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

April 10, 2013
Victoria, British Columbia

MINUTES

ATTENDANCE: In Person: Justice Leonard Mandamin (Chair), Justice Douglas Campbell, Justice Michael Phelan, Krista Robertson, Kathy Ring, Koren Lightning-Earle, Marilou Reeve, Aimée Craft, Diane Soroka, Kathryn Tucker, Daniel Albahary
By teleconference: Chief Justice Paul Crampton, Lucia Shatat

Welcome & Introductions by Justice Mandamin (Chair).

(a) Minutes of Past Meeting (October 16, 2012) – approved.

Justice Mandamin indicated that the focus of the meeting is to move past the development of the Guidelines into the new area of alternatives to litigation in the Federal Court in aboriginal law matters. In particular, we should try to see if we can include the use of dispute resolution to assist parties in the communities; however, this would be offered as an alternative (not a replacement) and is not meant to curtail a party's right to pursue a matter in the Federal Court.

There are three general areas:

(a) Disputes within First Nations (e.g. governance matters)
(b) Disputes between First Nations and the Crown
(c) Disputes between First Nations and a Third Party

The Pilot Project (Judicial Review of First Nations Governance Disputes) has a triage process in place whereby files are examined to determine if they meet certain criteria (e.g. does it involve a First Nation matter, an internal matter, and whether it is suitable for dispute resolution). For example, a matter involving estates and trust, which involve questions of law, would not be suitable. Thereafter, the parties may informally be canvassed to see if the matter can be resolved by agreement. If there is a willingness to try alternative ways of resolving the matter, a case management judgment may be assigned. If an agreement is reached, the agreement may be recognized by Court Order if the parties so desire. If there is no agreement, the matter returns to the Court process.

There have been at least a dozen matters in which judicially assisted dispute resolution was considered. They include:

- Nine matters re: First Nation governance matters (4 matters were resolved, 2 were not resolved but the involvement had a beneficial impact as the parties decided to proceed with judicial review, but took advantage of the judicial review process to deal with the aftermath (e.g. have an election that is satisfactory to all parties if new election is ordered by the Court), in 3 cases, the parties declined to go to judicial review, and these matters were settled by a Court decision).

- One case involved a third party, and it was resolved through a court-mediated session (trial involving copyright and trademarks);
- Three cases involved Canada as a party – one was resolved, one was resolved after Canada was removed as a party, and a third was a judicial review.

A number of elements are important in that regard:

1) It is important that the grieved party gets heard - by not only the other side but also by someone in whom they have some confidence (e.g. judge or prothonotary acting as a judicial officer in helping the mediation process) – the matters get aired.
2) If the community is impacted by the conflict, it is important that it be heard in or by the community. For example, in one case, there were 3 judicial review applications in the Court – J. Hughes brought all the matters together and he indicated that he would hear it and prepare a judgement, but that his decision would not be released if the parties were successful in resolving it. J. Mandamin went into the community and a community circle was held (using protocol). The second day, no agreement was reached with respect to the election dispute and the parties preferred to have J. Hughes' decision, who ordered a new election. After the election had taken place, some issues were raised on appeal – and the composition of the appeal panel was questioned (e.g. one Elder was the Mother of a defeated candidate). The Registry received a call from the Elders who asked if J. Mandamin could come back – J. Hughes decided that he was still seized of the matter and directed that J. Mandamin could return to assist. The community really didn't want to involve the lawyers – the circle consisted of Elders and they explained what their views were. One of the Elders indicated that she had accepted tobacco and that she therefore could not step down. J. Mandamin said that it was their decision – none of the Elders stepped down. The matter has not returned before the Courts.
3) The ultimate resolution of the dispute is a matter for the community (e.g. everyone should be satisfied with the election process if an election is taking place after a governance dispute).

The triage process under the Pilot Project is, unfortunately, not always systematically done – Registry Officers must recognize the documents. They will then bring the matter to J. Mandamin's attention. The parties can also bring the option of dispute resolution to the attention of the Court by writing a letter requesting case management. The process needs, however, to work on consent.

It was suggested that Registry Officers could simply flag any proceedings that contain certain key words (e.g. election, First Nation, etc.) and then send out a standard letter to the parties with the Practice Guidelines explaining the option.

It was noted that sometimes, people will still consider their dispute to be private and while they are willing to try mediation, they do not want to take it to the community.

Some questioned the place for law within the process. There seems to be a community aspect (a healing aspect), but there is also what the law provides for. In other words, the process has a purpose beyond resolving the legal dispute and the question is how to incorporate the law in a helpful way and that gives effect to what the role of the Court is in the process. The description of the role of counsel is important and we should be mindful of this.

It was noted that a question of law on one point alone could be referred to the Court. It was also noted that there are two situations: 1) where there is a question of law that can be resolved in advance, in order to move on to the community dispute resolution; and 2) what is the law that informs the dispute? If one is working with a First Nation to develop a dispute resolution process, an opportunity for the community to

be educated on the state of (Canadian) law should be built into the process.

Kathy Ring went over the memorandum "Comments on the Proposed Application of the ADR Pilot Project to Crown-First Nation Disputes" which explains the concerns of the Department of Justice on the proposed application of the ADR Pilot Project to Crown-First Nation disputes. Difficulties arise when attempts are made to apply the process to Crown-First Nation disputes because these disputes are very different in nature from First Nations governance disputes. She underlined the importance of having a neutral mediator. In particular, the mediator should have an emotional detachment and parties to a dispute need to have confidence in the integrity of the process. Further, a mediator of the First Nation's community could also conceivably be called as a witness if the mediation is unsuccessful.

