Federal Court ~ Aboriginal Law Bar Liaison Committee
May 31, 2017
Winnipeg, Manitoba

MINUTES

Attendance: Prothonotary Lafrenière (Chair), Justice Mandamin, Justice McDonald, Prothonotary Milczynski, Dr. Ron Stevenson, Sheldon Massie, Paul Anderson, Mr. Matiation, Krista Robertson, Michael Jerch, Gaylene Schellenberg, Drew Mildon, Kathryn Tucker. **Phone:** Andrew Baumberg, Scott Robertson

1. Opening / Review Agenda & Minutes of October 13, 2016.

Agenda and minutes approved. Krista Robertson moved and Paul Anderson seconded.

Prothonotary Lafrenière noted that we shall start with Dr. Stevenson's presentation, followed by other agenda items, and then circle back to the issue of how to make space for indigenous legal traditions and development of a long-term agenda for the committee.

2. Discussion: how to make space for Indigenous legal traditions (procedure and evidence) into Court process

Dr. Stevenson circulated the agenda for the Symposium.

> **Action:** Dr. Stevenson to circulate the detailed summaries for the Symposium once ready.

Dr. Stevenson then provided a brief overview of the symposium, at which the Minister indicated that Indigenous legal traditions were an increasingly important aspect of reconciliation, and that there is a rich diversity of traditions. The government is conducting a review of law and policy, allowing an opportunity to consider the role of indigenous legal traditions. Legal pluralism is a very important part of Canada's constitution. There followed a wide variety of presentations at the Symposium on indigenous legal traditions, including First Nations and Métis (though unfortunately no Inuit) presentations, academic perspectives, representatives of the Courts and law societies, the international context, and exchanges between outside and inside experts. There was much attention during the Symposium to the case method (lead largely by Professor Val Napoleon), including significant debate about this approach. There was also considerable discussion between the Department and outside experts. The Symposium is considered part of a process of engagement.

Dr. Stevenson then set out the three parts to his presentation before the Committee: overview of his remarks at the Symposium (which he described as a "points of contact" approach); examples of reactions during the Symposium; and brief comments for moving forward.

Points of contact – that is, how Indigenous law fits into the broader Canadian Constitution. We are no longer simply asking what indigenous legal traditions are, but instead, how to achieve recognition. What are the points of contact between Indigenous legal systems and other legal systems in Canada? The plural is used intentionally. Main argument is that we need to start a serious conversation about how to integrate indigenous legal traditions. To do this, there is a need for a legal theory to underpin integration. We need to think creatively about how to change systems to facilitate the growth of indigenous legal systems. This means thinking not only about points of contact, but also the principles that govern resolution of proceedings, principles of jurisdiction, and the growing administrative law of engagement.

The following 6 issues are relevant:

> *1. What is recent mainstream experience and perspective regarding indigenous legal traditions?*

2. *What is the role of section 35 in considering Indigenous legal traditions?*
3. *What policy rationales can be considered, separate from the law, to support recognition of Indigenous law?*
4. *Clearing away some of the theoretical underbrush*
5. *Careful examination of points of contact*
6. *Further issues in developing a nation to nation relationship*

1. What is recent mainstream experience and perspective regarding indigenous legal traditions?
For many crown lawyers, the first contact is in the courtroom, which can sometimes distort indigenous law. The question arises as to whether indigenous and non-indigenous legal systems are on equal footing. Ultimately indigenous law is used for different purposes – worldview, legal framework, question of fact.

2. What is the role of section 35 in considering Indigenous legal traditions?
What are the broader roles of indigenous legal traditions? Among them are the "second wave" related to indigenous title, as well as the question whether indigenous legal traditions have been integrated wholly into the common law. There are numerous answers from different scholars. Dr. Stevenson's view is that the answer is "no." Section 35 plays a broader role in "protecting" Indigenous law. It provides a broader right to have and maintain a legal system – a protective framework within the Canadian constitution. The key point is that the point of contact between indigenous law and the Constitution is contested and difficult, but absolutely essential to understand.

