Federal Court ~ Aboriginal Law Bar Liaison Committee	Cour fédérale ~ Barreau – Droit des Autochtones - Comité de liaison

January 4, 2022

MINUTES

Attendance
Court: Chief Justice Crampton, Justice Favel (Chair), Justice Shore, Justice Grammond, Prothonotary Milczynski, Prothonotary Ring, Prothonotary Molgat, Prothonotary Coughlan.
Courts Administration Service: Andrew Baumberg (Legal Counsel / Secretary), Sophie Gagné, Nusra Khan, Sarah MacLeod, Tara-Rose Mcdonald, Bradely Wiseman.
Indigenous Bar Association: Scott Robertson, Paul Seaman.
Canadian Bar Association: Robert Janes, Julie Terrien.
Department of Justice (Canada): Paul Shenher, Eden Alexander, Apryl Gladue.
Advocates' Society: Karey Brooks (regrets).
Other members of the Bar: Prof. Aimée Craft, Pamela Large-Moran.

1. Adoption of Agenda
Approved.

2. Adoption of Minutes (October 18)
Approved.

3. Court Update
Update by Chief Justice Crampton:

- All hearings are remote, with the option for in-person hearing.
- A small number of hearings was scheduled in-person in January, though they have almost all been converted to remote, at the parties' request.
- The hearing mode for hearings that currently are scheduled to be in person will continue to be decided by the judge seized of the case.
- There was a question at the meeting with the CBA in December whether all participants in the hearing room must be vaccinated – several members of the Bar encouraged a more stringent approach. The CBA will be providing further submissions.

Julie Terrien: we are going to the CBA section executive and will provide an update in January.

Chief Justice: where there are no witnesses, a remote hearing is a reasonable substitute for an in-person hearing. If there are witnesses, some members of the Bar are of the view that a remote hearing is not as good as an in-person hearing for cross-examination, so this will require further discussion.

Paul Shenher: will check with colleagues on other committees.

Chief Justice Crampton noted that the 2021 Covid Practice Direction requires updating, including to address the issues raised above. The situation continues to evolve.

Finally, a 50th anniversary conference is planned for June 27-29.

Action: Andrew Baumberg to send the Chief Justice's recent PBLI PPT presentation to members of the Committee.

For hearing observers, the list of public attendees is no longer being sent to the presiding judge for pre-hearing review / approval.

4. Sub-Committee: Scope and Cost of Litigation

Andrew Baumberg provided an update:

- the sub-Committee met December 16 – given the relatively few survey responses (only 41), it decided to extend the survey and promote it via additional channels – the new closing date is January 28.
- since the sub-Committee meeting, an additional 7 survey responses have been received
- preliminary comments regarding the survey responses: although there are insufficient replies (for now) to draw statistically sound conclusions, there are a great number of free-text comments regarding practice issues / recommendations – in February, following the extended survey period, the sub-Committee will begin a comprehensive review

Prothonotary Ring asked participant groups to make additional efforts to promote the survey.

Robert Janes: more lawyers doing aboriginal law out West are with specialized firms, whereas in the East, practitioners tend to be more mixed practice.

5. Appointment of a Neutral Advisor to the Court Regarding Indigenous Law or Traditions (Rule 52 Assessor Framework)

Andrew Baumberg provided an update: the Practice Guidelines (4th Edition) include the Assessor Protocol at page 5. There are at least two issues that require attention:

i. Development of guidelines regarding compensation for assessors / advisory committee members

ii. Creation of Indigenous Law Advisory Committee

Per Protocol: "**Establishment of Indigenous Law Advisory Committee:** In consultation with members of the Liaison Committee, the Federal Court will appoint a committee, to be known as the Indigenous Law Advisory Committee, of persons who are knowledgeable in Indigenous Law to assist the Court in cases where the Court is considering the appointment of an assessor as a neutral advisor to the court. Among other things, such assistance might relate to the reception, interpretation or application of Indigenous Law or traditions. The Indigenous Law Advisory Committee will appoint a Chair."

