

Federal Court ~ Indigenous Bar ~ Aboriginal Law Bar
Liaison Committee Meeting

MINUTES OF MEETING

Saturday, March 11, 2006 (12:15 p.m - 2:00 p.m)
Fairmont Palliser Hotel
Calgary, Alberta

PARTICIPANTS

Justice Dolores Hansen	Federal Court
Candice Metallic	Indigenous Bar Association / Assembly of First Nations
Kathy Ring	Department of Justice (Vancouver)
Christopher Devlin	CBA Chair National Aboriginal Law Section
Ritu Gambhir	CBA Vice Chair Aboriginal Law Section
Karen Lajoie	CBA NWT Aboriginal Law Section
Gary Campo	CBA Treasurer National Aboriginal Law Section
Peter Hutchins	CBA Member National Aboriginal Law Section
Peter Grant	CBA Member National Aboriginal Law Section
Gaylene Schellenberg	CBA National Office
Jeff Harris	CBA Member National Aboriginal Law Section
Heather Treacy	CBA Alberta Aboriginal Law Section
Teresa Homik	CBA Member National Aboriginal Law Section
Sheri Wicks	White, Ottenheimer & Baker
Kathryn Deo	Woodward & Co.
Susan Hardy	Nunavut Department of Justice
Sandra Gogol	CBA Secretary National Aboriginal Law Section
Stuart Gilby	Burchell Haymen Parish
Catherine Stewart	CBA Ontario Aboriginal Law Section
Sarah Overington	CBA Chair Yukon Aboriginal Law Section
Andrew Baumberg	Executive Officer, Federal Court

Recording Secretary: Andrew Baumberg

Opening Remarks

Justice Hansen, Christopher Devlin, Candice Metallic, and Kathy Ring and others present agreed that the primary focus for the meeting should be to develop a framework for discussion of the issues related to expert witnesses, including the role of Elders.

Federal Court Practice - Expert Witnesses

Peter Hutchins noted that many expert witnesses had found their experience in the Courts to be very negative and as a result would not return. In his view, the role of expert witness required rethinking to counter this trend. He discussed various issues concerning expert witnesses set out in a short outline (reproduced below) which he presented at a Federal Court seminar in September 2005 :

Sui generis Nature of Aboriginal Litigation

- Interdisciplinary issues at stake;
- Cross-cultural and multicultural character of the issues;

- The importance of oral tradition histories;
- The evolving understanding of relevant and appropriate expertise;
- The extreme dependence upon historical analysis;
- The presence of complex linguistic issues;
- The challenges for valuation – historic claims, *sui generis* interest in land, the cultural importance of land, etc.
- A unique legal context with several legal systems applicable in any one case:
 - Aboriginal customary law;
 - Common law;
 - Constitutional law;
 - Civil law;
 - Federal common law;
 - International law;

Some Problems for Litigators

- The adversarial and winner take all nature of the process;
- Preparation of evidence to satisfy the Court while avoiding extraneous inquiry and expense;
- Shrinking pool of “willing” experts;
- The presence of “career” Court experts;
- Prohibitive cost of meeting the ever increasing “evidentiary burden” (almost inevitably borne by Aboriginal Plaintiffs);
- Management of documents:
 - Disclosure and production of historical/archival documents: is it a wasteful exercise – duplication of research, no context or analysis;
 - Should the Court consider and what weight should the Court give to documents that:
 - . are not identified by experts;
 - . are not contextualized by experts;
 - . are not analysed by experts;

Possible Alternative Approaches and What the Court Might Do

- A code of ethics for experts;
- Rethinking the expert witness categories (e.g. how to classify Aboriginal elders)
- Court appointed experts acting as “friends of the Court”;
- Early identification and disclosure of potential experts;
- Early pre-trial Court involvement in structuring evidence;
- Require Case Management Conferences prior to commissioning expert evidence – to encourage or order:
 - Joint commissioning of evidence;
 - Collaboration of experts;
 - Peer review of Expert Reports;
 - Selection from a predetermined pool of experts;
- Require participation of experts prior to closing pleadings;
- The use of a panel of experts in Court to ‘air’ the issues;
- Collaboration of Parties’ experts prior to preparing Reports;
- Collaboration of Parties’ experts after Plaintiffs’ Reports are filed;
- Collaboration of Parties’ experts after preparation of Reports and filing of Plaintiffs and Defendants Expert Reports;
- Peer review of Expert Reports;
- Possible limited use of experts at the Appellate level;

