Federal Court ~ Aboriginal Law Bar Liaison Committee	Cour fédérale ~ Barreau - droit des autochtones Comité de liaison

Meeting of June 11, 2009 (Victoria, B.C.)

MINUTES

Present: Elder Greg Sam, Justice Francois Lemieux (Federal Court / Committee Chair), Justice John Mansfield (Federal Court of Australia), Justice Michael Phelan (Federal Court), Justice Leonard Mandamin (Federal Court), Prothonotary Lafreniere (Federal Court), Peter Grant, Deborah Hanley, Sheila Reid, Kathy Ring, Ron Stevenson, Robin Campbell, Peter Hutchins, Chris Devlin, Aimée Craft, Karen Lajoie, Gaylene Schellenberg, Michelle Casavant, Anita Merai-Schwarz, Andrew Baumberg

OPENING PRAYER & INTRODUCTIONS

Mr. Greg Sam, an Elder with the Tsartlip First Nation, offered an opening prayer to support those present to work together on this important endeavor.

PHASE I PRACICE GUIDELINES

Members of the Committee were asked to provide final comments on the June 9 draft to **Mr. Baumberg** within two weeks of today's meeting.

PHASE II PRACTICE GUIDELINES - PROBLEMS & POTENTIAL SOLUTIONS

Justice Lemieux provided an overview of the key issues on the agenda:

- Qualification of Elders – Legitimacy and Credentials
- Can-says & Will says – Story-telling
- Cross-examination – Truth-telling process
- Assessment by External Expert – Reputation of Elders in Community

He recommended that, at this stage, the Committee focus on procedure rather than substantive evidentiary matters that are subject to jurisprudential direction. Recommendations for addressing the four issues above were then noted:

- Proposed protocol submitted by the Professor Hopkins and David Nahwegahbow of the Indigenous Bar Association (IBA) at the Committee's Yellowknife meeting
- Proposed protocol submitted this week by Kathy Ring for the Department of Justice (DOJ)
- Proposed protocol submitted today by Aimée Craft for the Canadian Bar Association (CBA)
- Response to the DOJ proposal, submitted by Peter Hutchins, with excerpts from affidavit of Elder Peter Waskahat (submitted to the Federal Court of Appeal in the Sawridge case)

Ms. Ring presented her paper, organized in three phases: pre-trial, case-management, trial management. Various points were noted:

- the protocol focuses on pre-trial disclosure, a challenging issue for DOJ
- item 2(c) – proposal to have party provide explicit link between oral history evidence and proof of specific facts – it is not always clear what the link is
- item 3 – proposal to have on-going obligation to correct witness list / summaries – this exists

in rules for other forms of disclosure

- re timing – pre-trial disclosure must occur early enough in the case to allow time for the Department of Justice to act (i.e., retain experts and get reports in timely fashion)
- if there is no pre-trial disclosure, then the Department can't do a full assessment for the purpose of settlement recommendations
- it is usually not possible to get disclosure at the discovery phase, because the witness who attends is not in a position to speak about the issues, which are often 'a matter for an Elder'
- re case management – recommendations include
    - necessity of information regarding interpreters
    - protocols regarding oral history evidence
    - assessment whether proposed evidence is likely to involve personal opinion
- re trial procedures
    - items (a)[a] and (b)[b] were taken from the Williams case (caveat: Justice Vickers stated that procedure was specific to case at hand and should not be standard for all cases)
    - Item (c) concerned possible presentation by Elders in an uninterrupted manner, with any objections raised by Crown only at end

Justice Lemieux noted that a key objective at the pre-trial conference is settlement, which is assisted by early disclosure – the parties and mediator will then be aware of key information.

Prothonotary Lafreniere noted, though, that there is no obligation *in advance of trial* for a party to provide evidence, explain the purpose and relevance of the evidence, and explain the logical connection with the facts to be proved.

- Re items 1(f)[c] and (g)[d] – these proposals go against the rules, and certainly are not imposed on other parties before the Court
- need simple, practical, reasonable guidelines

Ms. Craft presented the CBA's draft protocol:

- proposal is organized according to the current structure of the Practice Guidelines
- trial preparation – include reference to possibility of alternate forms of testimony – this is at the end of the list, but is an important element
- Re item 3 (trial) – key principles emphasized: *flexibility, creativity, respect, sensitivity*
    - query whether there should be distinction between approach to testimony regarding laws as opposed to testimony regarding oral history
    - possible use of community expert to assist with explanation of oral protocol
- use of video-recording – proposal for first stage examination (the "direct") with opportunity for Crown to assist, with objections at end and list of questions prepared by Crown, put to Elder by counsel for the aboriginal party
- visual, auditory, and tactile components – in some cases, a site visit, or a video of the site, is possible to assist the Elder with testimony

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[a] Opening statement concerning list of individuals to be called and why.
[b] Possible procedures for assessing admissibility of oral evidence.
[c] Proposal to have detailed description of processes used to choose the particular individual to tender oral history.
[d] Proposal to have production of recordings where oral history evidence has previously been recorded.