Andrew Baumberg held a call with Robert Janes on December 15 to discuss the costs issue, and they propose the following:

- if parties request the designation of an assessor, they should pay costs
- if the Court calls an assessor on own initiative, it should pay the costs

Robert Janes followed up on his initial invitation to the sub-Committee advisory members who assisted with development of the Assessor framework to confirm who agrees to be a member of the Indigenous Law Advisory Committee. Some have already replied to confirm their interest, while replies are pending for others.

Regarding the advisory group, their role is generally limited to suggesting a person for the role; an honorarium would be appropriate in the order of $300 per person. This can be discussed and included in a minor amendment to the framework.

Justice Strickland: would both parties pay, or only one if there is a single party requesting an assessor?

Robert Janes: it would usually be consensual. Rule 52 costs are considered a disbursement.

Andrew Baumberg referred to the case of *Porto Seguro*, where the Court ordered payment by the registry, to be reimbursed per the costs award depending on the outcome of the case.

Robert Janes: if the above is acceptable, we can prepare an updated framework for review with the advisory committee.

Paul Shenher: agrees.

Justice Favel: this seems to be a reasonable approach.

6. Sub-Committee: Indigenous Laws and Legal Orders (ILLO)

- Indigenous law case-list
- Development of a protocol

Justice Favel: one of the sub-Committee initiatives is to develop a case-list and then a protocol regarding how Indigenous law might be raised within the Court.

Justice Grammond: the work is in progress, with draft summaries provided for discussion. The group of law clerks is updating their draft and working on the remaining case summaries. There will be a more complete report once the work is done.

Chief Justice Crampton: asked about concrete steps to create more space for Indigenous law and protocols.

Justice Grammond: the Committee must be careful regarding its mandate – it is not meant to be deciding the substantive issues. It is up to parties to propose recognition of a particular feature of indigenous law. In so doing, we also accept indigenous agency. It is difficult to give a specific answer at this stage. The best we can do is signal readiness to engage the issues, and provide tools such as the case list. One issue is that the parties may be represented by non-indigenous lawyers.

Andrew Baumberg noted the counsel checklist [posted on the Court website], which will assist in this regard. Furthermore, the sub-Committee discussed the possibility of using the case-list, once the case summaries are completed, as a foundation for further discussion regarding development of guidelines for raising indigenous law issues in Court.

Chief Justice Crampton: this remains a priority for the Court.

Scott Robertson acknowledged the value of the Court's work on this emerging issue, which has been greatly appreciated, so he encouraged the Court to continue. Other Courts and tribunals in Canada look to the Federal Court as a leader in this regard. It is an important project, bringing in academics, Elders, and others. Many of the tools have now already been developed by the Court, including the guidelines and case-management. Of note, though, it is difficult to engage indigenous law issues directly during the pandemic and a remote hearing – often, the issues must be heard on the land.

Chief Justice Crampton agreed that there has been a lot of work, and noted an example of Justice Lafrenière participating in a mediation in an Indigenous language.

Apryl Gladue reiterated some of the comments made by Scott Robertson. She is currently working on these types of issues in her office, and looks to the Federal Court's leadership, which is noted in legal opinions on active files.

Justice Favel: although it does appear to be taking time, this reflects the complexity of the subject. However, the project is moving forward on numerous fronts simultaneously.