3. What policy rationales can be considered, separate from the law, to support recognition of Indigenous law?
As Crown lawyer, we are called on to give both legal and policy advice. Dr. Stevenson noted that he had been struck by evidence, from a variety of social sciences, of the positive impact that revitalization and growth of indigenous law can play in indigenous communities. Communities that take control of their own indigenous law, and reflect that institutionally, tend to do better on all available metrics of success. There is considerable literature from social sciences showing a strong policy rationale supporting the growth of indigenous law. This is closely connected to the devastating legacy of the residential schools and the calls of action from the Truth and Reconciliation Commission. A key point is that this provides an external reason for mainstream actors to be supportive of consideration of indigenous law as a positive contributor to a broader Canadian constitutionalism.

4. Clearing away some of the theoretical underbrush and *5. Careful examination of points of contact*
There are numerous debates regarding the interplay between constitutional law and indigenous law – it is important to be aware of them. He takes the view that the constitution provides a coherent foundation for a form of tri-juralism, and recognition of indigenous law, even if there are many questions at the points of contact. Federal sovereignty is united, but divisible. Section 35 provides a foundation for many different types of relationships. The key point is that much can be gained by considering how systems interact. Reference was made to many paradigmatic issues in mainstream public law which provide, by analogy, angles by which indigenous law can be explored. Legal systems are mutually interactive, and can provide mutual protection. Reference to Prof. Borrows: there is a need to have a protective sphere for indigenous law through recognition statutes and other points of contact.

There has been debate over whether certain questions are appropriate for mainstream courts – it is more contested than one might expect. The involvement of main stream courts can be supportive, but it can also be questionable. Active fostering of new institutions can also be helpful – there is a need for deeper consideration of the U.S. tribal courts. For consideration: a managed transition to indigenous legal systems taking a more active, primary role along national, linguistic or other lines. Section 35 can play a broader, supportive role, for the overall growth of indigenous legal traditions: a right to have and maintain an indigenous legal system as a constituent component of native constitutionalism. These are different

pieces that add up to a tripartite vision of Canadian federalism.

6. Further issues in developing a nation to nation relationship
Indigenous legal systems are normally linguistically-based, so development of indigenous law is inherently tied to the nation to nation relationship. The hope was that the symposium would move the overall conversation forward regarding how systems interact.

Reactions at Symposium
Dr. Stevenson saw the standard tensions in legal philosophy play out during the symposium: the influence of 19th century positivistic law, natural law theory, and law as narrative. He noted that 19th century law, tied to notions of racial superiority, had the effect of destroying legal systems. 'Law as rules' is encoded in the training of most public lawyers, and judges. But law is always grounded in practice, in society (ref.: Fuller) – this perspective opens up the discussion and allows one to approach the discussion more creatively. However, a key point of tension during the symposium: many lawyers were struggling with the generality of how indigenous laws are described (i.e., broad principles). However, by approaching analogies in mainstream law (e.g., unwritten principles of Canadian constitutionalism), it is possible to engage this issue. Indigenous laws structure how society operates, providing points of contact with non-indigenous law. He also noted the debate in the literature between "grounded" versus "ungrounded" law – we need to find a mutual grounding in Canadian constitutionalism. Although there are important differences, we also have much in common. We need to think about different notions of people being grounded in the law.

There was an intention at the symposium to chart recommendations for a way forward. The lessons are being shared, and there is a willingness to work with others on a broader vision of tripartite federalism. The primary work remains within communities. However, if we don't pay careful attention to points of contact, there will be problems.

Prothonotary Lafrenière thanked Dr. Stevenson for his remarks, proposing that members of the Committee reflect on the remarks and then discuss them later in the meeting after first addressing some of the other items on the agenda.

3. Possible changes to the Federal Courts Rules or Practice?

Use of Assessor Rule: Krista Robertson reviewed her draft written report with members of the Committee. It provides some preliminary thinking for consideration, to see if there are ways to move forward.

> **Recommendation:** It might be helpful to have assistance from a member of the Court or maritime bar with experience using the assessor rule.

In matters where indigenous law comes forward and there is concern about the potential of undermining the integrity of the law in an adversarial context, the assessor rule might be used.

Krista Robertson suggested the creation of an advisory group connected to this committee that might provide recommendations for a list of potential assessors, recognizing the plurality of traditions. They could then be placed on a roster of assessors who could be used under the Rule on a pilot basis.