- cross-examination – key issue is to minimize interruptions

Prothonotary Lafreniere noted that many issues in the trial management list are actually decided at the case management stage rather than by the trial judge – timing of these should be revised accordingly.

Ms. Hanley provided comments on behalf of the IBA. In particular, she expressed concern regarding the IBA's role on the committee. Members of the IBA have insufficient time / resources to provide meaningful input. Furthermore, there is concern from Elders that they are not involved in this stage of discussions, and it has been difficult for the IBA to hold teleconference meetings for all the Elders to discuss the proposals.

Prothonotary Lafreniere notes that the IBA's presence is crucial, and **Justice Lemieux** agreed that the IBA is an important participant. The committee's ongoing work will involve full consultation with IBA and Elders at the Fall meeting.

Mr. Baumberg confirmed that he could provide support for teleconferences for meetings of Elders to discuss issues and prepare for these meetings. **Prothonotary Lafreniere** added that Court has video-conference facilities that could allow for better exchange

Mr. Hutchins commented on the IBA's situation as well as the DOJ proposal:
- situation is similar to efforts for Treaty 6, 7, 8 Elders' intervention in Sawridge appeal – goal was to assist Court to understand Elders' perspective (see excerpt of transcript of Elder Waskahat) - rejected because the Court found the request to be late – delay was due to need for Mr. Hutchins, *before meeting with the Elders*, to have purification "sweat lodge" followed by time to complete the process
- he provided a brief description of a recent settlement process involving the Court: the claim was filed in Court and then immediately went to case-management for supervision of the mediation process by the Court - judge came to community to hear their perspective
- he then presented parts of a transcript of Elder Waskahat, who refers to the original understanding of the agreement between the Crown and First Peoples to work together to resolve issues: this requires early notice so that everyone has time to come together to develop a response, and recognizes the importance of equality, respect for indigenous system of laws, and meeting to discuss any changes to the process for resolving disagreements
- Re DOJ proposal: he does not believe that a culturally sensitive process can be balanced with the adversarial process, adding that trial judges do not know what to do with the Supreme Court 'guidance' to balance aboriginal perspectives with common law / civil law perspectives
- concern with cost of expert evidence: do not add *more* burdens now for oral history
- objection to excessive focus on prior contradictory evidence and participation of expert witnesses whose primary goal is to undermine testimony of Elder
- there should be more emphasis on wider process of dialogue / exchange in groups of Elders rather than focus on individual Elders

Prothonotary Lafreniere noted that in case management, it is possible to have an informal motion (if uncontested) or a formal motion (if contested) to Order video-tape of evidence out of Court

Justice Mandamin noted that there is very different process for Elder to speak within community compared with speaking within judicial process in Court – the judicial process, as currently structured, generally does not work.

- reference to Cold Lake claim process – some spoke in panels, others alone, some spoke in aboriginal language, others in English because they did not want someone to speak for them – a solid picture was built over discussions with numerous members of the community

Mr. Grant referred to the Delgamuukw case:

- there was commission evidence with Elders testifying together – sometimes Elders spoke with each other before answering the question, and this was found to be very helpful
- counsel were very careful to have interpreters go through certification, but Elders still found that interpretation was not adequate – some Elders took control of process and asked interpreters to step aside, instead speaking in English
- re pre-trial disclosure to assist with settlement – in many cases, there are indigenous protocols that restrict access to information
- reference to Justice Hugessen's recent settlement of 30-year old case – allowed testimony in settlement process that was not available for trial judge
- in this case, there was commission evidence, but 90% of Crown's questions were put to plaintiff's counsel, who then asked questions of Elders on behalf of Crown – there followed some minimal cross-examination by Crown counsel
- challenging issue of privacy / confidentiality of information to be disclosed – reference to a recent experience where Crown counsel showed no respect for sacred sites / ceremony
- reference to protocol in settlement agreement for residential schools creating an inquisitorial model: only the adjudicator asks questions in inquiries regarding sexual abuse – importance of allowing the witness the safety and space to tell their story
- often there is a non-linear development of facts through presentation by numerous witnesses – has never seen an aboriginal community with one single 'expert'
- key issue in cases is cost: if we add significant number of new pre-trial processes / hurdles, this will result in some plaintiffs not getting to Court – the *guide* should not become a *prescription* that adds additional burden
- needs respect for Elders, giving them control over the process

Elder Sam asked why the Court relies so much on Elders, many of whom are dying.