7. Online Access to Documents

Chief Justice Crampton provided an update:

- the Court conducted two rounds of consultation, first in preparing its 2020-25 Strategic Plan and then in the Summer of 2021 with representatives of a number of practice areas, including Aboriginal law
- feedback from the Aboriginal law bar was received orally at the October 18 Committee meeting as well as in writing[a] - the Bar expressed concern, in particular, with respect to public access to *affidavits*
- the initial plan was to include only the materials prepared by the Court as well as pleadings, whereas feedback from the consultation process reflected much support for the inclusion of

[a] Paul Shenher (DOJ) provided the following feedback on November 1, 2021:

> There was a concern about affidavits, such as those filed in support of motions for standing, summary judgment, advance costs, etc. Most affidavits are not subject to a publication ban or confidentiality order, but nonetheless include personal/sensitive information.
>
> For example, in Crown affidavits, we include the names of our client representatives, their location, their employment status, and a description of their employment in order to establish the basis of their knowledge/ability to swear the affidavit. Crown affidavits can also include detailed information about an Indigenous community (e.g. custom election codes, financial information) or about its members (e.g. *Indian Act* registration status, family ancestry).
>
> In Indigenous-litigant affidavits, we see narratives about family history, current family circumstances, *Indian Act* registration status, details about internal governance disputes, and asserted oral histories that are typically held close to the community.
>
> There was feedback about releasing any of the above-noted information on the internet, which could then be exploited by online hackers/scammers or used for other improper purposes.
>
> A recommendation was made that the project consider an additional form or information query to identify records, such as affidavits, that parties may not want to make available online at all or that parties may wish to redact in some way.

additional materials (e.g., evidence), but with the option for an exemption. The Court's working group is now trying to address implementation issues for a pilot project.

- We are working out some technology issues, but are getting close. If member groups from this committee want to be involved in the initial pilot, please let Andrew Baumberg know.

Paul Shenher: since the last meeting, he reported this project to the Department of Justice. The issue has also been raised via requests from commercial publishers asking for permission to host documents on their platforms. We shall be bringing both discussions together to develop a response. Any information from the Court would be helpful regarding the direction being taken on the online access project.

Chief Justice Crampton: this is an access to justice and open court initiative, which must balance these principles with confidentiality / privacy concerns in specific cases.

Scott Robertson: initial discussions within the IBA executive have viewed the proposal favourably.

Other Committee members agree.

Robert Janes: almost everyone says – you can only find out by trying, and addressing problems as they arise.

Chief Justice Crampton: confidentiality issues generally are addressed via a confidentiality motion, but we are trying to build flexibility in the project.

8. Rules Committee

Andrew Baumberg provided an update: 3 groups of amendments received Governor in Council approval on December 9, were registered December 13, and published in Canada Gazette Part II on December 22. They come into force on January 13. [See Notice issued by the Courts.]

Group 1. Amendments to the Federal Courts Rules
The Rules are amended to (a) allow the Courts to strike a balance between the importance and the complexity of the case and the amounts involved; (b) provide the Courts with the necessary tools to deal directly with dysfunctional or destructive conduct in the litigation process; (c) increase the effectiveness of the Federal Court of Appeal in managing motions and access to justice for litigants; and (d) reform the definition of "Christmas recess" and "holiday."
Publication in the Canada Gazette, Part II: December 22, 2021
Coming in Force: January 13, 2022

Group 2. Amendments to the Federal Courts Rules (Enforcement)
The amendments to the Rules regarding the enforcement of orders address practical, procedural and legal difficulties with considerations of efficiency, consistency, access to justice and the sensible use of judicial resources.
Publication in the Canada Gazette, Part II: December 22, 2021
Coming in Force: January 13, 2022

Group 3. Amendments to the Federal Courts Rules (Limited-Scope Representation)
The amendments to the Rules add an option for a party to be represented by a lawyer on a defined, limited mandate (i.e., for only part of the Court proceeding). This will increase the

proportion of proceedings in the Federal Court of Appeal and the Federal Court in which litigants are represented by a lawyer, whether on a limited or unlimited basis. Allowing litigants to have a lawyer represent them for only part of a legal proceeding will provide litigants with better access to justice while also making the Court process more efficient.
Publication in the Canada Gazette, Part II: December 22, 2021
Coming in Force: January 13, 2022

9. Long-term Committee Plan

Justice Favel noted the Chief Justice Crampton's request to have a more strategic focus to this committee, as well as discussions regarding the TRC calls to action.

