

**January 29, 2021**

**Attendance**

**Court:** Chief Justice Crampton, Justice Favel (Chair), Justice Lafrenière, Justice Strickland, Justice McDonald, Justice Shore, Justice Grammond, Prothonotary Milczynski, Prothonotary Ring, Prothonotary Molgat

**Courts Administration Service:** Chantal Proulx (Acting General Counsel / Executive Director), Andrew Baumberg (Legal Counsel / Secretary), Marie Desrosiers (Registrar), Isabelle Simard, Geneviève Lévesque, Alaina Woolfrey, Eileen Church Carson, Shakiba Azimi (Law Clerks)

**Indigenous Bar Association:** Scott Robertson

**Canadian Bar Association:** Julie Therrien

**Department of Justice (Canada):** Sheldon Massie, Paul Shenher, Eden Alexander

**Advocates Society:** Karey Brooks

**Other members of the Bar:** Pamela Large-Moran

**1. Adoption of Agenda**

Adopted.

**2. Adoption of Minutes (November 13)**

Adopted.

**3. Court Update**

Update by the Chief Justice

- COVID-19 Practice Direction update no 7 was issued January 18
  - the Court decided to close facilities to the public in Ontario / Quebec due to the provincial lockdowns
  - elsewhere, the Court installed drop-boxes for paper document submission
  - in-person hearings are available elsewhere, but most parties prefer to conduct the hearing by Zoom, which has been working well, including trials
  - the Practice Direction update continued most procedures from the June 2020 consolidated practice direction
- virtual hearings are now the norm
- there is a Sharepoint pilot underway in the Immigration field for exchange of the certified tribunal record – this shall eventually be expanded to other practice areas
- bookmarking / OCR formatting is now expected as a standard practice for electronic documents – it is actually easier to prepare bookmarks digitally than it is for paper documents; this will make it easier for the Court to find the relevant parts of the record
- there are numerous materials on the Court website:
  - [General Policy Statement re: Virtual Hearings](#)
    - [User Guide for Participants](#)
    - [User Guide for the Public and Media](#)
    - [Practice Tips for Remote Hearings](#)
- The Court is offering additional webinars re Zoom hearings: February 2 (J. Pentney) and February 9 (J. Lafrenière)
- A Protocol is available for litigants who attend at a Court hearing in-person

#### 4. Practice Guidelines (4th Edition)

##### (a) Protocol for administering an oath

Chief Justice: a protocol for administering an oath with an indigenous witness has been developed, or is under consideration, by numerous Courts across the country. The Federal Court is open to different forms of taking the oath – for example, Justice Zinn heard witnesses who took an oath according to the First Nation’s local protocol. He invited feedback from the Bar regarding the protocol to be followed.

Justice Favel: the subject is covered in the current practice guidelines,<sup>a</sup> and has been addressed on a case by case basis. *Is this sufficient?*

Scott Robertson: the practice guidelines provide options that could be considered when developing a protocol for trial. The specific form of oath may vary widely, though, from one witness to another.

Chief Justice: this item could be covered early within case-management of any given proceeding.

**Action:** Scott Robertson to consult within the IBA regarding the procedure for taking an oath.

##### (b) Protocol for oral history

Justice Favel: the Court’s comments were not substantive – we are essentially at the final editing stage.

Paul Shenher: at the last meeting, we were simply conducting a refresh on the project after a long break. One suggestion (presentation of evidence by a panel of Elders) has been added at paragraph 6, including case citations.

Panel of Elders “6. A panel of elder - Elders may be called to testify as a collective where the oral traditions of an Indigenous group are held as a collective. In such cases, the party calling the panel should identify the panel members and the basis for collective testimony. Restrictions on the testimony, such as who may answer questions posed on cross-examination, may be needed to assist the court.”

Furthermore, some clarity has been added regarding use of the terms “Aboriginal” and “Indigenous”.

Andrew Baumberg proposed the following next steps:

- approval of revised Protocol by the Committee;
- integrate Protocol into Practice Guidelines, which can then be circulated to the Committee by email for final review;
- subject to Committee feedback / endorsement, it would be sent to translation, and then the Practice Guidelines would be published.

