

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

MINUTES OF MEETING

Friday, September 30, 2005 (1:30 p.m - 3:30 p.m.) in Ottawa /

PARTICIPANTS

Justice François Lemieux	Federal Court
Justice Dolores Hansen	Federal Court
Justice Michael Phelan	Federal Court
Justice Yves de Montigny	Federal Court
Andrew Baumberg	Executive Officer, Federal Court
Emily McCarthy	Legal Officer, Federal Court
Tony Chambers	Department of Justice
Andrew Beynon	Department of Justice
Kathy Ring	Department of Justice
Christopher Devlin	CBA Chair Aboriginal Law Section
Candice Metallic	Indigenous Bar Association
Ritu Gambhir	CBA Vice Chair Aboriginal Law Section
Karl Jacques	Department of Justice
Liza Swale	CBA Ontario Aboriginal Law Section
Doris Aubin	Department of Justice
Karen Lajoie	CBA NWT Aboriginal Law Section
Tom Vincent	Department of Justice
Jeffrey Clark	Department of Justice
Martin Reiher	Department of Justice

Recording Secretary: Andrew Baumberg

1. Opening Remarks

Justice Lemieux welcomed everyone present, noting that this was an open, first meeting, with a single agenda from the Court: *how can we do things better?*

Christopher Devlin saw this meeting as a fantastic opportunity for the bar, and he was very pleased to see members from the CBA, IBA, and DOJ in attendance. In his view, meetings would best occur in the Spring at the annual CLE in order to maximize attendance from the bar.

Candice Metallic welcomed the invitation to the IBA, noting that the organization represents some 300 members out of approximately 1000 First Nations law graduates.

Kathy Ring noted that the Department of Justice was organized by portfolio, with some cross-portfolio issues in aboriginal affairs and litigation. In her view, dialogue is very welcome. She added that often the only contact with private bar counsel is in an adversarial context. She recommended regional participation, as there were often important regional differences.

2. Federal Court Practice

- Update: Sub-Committee on Representative Proceedings

Christopher Devlin gave some context to the repeal of former rule 114. **Emily McCarthy** then gave an update of the work of the Federal Courts Rules Committee, noting the Committee's intention to reinstate the rule, both for actions and applications, subject to some key principles:

- the Rule would not be available at the Federal Court of Appeal
- the Rule should not require leave of the Court, though there would be a mechanism to challenge the representative nature of the proceeding
- some protective measures would be available to the Court - similar to class actions but without certification

She then noted two other practice issues of interest:

- **Case Management / Status Review Rules** – the Federal Court is now conducting a systematic review of the rules governing case management and status review, and welcomes input from the Bar at this early stage in the process.
- **Expert evidence rules** – a discussion paper (available on the Federal Court web site at http://www.fct-cf.gc.ca/bulletins/notices/notices_e.shtml) was circulated by the Rules Committee in September 2004 regarding earlier service of expert affidavits. Draft amendments were expected to be before the next Rules Committee meeting November 25, 2005 and then published in the Canada Gazette for public comment.

Justice Lemieux asked how the case management review would proceed, as this was a very important issue to the bar.

Emily McCarthy noted that an ad hoc committee had been created to conduct preliminary work, but no formal subcommittee of the Rules Committee existed yet. The process was at a very early stage, looking substantially at Rules 380-385.

Christopher Devlin noted that early identification of experts and focus of the issues was important. He recommended consideration of joint commissioning of evidence, as well as the participation of experts prior to close of proceedings.

Kathy Ring noted that, at the Vancouver office, an in-house historian had been engaged (Clint Evans). The Department was continuing to build relationships with academia, though noted a unique problem with the Crown. If academics work with the Crown, they risk losing opportunities to continue work with aboriginal communities. As a result, the same experts must often be re-used more frequently. Many experts are now retired or near retirement and won't want to be in witness box. Similarly, junior experts have sometimes had a bad experience, and so

will provide internal advice, but won't go on the stand. She recommended that an expert (Dr. Arthur Ray, UBC) be brought in to present comparative research on the use of experts in Courts.

Justice Lemieux referred to his experiences with a trial related to the railway industry, with numerous experts for each party, at which he had the experts meet outside the Court to determine which issues allowed for agreement among the experts, which allowed considerable savings in time.

Candice Metallic recommended that elders be included in the expert witness category, noting that they faced similar problems as other expert witness (e.g., challenges to their credibility, etc.). She noted that the pool of elders is also shrinking, as they are reluctant to enter the adversarial process.

Emily McCarthy noted the timelines for the Rules Committee review of case management and status review rules:

- internal document in October
- plenary rules committee meeting November 25, 2005
- discussion paper - early 2006
- timeline for amendments - possibly 12-18 months

Justice Lemieux invited members of the Bar to communicate, and possibly meet, with Emily McCarthy with proposals regarding case management / status review.

Christopher Devlin suggested, with respect to expert witness, that Peter Hutchins be invited to develop a paper with the support of the CBA, and the IBA and DOJ could do likewise. He noted that a common view would likely be possible on many points - they will discuss this further.

