Federal Court ~ Aboriginal Law Bar Liaison Committee Meeting

June 10, 2015 Membertou (Nova Scotia)

MINUTES

Attendance: Elder Stephen Augustine, Justice Mandamin, Justice Phelan, Julie Blackhawk (Department of Justice), Aimée Craft (CBA, MB), Robert Janes (CBA, BC), Brian Hebert (CBA, NS), Drew Mildon (CBA, BC), Derek Simon (CBA, NS), Diane Soroka (CBA, QC), Krista Robertson (CBA), Gaylene Schellenberg (CBA);
Teleconference: Chief Justice Crampton, Justice Shore, Prothonotary Lafrenière, Brenda Gunn (IBA), Scott Robertson (IBA), Stephanie Skogan (Department of Justice), Alisa Lombard (Specific Claims Tribunal), Andrew Baumberg (Secretary)

1. Welcome & Introductions
Elder Stephen Augustine offered an opening prayer.

2. Review
- Agenda – **Justice Mandamin** noted that there is one other possible document for discussion (re intellectual property case management / trial management)
- Minutes of Past Meeting (October 2, 2015) – approved.

3. Revised Working Draft Practice Guidelines / Court-assisted Settlement of Disputes
- **Discussion of Revised Working Draft Practice Guidelines / Timeline for additional comments (Completion by Fall 2015)**

Justice Mandamin presented the revised Practice Guidelines, noting that the current draft now includes a judicial review section and a dispute resolution section. Given the advanced state of the drafting, it is hoped that it could be finalized in time for the Fall meeting. He added that he is still in favour of a 'Ferguson'-style guideline, which includes a more narrative style to drafting.

Krista Robertson considers this now to be a very coherent document, a very positive development. The CBA comments were all integrated into the draft. Subject to further written comments, here are a few specific comments:

- add a reference to the common list of authorities

Justice Mandamin noted that the Common List allows a party to rely on a case without having to make a copy, so you do not need to file the whole case; another purpose of the common list is simply for use as a commonly used body of cases (i.e., as a resource list)

Krista Robertson continued:

- a best practices template could be included in the guideline as an Annex

Justice Mandamin agreed with proposal, though noted a difficulty: usually the best practices are not written up in the Court decision. Someone with knowledge of the case needs to describe it.

Andrew Baumberg suggested that we discuss the process for submitting a best practice.

Robert Janes noted that judges have experience in cases where they see things being done very well. It might be useful for the court to refer these practices to the committee for inclusion.

Justice Mandamin agreed that we can canvass the court internally.

Andrew Baumberg suggests that both the court as well as bar groups bring ideas. We can include some identified best practices in the current guidelines along with text about submission of other practices, which could be provided to key contacts within the CBA, Department of Justice, and IBA, who could then present them to this Committee.

Julie Blackhawk suggested a template for oral history and documents.

Krista Robertson continued:

- add a reference to Rule 316 (in an application, a party may bring a motion to hear viva voce evidence; also, cross-reference the oral history section)

Prothonotary Lafrenière added that an application can be treated as an action if credibility is an issue or witnesses need to be called; see *Federal Courts Act* s.18.2(4).

Julie Blackhawk, as a response to the draft guidelines, indicated that she needs to talk with Department of Justice. However, she appreciates the effort to incorporate comments provided earlier by the Department. A couple interim suggestions:

- although the current draft captures the 'barriers to settlement' that were noted by the Department, it might be useful also to describe barriers from the Aboriginal perspective
- in the initial preamble – recognize role of Elders

Krista Robertson will canvas suggestions re barriers to settlement.

Justice Mandamin discussed the notion of settling some issues rather than all; this has not been advanced sufficiently.

Robert Janes suggested that major procedural options need to be considered (e.g., dividing issues in stages to address them in order); if there are other procedural options, they might also be proposed. He added that parties need to consider what is appropriate for ADR: there should be caution to "drift to ADR if there is no hope of settlement" – it may simply add cost. There is a dual aspect to the cost of ADR: both if it fails, but also that some cases would resolve themselves "on their own with the passage of time."

Krista Robertson will address these in written comments.

Julie Blackhawk, Krista Robertson, and Brenda Gunn confirmed that their respective organizations could provide final written comments within 6 weeks.

Written comments are therefore requested by July 31.

- **Discussion regarding Court-assisted Settlement of Disputes**

The existing 'pilot' is being integrated into the revised Practice Guidelines, which will likely replace the previous Practice Direction.

4. Business Arising from Last Meeting

- **Symposium on Alternative Dispute Resolution**

Justice Mandamin noted that in discussion at last meeting, there was a suggestion to develop a session on Aboriginal dispute resolution. This would be a panel of knowledgeable / experienced speakers. The Court would work with the National Judicial Institute (NJI) to develop an education program. This group would then be available to the CBA / IBA / DOJ to do further sessions on dispute resolution. This would allow more candour within each group for discussion. He has met with Justice Adèle Kent at the NJI, who is open to the idea. It will probably take about a year to develop.