In B.C., she learned that there are now four First Nation courts, though in a criminal context, which involve Elders. Sometimes, a simple approach is most effective. She had asked if they had procedural guidelines. The answer: *people just listen*. She also had asked how they selected Elders. The answer: *we know who the Elders are*. With appropriate consultation with communities, people can be identified. There could be some screening for appropriate court cases to determine whether a party intends to bring indigenous law into the Court, in which case there could be a recommendation to rely on an assessor.

Prothonotary Milczynski noted that the assessor rule is used for a trial / judicial review on the merits, but a resource like this would also be invaluable earlier in the proceeding, such as for settlement discussions.

Prothonotary Lafrenière noted that Krista Robertson's suggestion is a creative use of the rule. We may also wish to consider development of a separate rule that is tailored to this type of situation. He added that in intellectual property cases, the Bar is asking for the court to receive a 'primer' at the case management stage. He strongly endorsed the report of Krista Robertson.

Paul Anderson shared an experience with the Shoal Lake 39 case. An individual was involved in part as a translator / mediator to help all present to understand the testimony of Elders. This type of approach does not necessarily require a formal rule, but could perhaps be integrated into the Practice Guidelines.

Justice Mandamin noted that the Dené, for the Cold Lake case, often chose a particular translator not because he could provide a word-for-word translation, but because "he understands what I mean." The interpreter would translate but also provide context.

Scott Robertson supported the proposal by Krista and would like to be involved in any advisory committee that might be struck to develop the proposal. If indigenous laws are to be developed further and raised in court, it is important to have a "safe place" created. The IBA offers its support.

Prothonotary Lafrenière added that there are costs associated with use of the Rule.

> **Recommendation**: a sub-Committee, but not restricted to committee members, with Krista Robertson to conduct consultation and report at next meeting. Paul Anderson and Scott Robertson agreed to be involved.
>
> **Recommendation:** review of Specific Claims Tribunal rules to assess whether there are any rules that might be relevant to the work of this Committee.

4. Identification of core group of judges and prothonotaries to case manage, mediate and hear Aboriginal law cases

Prothonotary Lafrenière noted that the Court has tried to develop a core group of judges with an interest in and knowledge of Aboriginal law, who will be called on to hear Aboriginal cases, to the degree possible. These include: Justices Campbell, Shore, Phelan, Mandamin, Strickland, McDonald, McVeigh, Diner. Others have done Aboriginal law cases as well, such as Justice Zinn and Justice Russell. The judicial administrator will first look to these judges, allowing a more cohesive approach to these cases. The prothonotaries are not included in this group – all are involved in case management of Aboriginal cases.

5. Triage of Aboriginal Law Disputes – is it working / can it be improved?

Prothonotary Lafrenière noted that the triage process is in place now for about 4 years. Members of the bar are encouraged to include a cover letter asking that the matter be brought to the Court's immediate attention.

Paul Anderson noted that they are seeing many self-represented litigants with wide-ranging claims being filed. It is something for the Department to bring to the attention of the Court.

Prothonotary Lafrenière noted that the matter will be brought to the court's attention to determine whether the case should be specially managed, not to determine whether a motion to strike should be brought. In some cases, it may initially hold off to see how the parties will move forward.

Scott Robertson has provided such a cover letter in a couple cases – in both recent experiences, it worked well. Both files were addressed expeditiously by the court.

Prothonotary Lafrenière added that the court has often tried to divert cases from adjudication directly to dispute resolution, avoiding the need for interim or interlocutory relief. He simply encouraged the bar to pass on the message that a cover letter be included.

Justice Mandamin noted that for self-represented litigants, other than 'sovereign citizen' type cases, the dispute resolution mechanism may often be a better solution.

Krista Robertson noted that she has been promoting the project. However, the web site and practice guidelines are not clear regarding the need to provide a cover letter.

Andrew Baumberg noted that the guidelines refer to a letter for case management under Rule 384.

Prothonotary Lafrenière noted that the letter need only indicate that the proceeding is an Aboriginal law case, not necessarily asking for case management.

> **Action:** Andrew Baumberg to review of the web site to ensure proper links for SRL's to the cover letter issue and Guidelines.
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> **Action:** Krista Robertson to provide a possible cover letter checklist.