Scott Robertson: paragraph 6 should apply more broadly than for nations who hold the oral traditions as a “collective”. We would like to avoid restrictive language that might be used as an obstacle. Some Elders are willing to testify only in a panel. Also, there are translation issues – having additional Elders in the panel can assist to ensure appropriate terms are used, ensuring the best evidence is available to the Court.

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<sup>a</sup> Excerpt from the current Aboriginal Practice Guidelines:

13. Ceremony Aboriginal communities may choose to begin important meetings with a ceremony or a prayer. In keeping with Aboriginal practice, participation is voluntary. Some such ceremonies or spiritual prayers are not to be recorded. On the other hand, Federal Court proceedings are a matter of record. These differing protocols may be reconciled by conducting the ceremony or prayer before Court is opened by the Court registry officer. Closing prayers may be done after Court is closed. The exception is when an Aboriginal witness chooses to take the oath by Aboriginal practice, such as on an eagle feather or with a smudge, during Court. This is no different than a witness taking the oath on a holy book. [Emphasis Added]

The Chief Justice asked regarding applicability of Rule 282.1, 282.2 and 283.<sup>b</sup> We might want to adapt these rules, and the provision for interpreters when there is a panel, to the situation of Indigenous Elders.

Paul Shenher: the intention was not meant to restrict these rules. He will follow-up with Scott Robertson to develop acceptable language.

Scott Robertson: perhaps there might be a hybrid of the hot-tubbing provision.

Andrew Baumberg noted that when developing the current expert evidence rules, the Rules sub-Committee on Expert Evidence had decided to defer the issue of testimony by a panel of Elders; it recommended that the Rules Committee should wait for recommendations from the Aboriginal Law Bar Liaison Committee on this issue.

Justice Shore: noted the decision in *Whelan v Fort McMurray No. 468 First Nation*, [2019 FC 732](#) regarding the testimony of Elders and the importance of indigenous language, as well as indigenous ceremony raised in other contexts.

### **(c) Assessor protocol (Rule 52)**

Robert Janes provided a written update on January 28: there have been a few responses from the original Indigenous advisory group volunteers for launch of project.

There is a question regarding compensation, for which Andrew Baumberg recommended recourse to the jurisprudence / practice under the Federal Courts Rules for Rule 52, on which the assessor protocol is based.

## **5. Sub-Committee: Indigenous Law**

Justice Favel noted the three current projects:

- i. case list – to be integrated into the Common List of Authorities
- ii. checklist – a resource for experienced Aboriginal law practitioners as well as general practitioners
- iii. sources of Indigenous law – this is meant to be a contextual document to assist the Committee: *how do we talk about making space for Indigenous law?* This was originally geared towards academic writing on this topic.

Another recurring theme is the Truth and Reconciliation Commission's Calls to Action. This subject was referred to the sub-Committee for discussion, and it was proposed that the Court develop a "reconciliation action plan" (RAP) similar in scope to that of the Federal Circuit Court of Australia (and other judicial bodies in Australia). This is another matter for the Committee to look at – development of a strategic plan for this area.

Justice Grammond: upon review of the Australian RAPs, it appears that much of the documentation covers work similar to what we already are doing, though some of the Australian documentation relates to the administrative arm – such as hiring targets.

Justice Lafrenière: this matter was raised previously many times within the Committee. We should probably have a more formal plan – there is an advantage to setting out our goals and time-frames.

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<sup>b</sup> 282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.

282.2 (1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.

283 Rule 93 applies, with such modifications as are necessary, to the use of an interpreter at trial.

Chief Justice: it would be good to have a list of strategic priorities for this Committee, along with dates and resources to work on them. Initially, when the Committee was first launched, there was a strategic direction. Since those principal strategic objectives were achieved, he has been suggesting a new five-year plan be developed for the Committee – we could perhaps start there.

