by the Government, is now at First Reading in the House of Commons after passing through the Senate. Under the Bill, customary elections are also included.

- Updates to Common List of Authorities

It was noted that there is very little take-up by the Bar of the Common List. The bar representatives are encouraged to promote the list. It was suggested that the Common List should be made more prominent on the Court web site.

- **Varia**

CBA Representative

Aimée Craft noted that she has been on the Committee as Chair of the CBA aboriginal law section since 2007 and is proud of the work that has been accomplished. She thanked the Committee for the opportunity to participate and introduced Krista Robertson, an active practitioner before the Federal Court, who will be the new representative for the CBA on the Committee. Different members of the Committee thanked Aimée Craft for her significant contribution.

Planning for Spring 2013 Meeting

The CBA meeting will be April 11 and 12th in Victoria. The Committee meeting will therefore likely be April 10. The Court will be asked to participate in at least one of the CLE sessions.

Agenda items are invited for the next meeting.

Close of Afternoon Session