- Education of the Judiciary in the methodology of diverse disciplines;

Some Models and Materials

- The Academy of Experts – Code of Practice for Experts, June 22, 2005;
- Part 35 of the British Civil Procedure Rules and Practice Direction, February 2005;
- The Quebec Code of Civil Procedure – Arts. 413.1 – 424;
- Extract from the Guidelines for the Rules of Practice for the Environmental Review Tribunal, Government of Ontario: <http://www.ert.gov.on.ca/pdf%27s/ERT-Guidelines.pdf>;
- *Anthropology and Indian Land Claims Litigation: A Symposium*, May 5, 1955;
- Bibliography.

Kathy Ring agreed with Mr. Hutchins concerning the seriousness of the problem and reiterated her remarks from the previous meeting in this regard. She noted, in passing, the experience of a German colleague trained in the inquisitorial court model, which appeared to have some advantages compared to the adversarial model with respect to the treatment of expert witnesses. In her view, even if the adversarial model were to be maintained, some improvements were necessary. In order to advance this agenda, she recommended that each group seek to identify more clearly the issues / problems within a fixed time-frame. Finally, she suggested that Dr. Arthur Ray be invited to participate, as he had worked with both First Nations as well as the Crown and was currently conducting research on this very subject.

Candice Metallic noted that Kathleen Lickers had offered to prepare a discussion paper with respect to the role of Elders – (i) qualification as expert witness and (ii) treatment within the Court process. She noted, also, that the IBA wished to invite an Elder to participate at a subsequent Liaison Committee meeting on this topic so as to relate his or her experience in the courtroom.

Peter Grant described the experience in Delgamuukw of an Elder testifying under oath and then subject to ‘interpretation’ by an expert witness. He also referred to the residential schools adjudicative process which had adopted a different approach.

Candice Metallic referred to the Indian Claims Commission as another example.

Christopher Devlin recommended that the CBA, IBA and Department of Justice prepare discussion papers setting out these issues, and the committee could then begin the ‘sifting process’.

A question was raised as to whether the issues should be addressed separately – expert witnesses and Elders. After some discussion, it was agreed that there was considerable overlap and it would be best to look at both perspectives in tandem. **Peter Hutchins** noted, in particular, that the issues were joined in at least two important ways:

- qualification process – who is the expert?
- assessment process – non-aboriginal experts comment on the testimony of Elders

Christopher Devlin, Candice Metallic, and Kathy Ring committed to try finding someone within their respective organizations to prepare a discussion paper in time for a longer meeting in the Fall which would be dedicated to this issue.

A question was raised regarding expenses, in particular for Dr. Arthur Ray. **Kathy Ring** agreed to explore whether he has funding for this project.

Liaison Committee Organization

There was a short discussion regarding the CBA proposal, in particular with respect to the location of subsequent meetings. **Christopher Devlin** proposed two possibilities: (i) in conjunction with the IBA conference (October 20 and 21, Saskatoon) or (ii) in conjunction with the joint Justice / CBA meetings (November 3, Ottawa). He indicated that he wished first to raise these options within his CBA Section and then contact the other Liaison Committee representatives to discuss the matter.

Bench books

Christopher Devlin recommended that this item be placed on the agenda of the national bench and bar liaison committee, given that it was not restricted to the aboriginal law practice.

Continuing Legal Education

Justice Hansen provided an overview:

- Federal Court education program – biennial seminars planned on aboriginal law issues
- the Court is in early stages of development of a specialized training program to assist judges and prothonotaries hearing cases in this area
- Court annual conference (late 2007) – “Evidence” is tentative theme for 2-day education event (including aspects of oral history evidence)
- the Court is open to invitations to participate in CLE programs

Rules Committee

Peter Grant explained that the Federal Courts Rules Committee was developing an amendment to the rules to reinstate representative actions. **Andrew Baumberg** confirmed that the legislative drafters were expected to complete a revised draft in time for the next meeting of the Rules Committee in June. If approved, the amendments could then be “pre-published” in the Canada Gazette for 60 days for public comment. Subject to any comments received, the Rules Committee would then be in a position formally to adopt the amendments.

There was insufficient time to address any of the other items on the agenda.

Meeting Adjourned at 2 p.m.