While the Department of Justice has concerns about the proposed application of the ADR Pilot Project to Crown-First Nation disputes, it welcomes a discussion to identify the perceived barriers to effective settlement of litigation involving Crown-First Nation disputes and to look at ideas for improving the current approaches to out-of-court resolution of such disputes.

A discussion ensued. The possibility of having the case management judge hear the case itself was raised. This sometimes makes for a more efficient process and there is more continuity in the matter. For First Nation communities, there is a concern that someone outside the community is deciding the matter and it would help if there was some continuity.

On the other hand, some members of communities have wondered how they know if a judge is truly impartial if the judge worked for 20 years for the Department of Justice. Further, even mediators outside of the community may have their own emotional attachments.

The possibility of having a case management judge early on in the proceeding was raised.

As next steps, we can focus on the duty to consult, look at barriers to settlement as seen by the various parties and continue to understand that there is more than one way of ADR.

<u>Development of Best Practices Compendium</u>

It was agreed that the heading "Pre-Claim Phase" should be changed as it can be interpreted in different ways. It was suggested that it could be replaced with "case history".

The possibility of adding a new section such "of special note", which would allow the author to describe any additional issues was raised. Or having a section "brief background" is also an option.

Krista Robertson agreed to prepare a summary of the Delgamuukw case.

Some suggested that they would canvass their section members to see if they had any cases of note that could be used for the Compendium.

The question of how and where to make the Compendium available was raised. These documents are prepared by counsel (not the Court). The possibility of making them available on the website of a committee section was discussed. The Federal Court website could then include a link to that site. The possibility of sharing the document with organizations such as the Native Law Centre was also raised.

The possibility of summarizing a judicial review decision on key issues was also raised – that way counsel would know how the Court has ruled on these issues. It was noted that the Common List of

Authorities (in aboriginal law) may not contain judicial review cases.

Chief Justice Crampton provided an update on the Pilot Project. The project is going quite well and the Court is encouraging parties to use the process and is trying to promote a greater awareness of it. J. Mandamin is also organizing a Court conference on this topic.

The Court understands the concerns of the Crown expressed in the memorandum "Comments on the Proposed Application of the ADR Pilot Project to Crown-First Nation Disputes" and it is hopeful that, through dialogue, we can find a way to move forward.

The Chief Justice has encouraged the Court to make greater use of the Litigation Guidelines. The Court is also in the middle of a strategic planning process. As part of that process, it looked at ways to promote access to justice. The Court's consultations led to the elaboration of three themes: 1) access to justice; 2) modernizing the Court and 3) delivery of justice. The first theme dovetails with the work of the Global Review Subcommittee of the Federal Courts Rules Committee which issued a report in the late fall. The Court is also considering some Practice Directions (with respect to adjournments, allegations of incompetence involving counsel (in immigration matters) which will be discussed at the next Court meeting). The Court is also exploring ways to make people see the Court as having multiple doors: for example, an adjudicative door, a mediation door, an alternative dispute resolution door. The Court is looking at enhancing case management, enhanced front-line staff training, preparing tables of correspondence for the Federal Courts Rules and provincial rules, pursuing increased outreach and relationship-building with law schools, legal clinics, bar associations and other stakeholders.

With respect to theme 2 (modernizing the Court), it includes initiatives such as e-filing, electronic service, the possibility that electronic communication is the default mechanism for communications with the Court, electronic access to Court records, making greater use of video-conferencing (while maintaining a physical presence in the regions), electronic courtrooms, and an electronic devices policy.

Under the third theme (delivery of justice), the Court is looking at ways to improve the scheduling of matters internally, to improve security of courtrooms for public, parties, and judges, to produce decisions faster. For example, a fast-track pilot project for immigration matters will be discussed at the next Court meeting. The Court is also looking at ways to exercise control over vexatious litigants or reduce the extent to which they waste scarce resources. This work may form the subject of a separate internal document.

Further, in connection with the Court's desire to help self-represented litigants in a way that does not tilt the playing field against the other party, the Court is also exploring the option of helping to direct them to local legal aid, local pro-bono services , etc. (e.g. by having applications at Registry counter and training Registry staff to explain differences between the local associations, and provide contact number of the local legal aid associations). The Court is continuing to look at the option of duty counsel, but the Court does not believe that the volume of work could justify duty counsel.

Justice Mandamin indicated that disputes involving First Nations and the Crown may not lend themselves to dispute resolution. It has been suggested that these matters (JR) get into case management quickly to obviate the necessity of having the parties attempt to comply with the short deadlines while they work out, at the same time, the complexities of the case, to narrow matters and hopefully even resolve matters. The suggestion of forwarding letters to the Chief Justice, with the concurrence of counsel of both sides, to get the case immediately into case management, was raised. Chief Justice Crampton indicated that this sounded like a good idea and that it could be discussed at the next Court meeting.

Miscellaneous Issues

- *First Nations Elections Act*

This Senate Bill, sponsored by the Government, is still at First Reading in the House of Commons after passing through the Senate.

- *Updates to Common List of Authorities*
  - It was suggested to add the recent decision of the Supreme Court of Canada in *Manitoba Metis Federation*.
  - After 2 months, additional suggestions will be provided or sought.

- The Court is starting to see more self-represented parties in aboriginal matters. Justice Campbell dealt with a situation dealing with a self-represented person. It was noted that at some provincial courts, sometimes the Court would ask a lawyer to be a Friend of the Court, without representing the litigant. It would be useful if the Federal Court could flag these types of situations.

- *Fall 2013 Meeting*

  IBA conference will take place on October 7-9 at Casino Rama. Student day will be on the 7th or 10th of October. The exact location of the meeting is to be determined as it might be better to hold the meeting in Orillia given J. Mandamin's trial.