- Procedural & evidentiary issues: section 35, *Constitution Act, 1982*

Kathy Ring raised a number of questions for further discussion in this area:

- who is proper person / what is best forum? (e.g. issues raised in criminal defence)
- notice procedure to bring in a First Nation
- corporation (especially with Métis) - can it have collective rights?
- overlapping claims (e.g. in B.C.)
- how to bring in parties who have an interest? – want certainty at end of process

The Department is reviewing these issues and will raise them again more formally at a subsequent meeting.

Christopher Devlin noted that the CBA would need more time to review Cynthia Westaway's notes which were circulated in advance of the meeting. He recognized a key question regarding the implication of neighbouring groups.

A question was raised as to whether the proposal was to stop the criminal process, to which he

replied that this would be difficult, given that criminal process has a different onus, is a matter of public law, and relies on legal aid. He also noted that there was a cost incentive in civil processes.

Justice Lemieux concluded discussion on this point, noting that the Court would wait for more formal submissions from the IBA, CBA, and Department.

- Additional practice issues

Kathy Ring noted numerous practice issues.

Firstly, with respect to bench books, she referred to a BC Court of Appeal Notice to Profession which provided a list of case authorities for which parties need reproduce only the head note and relevant passage. It was noted that this might be more challenging for an itinerant Court.

Secondly, with respect to document production, she noted that many trials involved numerous instalments of an affidavit as the experts progressed through very substantial research. This process allows a partial exchange of affidavits early in the process. The rule on affidavits refers to form 223, with standard paragraphs requiring that all relevant documents be listed along with an affirmation that the affiant is not aware of any other document that is relevant. This is problematic, given that the affiant usually is aware of the preparation of additional supplemental affidavits. She asked whether it might be possible to change the wording. She referred to rule 226, which allows a supplemental, the idea in the Rules being that there will be only two affidavits, whereas in aboriginal litigation the norm is the opposite. Often, parties develop a research plan and proceed in order, but may work in stages and circulate updates in due course.

Justice Phelan suggested that counsel ask for a case management judge on day 1, who could then provide directions regarding the form and timing of affidavits. **Justice Lemieux** noted that this also applies to continuing discovery.

Kathy Ring raised a third practice question with respect to electronic document management, i.e. what are the 'lessons learned' from the electronic trials to date, and are there are ways that we can use the available electronic tools more effectively.

Fourthly, she noted an issue with oral history evidence and discoverability of such evidence prior to trial.

Fifthly, she noted an issue with presentation of this evidence at trial, particularly with respect to cross-examination. There was criticism of justice lawyers, trying to balance the adversarial process and respect for the witness.

Finally, she noted an issue regarding costs (raised by the Alberta Office), in that the costs regime under the Rules doesn't affect wealthy litigants.

Christopher Devlin recommended that these be put on paper for comment / discussion among the different groups.

Justice Hansen noted, with respect to electronic management of documents, that the judge has discretion and should have this issue addressed well in advance of trial. The case management judge may be working in parallel with trial judge preparing for trial. She recommended that it be considered a subject for an education program.

Justice Lemieux noted that some of these are case management issues, some are trial issues.

Justice de Montigny added that the Court could certainly benefit from litigants' experience in the Provincial Courts.

Kathy Ring proposed that one or two topics be chosen for discussion at the next meeting.

- Information re pending litigation

Andrew Baumberg noted that this issue had been raised by the Chief Justice, at the earlier meeting with the CBA in March, for further discussion by the group. It was noted by various individuals that little information was available in this regard.

3. Continuing Legal Education

- CLE program

Justice Hansen invited collaboration for upcoming conferences, suggesting that judges be invited to participate in CLE events. She added that a joint conference with the Court, possibly every year or every second year, might be considered, as is the case now with the Maritime Law Bar and the Intellectual Property Law Bar. Funding options could be explored to facilitate such an event.

Christopher Devlin will bring this to the organizing committee for the Spring Meeting [the meeting has been scheduled: March 10 & 11, 2006, in Calgary]. This is a joint CBA / IBA CLE and business meeting. The next meeting of this liaison group would be on day 2 of that program.

Candice Metallic noted that the IBA conference is held every 3rd weekend October.

4. Next Meeting

It was proposed that the next meeting be held in the Spring in Calgary.

5. Varia

None.

6. Closing Remarks

Justice Lemieux thanked everyone for their participation and for this very successful first meeting.

Follow-up List

- **Kathy Ring** recommended that an expert (Dr. Arthur Ray, UBC) be brought in to present comparative research on the use of experts in Courts. **Candice Metallic** recommended that elders be included in this expert witness category, noting that they faced similar problems as other expert witness (e.g., challenges to their credibility, etc.).
- **Christopher Devlin** suggested, with respect to expert witness, that Peter Hutchins be invited to develop a paper with the support of the CBA, and the IBA and DOJ could do likewise. He noted that a common view would likely be possible on many points - they will discuss this further.
- **Justice Lemieux** invited members of the Bar to communicate, and possibly meet, with Emily McCarthy with proposals regarding case management / status review.
- **Christopher Devlin** recommended that the list of practice issues raised by Kathy Ring be put on paper for comment / discussion among the different groups. **Kathy Ring** proposed that one or two topics be chosen for discussion at the next meeting.
- **Justice Hansen** recommended that electronic management of documents in the context of aboriginal litigation be considered a subject for an education program.