- there are many more people who can provide assistance / knowledge / language
- are there resources for Court / committee members to meet with communities to learn more?
- possible workshop / seminar for education re protocols and ceremonies?
- important to use the best of both worlds
- re time for this process by members of committee: make time – this is a priority for Elders

LUNCH – COMPLIMENTS OF CBA

PHASE II PRACTICE GUIDELINES - *continued*

Justice Mansfield speaks about the Federal Court of Australia approach to native title cases

- no historical treaties with aboriginal peoples, so claims proceed under *Native Title Act 1993*

- *Milirrpum v. Nabalco Pty Ltd* (1971) FLR 141 concluded that aboriginal peoples had no interest in land, but countered by *Aboriginal Land Rights (Northern Territory) Act* in 1976
- there are three requirements to prove native title:
    1. At settlement there was aboriginal group who had traditional interest – usually proved by aboriginal elders or written record
    2. Continuity of interest
    3. Group has continued to practice *same traditions and customs* since settlement
- jurisprudence is generally sympathetic to continuity, but the last condition is particularly challenging due to various events in 1900's that undermined communities: World War II, "stolen generation", evolution in traditions, etc.
- Federal Court of Australia has a panel of judges who are more interested in native title cases and so do more of them – the judge manages the entire case
- claimants are represented by special body established under the *Native Title Act*, chosen by election by people, to look after native title issues for the whole area – this provides a cogent / coherent approach and funding
- one of the Representative Body's task is to decide which claims should be supported – some of these selection decisions are subject to challenge on judicial review
- preservation of evidence happens frequently – common if witness is very old, or ailing
- often the lawyers want to control the process for preservation of evidence, resulting in huge delays for counsel to manage evidence and ensure that there are no surprises – if urgent, it is important to take evidence as soon as possible to preserve it
- citation of Justice French: 'aboriginal evidence is of highest order, more important than any other evidence … it is evidence of hearts and minds of the people, critical to the people … like a library of the traditions'
- on-country evidence (e.g., in indigenous community / land)
    - this should be the *starting point*
    - key questions: where do you go to hear the evidence and who do you hear?
    - Answer: go to where the evidence is best taken - every judge who does this type of case will tell you that the quality of what witnesses tell you *on country* is much, much better than in formal courtroom
    - many individuals are comfortable in court setting, but others are not
    - in courtroom, many witnesses are unable to speak well, but the issues come alive on country
    - whatever you do, critical to include on country evidence in planning for trial
- group evidence
    - very important process for receiving evidence – some aboriginal peoples in Australia are very shy, very conscious of responsibilities (of what they should say or not say, and special protocols, and whether it is their role to tell the story)
    - some people will give evidence only if it is their 'business' to give story
    - so, if sitting with 3 or 4 people, in right setting, they may more easily testify, allowing discussion re who is the best person to tell the story
    - you also get telling evidence from Elders' family members, who have grown up with Elders and have learned specific cultural practices
    - important to set the right climate to hear evidence and be open to participating in required protocols / ceremonies that are key to allow evidence to be given
    - Crown may have some cross-examination, bringing out additional information,

which is fine, as this is important role for Crown to assist
    - example provided of evidence given in a group, with large presence by community, which gives significant guarantee of reliability – whole community may point out error
- re adversarial model and burden of proof
    - in Australia the Crown, on the whole, takes the position that it wishes to be *persuaded*, rather than to *dispute*
    - 15 years ago, there was a lot of fear about native title claims, but this has been diminished considerably
    - Crown now simply wants to be satisfied that it is appropriate to acknowledge claim – less adversarial
    - we have to be satisfied that there is an appropriate claim leading to *in rem* declaration
    - some States more collaborative than others
    - *Native Title Act* amendments to grant Court further jurisdiction to monitor cases
- re expert witnesses and "hot tubs" process
    - cost, delay, time are massive problems – court has tried to address these
    - no claim goes to court without appropriate anthropological research, with support via Representative Body, and Crown also has access to an anthropologist
    - key issue re evidence: *What is in dispute? Why?*
    - process: general discussion, followed by meeting of experts, monitored by Court Registrar (1 scribe and 1 'provocateur'), to determine the nature of the dispute and try to clarify factual issues – this may take a day or even a few days
    - eventually leads to settled structure for experts' reports, with more narrow focus on factual issues in dispute
    - these can be the focus of evidence in court to address the remaining issues
    - example: in one case, after the anthropologists met, the issue in dispute was very narrow – one said yes, the other said no – part-way though the hearing, after a number of witnesses gave evidence, one anthropologist changed his conclusion, allowing the hearing to end early – very practical approach
- cross-examination of indigenous witness
    - nothing wrong with cross-examination, but it is difficult to do
    - differences between aboriginal / non-aboriginal ways of relating may lead to unexpected results – someone may answer "I don't know" when they actually mean "I can't tell you" or testimony with temporal reference may actually be intended to have non-temporal significance
    - testimony is usually given within very specific cultural framework – 'facts' change over time with additional perspective (e.g., 'facts' in today's news stories will often be found, with additional time / perspective, to require revision)
    - see for example, rules re cross-examination of witness – key case: *R. v. Anunga* (1976) 11 ALR 412
    - Milirrpum case, above, also refers to this issue
    - counsel need to cross-examine in the proper manner to get to evidence
    - recommendation: don't be too prescriptive re procedure
- in conclusion, Australian experience is that on country evidence is not exaggerated