Andrew Baumberg: the plan that was circulated is simply a framework, to add further material regarding Committee history and completed projects. The presentation by Chief Justice Bauman – "A Duty to Act" – was circulated to the Committee, as it is relevant to the Committee's long-term plan.

Justice Favel noted the issue regarding land acknowledgements, regarding which Scott Robertson had provided some feedback to Andrew Baumberg.

Scott Robertson: we sometimes get caught up in protocols – more important to focus on *why* rather than *how*. Why is a land acknowledgement important, and why do we want to create space? We could follow a similar approach to that adopted by universities, for example. There is an educational component – there is a learning curve. There remains work to be done both for indigenous and non-indigenous participants.

Action: Andrew Baumberg to share Scott Robertson's comments with the Committee, for discussion at next meeting. [the following message was circulated to the Committee on January 10]

> With respect to land acknowledgments, I believe the Court's role is not to publish guidelines on the "how" but rather to ensure the Court, and those legal representatives that appear before the Court, understand the "why". Life is a series of learning opportunities. I believe the unfortunate incident involving Justice Bell, provides an opportunity for the Court to take a leadership role (and a duty to act) to start a conversation on the importance and significance of land acknowledgements. Whether the Court, or the participants of the Court wish to partake in a land acknowledgment should be up to them and should not be forced upon them. The land acknowledgement should not be seen as adversarial or a part of a rote procedure but rather a recognition of the lands on which we now exist and a commitment to reconcile those pre-existing sovereignties. No more, no less.
>
> This may also be a learning opportunity for the Court to step away from the standard procedure of codifying (ie. sterilizing) an important process. The Court may want to publish context to what an acknowledgment really is and why it is offered. I would refer you to the simple, yet elegant, explanation as set out by Northwestern University (https://www.northwestern.edu/native-american-and-indigenous-peoples/about/Land%20Acknowledgement.html):
>
> > **Why do we recognize the land?**
> > To recognize the land is an expression of gratitude and appreciation to those whose territory you reside on, and a way of honoring the Indigenous people who have been living and working on the land from time immemorial. It is important to understand the long standing history that has

> brought you to reside on the land, and to seek to understand your place within that history. Land acknowledgments do not exist in a past tense, or historical context: colonialism is a current ongoing process, and we need to build our mindfulness of our present participation. It is also worth noting that acknowledging the land is Indigenous protocol.

This should be a good introduction to the discussion. Hope this helps.

Chief Justice Crampton: apart from the one incident, and based on past experience, he had generally been assuming that it was understood that the space was there to make a land acknowledgement.

Scott Robertson: it is not so much having a protocol to keep everyone in line, but to step back and ask a question why we have a land acknowledgement, and to make clear that the space is there. The goal is not to have specifics regarding the form of the land acknowledgement, though a protocol might propose advance notice to the Court and other parties regarding the content of the acknowledgement. It is preferable to avoid adversarial content.

Chief Justice Crampton acknowledged that the content of the land acknowledgement is the principal potential issue of concern. However, he reiterated the Court's openness to counsel making land acknowledgements.

Paul Shenher is advancing a discussion in the Department on this issue.

Andrew Baumberg provided a reminder regarding the law clerk application process – the deadline for law students (or others) to apply for a 2023-24 clerkship at the Federal Court or Federal Court of Appeal is January 17. If one of the Committee organizations has members who might be interested, please let them know. For more information, please see Court website: https://www.fct-cf.gc.ca/en/pages/about-the-court/careers/law-clerk-program [This reminder and link was circulated to the Committee on January 10.]

Chief Justice Crampton also noted that the Court is working on a consolidated practice guideline.

10. Next Meeting

Justice Favel: the Committee aims to meet 4 times per year, so the next meeting will be around March.