6. Band Governance Disputes: Creative use of costs to encourage or deter certain types of conduct / to promote settlement and deter frivolous proceedings and motions.

Prothonotary Lafrenière noted that some cases assess costs against an individual rather than against the band. He then referred to the Rules sub-Committee on costs and the need to discourage frivolous claims. Also, in some cases, the parties want an election but there is no funding available. Should the court be doing more? He added that the Court is looking at this along with a broader review that goes beyond Aboriginal law cases.

Paul Anderson can bring the matter to the elections group at INAC.

Justice Mandamin added that the costs issue goes beyond the taxable costs – counsel are likely sending a different bill to their clients. This is an issue for the wider bar.

Scott Robertson noted that this is definitely an issue to be raised within the Bar. He will raise it on the agenda for the next IBA meeting. That said, there is a difficult balance to make related to access to justice.

Sheldon Anderson noted that the Department made submissions to the Rules Committee taking the position that there was no need to make special provisions for costs in Aboriginal law cases.

Prothonotary Lafrenière added that in many cases, the issue of costs is more challenging to resolve than the substantive issue. Parties do not always think about costs until after the case is finished.

Krista Robertson raised the question as to whether a court can order that a party pay out of pocket rather than being indemnified by the band.

Prothonotary Lafrenière added that in some cases, the Court may simply note that the party was clearly acting in his / her own personal interest, not in the interest of the band. This is then for the band to determine whether it should reimburse the expense. In a recent case, the court ordered costs against an individual party in the amount of $150K.

> **Action:** Prothonotary Lafrenière to circulate the case.

Drew Mildon noted that this is sometimes an issue of there being a gap in the dispute resolution options at the community level.

Action: The issue is tabled for further discussion at the next meeting.

7. Varia

a) Informal requests for interlocutory relief – draft Notice.

Prothonotary Lafrenière noted that in case management, the court regularly grants relief on informal motion. However, this occasionally occurs outside case management as well. In order to make this practice more transparent, the attached draft Notice is being issued. Comments are welcome.

b) Scheduling – draft Notice.

This is to clarify the scheduling practice. Comments are welcome.

c) Trial management guidelines.

Prothonotary Lafrenière noted that these guidelines were drafted by a case management working group that was focused primarily on intellectual property cases. The Court has attempted to bring in guidelines to provide structure to the trial. There is little in the Rules to structure the management of a trial – these guidelines will assist. Certain aspects in these guidelines will not be applicable to Aboriginal law proceedings.

Comments are welcome, or the matter could be tabled for discussion at the next meeting.

Krista Robertson suggested that there should be cross-referencing between the Trial Management Guidelines and the Aboriginal Litigation Practice Guidelines.

Prothonotary Lafrenière added that the Court is moving the requisition for trial date early so as to identify the trial judge.

Action: Tabled to next meeting.

d) Court modernization

It was noted that the Court did not receive funding for its electronic case management system project – it will be necessary to explore creative alternatives. However, funding is available for installation of e-court equipment in a number of courtrooms later this Fall. The Court is looking for volunteers to proceed with trials electronically, which should provide substantial savings in trial time.

e) Court File Retention schedule: *practical requirements for practitioners*

The Courts' archive facility is full and expensive to run. However, feedback from the bar recommended retention of documents even in discontinued / settled files, which are sometimes relied on by counsel in other cases.

Andrew Baumberg noted that at the May 5 meeting with the Canadian Bar Association, the Chief Justice asked for a reasonable temporal cut-off for file retention. Ultimately, though, a shift to electronic filing is really the solution, even if most courts have some form of retention schedule.

Prothonotary Lafrenière asked for feedback: what can be destroyed safely?

Gaylene Schellenberg noted that there is an active CBA consultation process in place.

There followed a brief exchange regarding possible historic interest in some of these cases.

Paul Anderson noted that much of the evidence filed in court is a copy of files from public archives. However, much of it has been compiled / organized through considerable work to focus on important issues.

Andrew Baumberg noted that the second part of the equation is to shift to e-filing. There is an open question whether practitioners are able / open to shift to e-filing.