- numerous settlements in claims – often the judge will issue proposed consent judgment and ask for comments from parties

Justice Mandamin described his experience witnessing informal court proceedings in Australia ("Murrey court") that were much more effective in getting useful testimony than a very formal process – did not need so many adjournments to get disclosure

Mr. Stevenson noted that DOJ is very mindful of the concerns raised earlier by Mr. Hutchins and wants to get behind the spirit of the document that bridges gap between adversarial model and more collaborative model – 4 key points were made:

  - strong procedure is key
  - we are trying to move key issues in dispute on the table up front
  - key principles are important – among other items in DOJ's proposal, there is strong support for community to control its own oral history
  - for very sensitive issues, trial judge has discretion to control process

- case management is not directed solely towards oral history, and allows for best practices to emerge: an opportunity to work through, at early stage, how to address these problems
- these cases raise challenging cross-cultural issues – testimony of Elder is privileged opportunity to gain insight into aboriginal peoples' world
- oral history testimony presents fundamental position of aboriginal peoples, but also serves the purpose of evidence within a judicial process
- can we rely on Elders for processes other than litigation – e.g., to assist with mediation
- also, in response to an IBA suggestion re discussion on *substantive* law issues, the Department is open to discussion with the IBA, CBA, and Court on substantive law
- proposal to take the document, broaden it, and come back to table – there does not seem to be a wide divergence in positions
- need balance between being overly prescriptive and being overly general

Justice Mandamin recommends opportunity for committee to exchange versions of paper.
In response to a query as to the process for creation of the first draft of Phase I, **Mr. Baumberg** described the process of compiling suggestions to create the first draft, which became the focal point for discussion.
Justice Mansfield recognized that the adversarial process is capable of dealing with these cases, though the adversarial process is evolving to include case management, mediation, etc.

- traditional adversarial judicial process is too narrow – e.g., discovery is not a right in Australia, generally, but must begranted only by Order of Court
- in his view, the proposals before the Committee are not so far apart

Prothonotary Lafreniere noted the recent Notice re Streamlining Complex Cases

- delays are often not due to Court but to overly cautious approach by counsel – Court is involved in case management to determine whether delays are necessary
- some cases require minimal discovery, others more, others require discovery in phases, sometimes discovery is a disadvantage to client and far too expensive – case management allows parties to work outside the rules (ref. to Rules 3)
- re DOJ suggestions, if these are set down in writing, they may be seen as default – perhaps appropriate in some cases, but not in others

VARIA & CLOSING

- **June: Mr. Baumberg** to pull comments from minutes and draft proposals together into a document which identifies common suggestions as well as points of diverging opinion
- **Prothonotary Lafreniere** will assist with the phase II consolidation document and focus on contentious issues (also, there are some issues in the draft protocols that can't be resolved in advance by case management judge – e.g., weight to be assigned to evidence)
- Phase II Consolidation document to be circulated to members of Committee / Elders
- **June - August:** conference call(s) with Elders to provide update(s)
- **September 15:** if any member intends to respond in writing, please submit by this date
- **Week of September 22nd** (**Mr. Baumberg** to canvass members for dates): Teleconference for discussion / focus on issues and differences of opinion in first draft of Phase II
- **October 15:** further discussion of issues at meeting in Vancouver
    - Location: Proposal to hold next meeting at special location in Vancouver and to approach Ms. Fran Guerin to help plan the meeting at long house (at University or Musqueam First Nation)
    - Participants: Reference to relationship developed with Elders at April Symposium – it is important to include Elders at next stage of discussion of draft guidelines
    - Proposal to invite Elders from April meeting & Mr. Sam for October 15 meeting
    - Funding: Mr. Baumberg to explore funding options and report back to Committee
- Important to provide advance notice to Elders of issues for discussion
- **Mr. Baumberg** to assist with organization of conference calls with Elders to discuss issues

Mr. Hutchins provided some final comments

- keep in focus an informal approach for testimony - "discussion around a table"
- it is important to set the bar for well-accepted facts so parties don't need to start at beginning to prove facts in each case – we have done this with the law (no need to re-argue the basics of the law every time) – there is a problem with the lack of institutional memory

Mr. Sam offered a closing prayer.

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