Stephen Augustine noted that he has worked with Professor Michael Coyle, University of Western Ontario, looking into Aboriginal Dispute resolution mechanisms, and offered to participate as needed.

Justice Shore suggested that it would be useful to link up with provincial bar associations to extend the expertise. More people should be aware of work of this liaison committee.

Andrew Baumberg raised a question regarding the broader strategy regarding dispute resolution: there is a need for (i) increased awareness amongst potential litigants regarding the available options / resources as well as (ii) development of local dispute resolution capacity.

Robert Janes responded, on the second point, that this also comes out of a B.C. report from the Treaty Commission, which is trying to come to grips with overlaps in treaty negotiation. There is discussion regarding development of indigenous resources to resolve disputes. There may be resources / discussion there.

Justice Shore referred to the Two-Row Wampum, relied on in judicial dispute resolution. It would be useful to have trained mediators in local communities, a new concept to resolve disputes within the community. This may be more attractive to those who are reluctant to come to the Court: the level of pride, dignity and respect is promoted.

A CBA representative referred back to the Law Commission of Canada (circa 2004), which prepared commission papers on this topic. There is also an indigenous laws research project at University of Victoria. Similarly, Val Napolean has done research on this.

Aimée Craft plans to do a literature review this Summer and will circulate the results.

- **Common List of Authorities: *exemption* list vs. *reference* list**

Discussed in part earlier.

Robert Janes referred to Ontario Divisional Court lists of cases, which are arranged by subject; however, he noted that there is overlap.

5. New Matters

- **Consultation re U.K. Pre-Claim Protocol**

Andrew Baumberg noted that the English Courts have adopted a pre-claim framework along with specific protocols in some areas, including judicial review. It is simply provided here for comment, as a possible approach relevant to the revision to the Judicial Review section of the Guidelines.

Robert Janes questioned whether this would be useful. It might simply become a "tick-box" on a list.

Julie Blackhawk noted that judicial review proceedings move quickly. There is little time to consider such letters given the short pre-Notice window.

- **Advocates Society Report - *Best Practices for Civil Trials* (June 2015)**

Justice Mandamin noted the work of the Advocates' Society as well as recent discussions between the Court and the Intellectual Property Bar: both emphasise the need to establish limits.

Andrew Baumberg gave an excerpt from the draft Notice re limits on days of discovery, which are tied to the length of the trial.

There was a suggestion from some members of the Committee that parties might simply ask for a longer trial so as to allow for more days of discovery.

Prothonotary Lafrenière noted that the 'issues' that arise in intellectual property proceedings are not the same as in Aboriginal law proceedings.

Robert Janes noted that the Advocates' Society, based in Ontario, assumes that the case management judge is *not* the trial judge. However, in B.C., the case management judge is also the trial judge, which works much better to keep parties in line. There is a continuation of knowledge re litigation choices / decisions; things move more effectively. Secondly, Aboriginal cases are trials of history / culture, yet the standard of discovery is not realistic (e.g., the Chief of a band was questioned for 30 days on oral history issues; instead, the experts should be discovered). There is a need to re-assess the discovery process.

Prothonotary Lafrenière added that the draft Notice is geared to getting the trial judge involved early in the proceeding so as to be able to address issues up front. However, if the government does not replace prothonotaries, the judge will then be doing more case management.

Justice Phelan suggested that interrogatories (ie, written questions) would be better than discoveries in some situations.

Julie Blackhawk and Robert Janes both noted that interrogatories can also become overwhelming if abused.

Robert Janes added that litigation needs to focus on the issues that are important; there are often too many side issues.

Justice Phelan referred to bifurcation of issues, common in intellectual property litigation (e.g., patent *validity* followed by patent *infringement*), so that they can be addressed in order of priority.

Future caseload of Federal Court

- **Major environmental and resource judicial review applications**

Julie Blackhawk noted that anecdotally, there is a dramatic upward trend in resource judicial review cases.

- ***First Nations Elections Act*** - Royal Assent (2014-04-11)

No knowledge of any proceedings yet.

- **Specific Claims Tribunal**

Alisa Lombard noted that the Tribunal has seen 3 judicial review applications through the Federal Court of Appeal. These should provide guidance to parties going forward regarding potential applications. About 30-35% of decisions are judicially reviewed. There are now over 60 active claims that could go ahead re validity. However, due to a shortage of judicial members, there is a challenge to proceed to hearing.

6. Varia

7. Planning for Fall 2015 Meeting

The IBA conference is October 15 – 17, in Toronto. Options for next meeting: afternoon of Thursday, October 15 or afternoon of Saturday, October 17.

Justice Mandamin is not available in person on October 15, but could be on the phone. He is available in-person on October 17. Krista Robertson and Julie Blackhawk are currently available for either date.

Scott Robertson will discuss the scheduling issue within the IBA and then contact Andrew Baumberg.

8. Closing

Chief Justice Crampton added comments regarding the draft IP Practice Direction: there is a need to promote the principle of proportionality.

Elder Stephen Augustine offered a closing prayer.