Krista Robertson asked whether there would be an opportunity for parties to take documents before destruction.
Andrew Baumberg noted the proposal (at May 5 CBA meeting) to publish a list of cases slated for destruction to allow parties an opportunity to retrieve documents.

On another topic, Krista Robertson asked about the possibility of video-conference at hearings to allow for community access to hearings.
Andrew Baumberg noted the new video-conference installations and cameras planned for many courtrooms across the country.
Justice Mandamin suggested that this be included in the Guidelines, not just to allow for hearings in the community, but also for remote video access.
Prothonotary Lafrenière suggested that it is likely just a question of the parties making a request.

Action: for follow-up by the Court and report at next meeting.

f) Registry screening of documents
Not addressed.

g) 'Thin file' pilot project
Prothonotary Lafrenière noted that the pilot would reduce registry workload for hearing preparation: tthe Registry would prepare their Court hearings with only a 'thin file' (rather than every document on the record being compiled). For example, for a motion, only the motion records would be available at the hearing, rather than all previous motions, correspondence, affidavits of service, etc.

h) Other subjects - Judicial appointment to the Court: Invitation to Apply
Prothonotary Lafrenière presented the issue and encouraged leading members of Bar to apply for judicial appointment – either for the position of judge or prothonotary.

i) Fall 2017 Meeting
The Conference is set for October 19 - 21 in Halifax at the Four Points Sheraton.

Proposal for next meeting: October 19 in Halifax.

Continuation of item 2. Discussion: how to make space for Indigenous legal traditions (procedure and evidence) into Court process
Prothonotary Lafrenière asked the question: *how do we make space for indigenous law?*

Dr. Stevenson responded that there has been an evolution, with a lot of work in communities to develop their legal framework. Should we apply deference, or an interventionist approach? In cases where indigenous law is raised as a matter in Court, it is often to address a related question in mainstream law. In these cases, an appropriate, respectful process seems appropriate. This may be less an issue for the courtroom as the need for development of appropriate administration of justice agreements to allow for creation of institutions.

Krista Robertston asked whether there was a need for a positive statement in the rules to facilitate creation of space for indigenous law.

Dr. Stevenson noted that there is some treatment of this question by Prof. Borrows, and in particular, regarding recognition by proclamation. Regarding tribal courts, these have typically addressed tribal law rather than addressing legal issues in mainstream law.

Prothonotary Lafrenière noted that there seemed to be a shift from trying to make space in the Federal

Court to having the disputes instead resolved elsewhere.

Dr. Stevenson noted that in the US, there was a recommendation to have a high degree of deference for intra-tribal matters.

Prothonotary Lafrenière noted the analogy of a recent case involving members of a Jehovah's Witness group challenging exclusion from the group. A high degree of deference was applied.

Drew Mildon noted the need for development of theory as well as practice initiatives. This would be a good initiative for the Law Commission.

Krista Robertston recommended continuation of this speaker series.

In response to a request, Prothonotary Lafrenière described the practice in intellectual property cases of having a "primer" For the judge, as there is an understanding that judges may not always be able to grasp certain scientific concepts without a primer. In Aboriginal cases, because of the nature of the issues, there is a specific way to look at a community to understand the issues in play, at least in actions, though probably less relevant in judicial review applications. Perhaps the assessor rule would be sufficient, but a separate rule may be necessary. The work that the Court has been doing is to try to facilitate resolution of disputes in the community as much as possible.

Justice Mandamin suggested that we may need to find language for a rule that captures what is needed in this context. A primer would probably be useful for a judge – parties would probably agree on the wider context.

Prothonotary Lafrenière added that the Court is expected to apply both common and civil law. Now it is also expected to apply indigenous law in some cases, but without the benefit of judicial notice of what the law is. It would benefit from an education.

Dr. Stevenson noted that in Australia, the broader indigenous perspective was usually put on the table early in the process.

Prothonotary Lafrenière then noted efforts to: establish a core group of judge; triage cases; shift to dispute resolution in the community; now develop a framework to hold an early education / primer on indigenous law.

Justice Mandamin described the Australian case at Alice Springs, where the judge found that by shifting the trial venue to the land had increased his ability to understand the evidence.