Karey Brooks: after the TRC report was released, JFK Law decided to explore how it as a firm could respond. Reconciliation Australia has a framework for any organization to take concrete steps to promote reconciliation in their context. By developing a formal plan, this ensures accountability. The Law Society of B.C. also has a Reconciliation Plan, and the B.C. Chapter of the CBA has a similar framework. Although Reconciliation Australia has a more detailed framework, we are doing work here in Canada. The Committee is doing a lot, but a formal plan and report allows us to showcase our work, as well as integrating accountability into the process.

Justice Shore: with respect to therapeutic jurisprudence, we may want to connect with law schools that focus on making Indigenous law more accessible.

Justice Favel: there is work in progress that directly falls into the reconciliation action plan framework.

Eden Alexander: reiterated points by Robert Janes, Karey Brooks, Scott Robertson: it is very important to make a statement of what the Court has already done – highlighting this work can provide a model for other organizations.

Andrew Baumberg: the Outreach Committee is already developing some of this work (e.g., a PPT deck with an overview of Committee initiatives), and added that it would be quite simple to develop a summary report of the current projects / goals / projected timelines. However, the work in Australia appears to be of significant scope, including numerous regional liaison initiatives with Indigenous communities, and would likely require additional resources if undertaken.

**Action:** Andrew Baumberg to develop a summary plan of the Committee's work.

Justice Shore: much of the work was completed by judges regarding procedure and processes. Also, in 2005, the NJI created a paper with input from many judges – still applied today to ensure an appropriate climate in litigation / mediation.

## **6. Sub-Committee: Communications**

Andrew Baumberg provided an update:

- meetings January 20 and March 3, 2020, then January 12, 2021.
- development of a PPT slide deck for use by members of the Bar / Court to describe work of the Committee to broader legal community – *1<sup>st</sup> draft complete (needs translation)*
- outreach to legal and other types of organizations – *draft listing circulated to sub-Committee*
- outreach letter – *draft circulated to sub-Committee*
- development of an Outreach strategy – *in progress*

There was a proposal that we might want to consider development of a Memorandum of Understanding for some initiatives or organizations. This needs more discussion.

Justice Favel: this sub-Committee may be the preferred group to consider the proposal related to documenting our work via a Reconciliation Action Plan.

Chief Justice: when speaking at an event, it would have helpful to have a tangible document to share about the various initiatives the Court has been pursuing in the Aboriginal law area.

Prothonotary Ring: regarding the oral history guidelines, we may want to have a targeted communications plan for release of the update. It will be of significant use and benefit to practitioners. It is not prescriptive, setting out numerous options, so it will be of use in other courts. This could be presented at upcoming events at different bar association, for example.

Justice Favel: we can start with highlighting the work that has been done, and add the oral history protocol, then circulate it to the larger committee.

## **7. Sub-Committee: Scope and Cost of Litigation**

Andrew Baumberg:

- subject to some technical fine-tuning, the survey is essentially complete, and now requires endorsement from each member organization;
- a question was raised by the Department of Justice regarding access to the survey results -- it would be appropriate to provide the survey results for all organizations who were involved.

Sheldon Massie: the Department is pursuing the necessary approvals.

Andrew Baumberg: there have been no other collaborative public surveys by the Court. If formal endorsement is an issue, perhaps it can be dropped. However, the sub-Committee view was that each organization should participate in the survey.

Julie Terrien: the CBA needs a *final* version with all the logic rules implemented before it can approve the survey.

## **8. Rules Committee**

Andrew Baumberg noted that the project is in progress to develop a public consultation document (as noted at last meeting) regarding issues that might warrant rule amendments.

## **9. Long-term Committee Plan**

Addressed earlier.

## **10. Exchequer Cup – April 30, 2021 [invitation to participate as mentor or judge]**

Justice Lafrenière: we are looking for counsel to act as judges or mentors for the moot. For volunteers, please contact Andrew Baumberg.

Justice Shore noted the need for Indigenous mentors for law clerks at the Federal Court. It would be helpful to have members of the Indigenous bar assist.

## **11. Next Meeting**

Justice Favel: the Committee is supportive of the proposal for more frequent but shorter meetings by video. Possible meeting in late April.

**Action:** Andrew Baumberg to survey Committee members for a possible date.