Paul Anderson noted that a lot of work has already been done and is available in the practice guidelines. If you go to the community and hear the Elders, you learn a lot. He gave an example of the visit to the land with Elders in the case of Shoal Lake #39 (re Garden Islands) and learning a great deal that was missing from the documentary record.

Dr. Stevenson added that in some cases, finding such evidence can open up avenues for settlement.

Prothonotary Lafrenière then asked for input on the long-term agenda for the committee.

Justice Mandamin described some of his experience with provincial court: working with the peace-maker courts showed respect for the First Nations' processes. This helps reverse the historic erosion of confidence in community-based dispute resolution. There is work in the committee to fine-tune the guidelines to help communities understand where opportunities exist for dispute resolution, possibly with reference to cases that have been successful in resolving disputes. When indigenous and non-indigenous law come into contact, there is an opportunity to approach the matter differently.

Dr. Stevenson agreed – at these points of contact, sometimes additional individuals outside the immediate dispute need to get involved, and resources need to be found, to develop new dispute resolution processes.

Prothonotary Lafrenière then referred back to the suggestions from Robert Janes at the last meeting:

> "… if we ask people to fill in a blank page, there won't be a response, but if we come up with concrete recommendations for comment, then there will be a lot of comment. He proposed a number of tasks that seem relevant for the committee:
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> 1. We want to discuss the approach to receiving indigenous law in Federal Court, with sub-issues:
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> - identification of potential issues and where they may arise
> - review of guidelines for possible new content
> - analysis of existing rules for creative approaches"
>
> We need to move on these suggestions and make the options more accessible to parties and ensure that they understand that the court is open to creative solutions. Other suggestions from Robert Janes include:
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> "2. Develop a response to the TRC in the Federal Court process – which recommendations likely apply to or affect the Federal Court?
>
> 3. Develop an approach to chronic disputes, including:
>
> - earlier intervention
> - remedies/approaches that focus on the underlying dispute
>
> 4. Discuss issues arising from the *Daniels* case that may potentially become contentious before the Federal Court."

Dr. Stevenson agreed with the first three, though suggested that the last item enters the area of substantive law that may be beyond the scope of the committee.

Prothonotary Lafrenière clarified that the Court is not providing a formal, written response to the Truth and Reconciliation Commission, but simply trying to address the pertinent recommendations as appropriate.

There was a suggestion from one Committee member to invite a speaker to discuss the dispute-resolution process in Akwesasne, which straddles the U.S. – Canada border.

Scott Robertson agreed that this is a good model to watch as it develops.

Sheldon Anderson raised the possibility of a pilot project related to band governance disputes in a particular community.

Prothonotary Lafrenière noted that the Court's resources are free, whereas dispute resolution by other individuals may have a cost. There have been suggestions that it might be useful to have a list of recommended mediators who could facilitate settlement discussions. Perhaps a different model for dispute resolution is needed.

In reply to a question, J. Mandamin noted that the Guidelines could perhaps have a new heading "Making Space for Indigenous Legal Traditions" that would describe opportunities that have been discussed, but acknowledging that if no local option is chosen, the court still has a video-conference option for community members to watch the proceeding from a distance. Otherwise, someone from the court could attend a community dispute resolution and then report back to the court. Similarly, an appendix to the guidelines could list all court cases that have relied on indigenous law.

Krista Robertson suggested that if assessors were advising the court, it would allow the body of indigenous law to be built in a more constructive way.

Justice Mandamin noted that the Siksika Nation has a dispute resolution process in which they have trained a number of mature community members on the role of arbitrator, with a neutral chair. If a dispute

ends up in Federal Court, the matter could be referred to the arbitration tribunal, with deference to the tribunal. If we start doing this with community dispute resolution bodies, this encourages procedural fairness.

Dr. Stevenson also suggested a conversation within the Committee to explore the barriers to settlement.

Prothonotary Lafrenière agreed, though noting that in many cases, the settlement discussions are kept confidential.

Krista Robertson added that there are very few items in the Truth and Reconciliation Commission report that are specific to the Courts. These could be identified for the next meeting.

> **Action:** Krista Robertson / Gaylene Schellenberg to compile a list of items in the Truth and Reconciliation Commission report that are specific to the Courts.

*** MEETING CLOSED ***