Federal Court ~ Indigenous Bar ~ Aboriginal Law Bar
Liaison Meeting
Wednesday, February 20, 2008 (9:00 a.m. - 4:00 p.m.)
Yellowknife, N.W.T.

MINUTES

PARTICIPANTS

Justice François Lemieux	Federal Court
Justice Yves de Montigny	Federal Court
Justice Anne Mactavish	Federal Court
Justice Leonard Mandamin	Federal Court
Justice John Z. Vertes	Senior Judge, Supreme Court of the N.W.T.
Mr. David Nahwegahbow	Indigenous Bar Association
Ms. Kathy Ring	Department of Justice (Canada)
Mr. Andrew Baumberg	Executive Officer, Federal Court
Ms. Aimée Craft	CBA Branch Section Chair (Manitoba)
Ms. Holly Doekson	CBA Staff
Ms. Jameela Jeeroburkhan	CBA (Montreal - Hutchins Caron & Associés)
Ms. Karen Lajoie	Department of Justice (N.W.T.)
Ms. Deborah Hanly	Indigenous Bar Association / CBA (Calgary)
Mr. David Wiseman	National Judicial Institute

***

OPENING

After an opening prayer by Justice Mandamin, introductions were made and the agenda was approved along with the minutes of October 25, 2007. Focus for meeting is to advance the Guidelines with further input for approval at the Autumn meeting in Toronto.

1. Examples of Elder Testimony (Justice Leonard Mandamin)

- Presentation of Indian Claims Commission (ICC) testimony using video excerpts
- Videotape of testimony at band hall of Cold Lake First Nation (CLFN)
- 37 witnesses total, including 32 Elders, over 9 days in English, Dené, and Cree
- Ceremony – practice of opening prayer to signify importance of event
- Normally, all electronic devices turned off for prayer
- Interpretation options – simultaneous / sequential / partial
- For CLFN, simultaneous Chippeweyan–English and English–Chippeweyan in parallel – allowed subsequent review of transcript of translation
- This parallel approach ensured that the witness understood questions
- Witnesses often would sit as group but testify one by one
- Questions put to witness through Commission counsel**,** as opposed to piece-by-piece questioning of Elders with cross-examination / regular challenges, which doesn't work well – better to allow Elder to finish
- Various examples of testimony were provided
    - Example of testimony of childhood memory relating to Primrose Lake area, which was the focus of the ICC hearing

- o Example of preservation of evidence via *de bene esse* ("for what it is worth") evidence – an application was made in Federal Court to allow commission testimony in English of Elder with cancer regarding trips to Primrose Lake to hunt for food for extended family
- o Example of question by opposing counsel that was confusing re legal terminology – it would be useful to have interpreter to translate difficult terms
- o Some witnesses didn't want interpretation of their testimony – no intermediary between them and commissioners
- o Example of testimony from cassette tape (recorded in 1976) regarding elderly woman who travelled to Primrose Lake and returned to buy cows with supplies
- o Questioning options **–** an advance 'test' of the questioning process with a few witnesses was very useful
    - Court direct and cross examination
    - Interrogatory process
        - inquiry by single questioner - all questions put through commission counsel
        - inquiry by tribunal
- o example of Elder testifying about terms of lease – at end, she notes that this is the first time that she felt that someone was listening to what she had to say

2. Protocol For Elder Testimony (Mr. David Nahwegahbow, Indigenous Bar Association)

- draft protocol is structured so as to be a component of the larger practice guidelines
- although aboriginal treaty rights are given constitutional protection, there are no special rules of Court / evidence to address this unique area of law
- contrast to New Zealand / Australia, where there is no constitutional protection but there are specific procedural / evidentiary frameworks for oral testimony
- aboriginal rights are reflected in SCC jurisprudence back to *Calder* based on pre-existing customs and laws of peoples who were here – it is unusual that those who are able to speak to these laws / customs are not formally recognized
- recognition of paper by Ms. Ring – there is a legal 'straight-jacket' for evidentiary issues in aboriginal law – system is quite constraining if Courts take 'hard-line' on aboriginal claims
- as trial judge, if you don't operate according to the 'normal' rules, you will be appealed – and so it is safer to operate according to standard legal framework as presented so well in the DOJ paper
- the committee needs to explore options: is it possible to be more creative?
- there is a need for special rules beyond the 'normal' rules
- it is difficult to reconcile the gap between the narrow approach in Canada and a more open approach taken in other jurisdictions
- prepared to engage in discussion on this topic on behalf of the IBA
- presentation of protocol (with thanks to Prof. Hopkins for drafting work, and the Department of Justice for supporting documents / transcripts from the *Williams* trial)
    - o if there is room for recognition of this protocol, it shall likely be under section 35 constitutional protection
    - o aboriginal treaty rights are *sui generis*

- Supreme Court direction to reconcile aboriginal and non-aboriginal perspectives
- Recognition of Courts' consideration of foreign jurisprudence: there are evolving standards of international law, including U.N. Declaration – Canada needs to take note of developments in the international arena
- Par. 1 – need to look at both aboriginal and non-aboriginal perspectives
- Par. 2 – the trial judge should have recourse to cultural interpreter from community – testimony is very difficult for Elders – where there are ambiguities, it would be useful to have someone to help clarify the question and / or the answer – current practice to have an 'expert' provide commentary on testimony of Elder is generally found to be objectionable to First Nations
- Par. 3 – venue for Elders testimony shall be done at special preliminary hearing – looks to *Williams* case as good example
  - Need to disengage from adversarial process
- Par. 4 – video-taping proposed – will help re interpretation / translation – also recognizes that Elders may not live to see end of trial
- Par. 5 – inquiry may include relocation to a site – because it is oral society that is land-based, it is important to be on land sometimes to help activate memory
- Par. 6 – alternative strategies for evidence should be considered if it is not possible to fully access and deliver oral history evidence
- Par. 7 – the parties should formulate a list of common principles at the beginning of the special inquiry – including possibility of collective testimony rather than individual testimony

- J. Lemieux noted that the two IBA papers and the presentation by Mr. Nahwegahbow raise questions of substance as well as process – the two are distinct – Courts have much more flexibility in terms of process – less in terms of substance, where tests are set out by Supreme Court

3. Discussion Paper on Oral History Evidence (Ms. Kathy Ring, Department of Justice)

- Paper focuses on oral history evidence solely in FC – doesn't look at other jurisdictions
- Notes challenge of setting fixed rules with respect to receipt of evidence
- Recognizes the perception that review of rules is straightjacket – notes, though, that for colleagues in DOJ, many with experience in other areas of law, the rules in aboriginal law cases are seen as being quite fluid compared to other areas
- Notes formal recognition in rules of other jurisdictions – many exist in some form in Federal Court rules / process
- Oral history evidence – information contained in evidence that is confidential
  - this exists in FC Rules re confidentiality orders
- Elder in community – difficult to attend at trial
  - FC rules re commission evidence before trial
- Also, many catch-all rules in FC Rules
  - see page 3 of draft practice guidelines
- Some key issues from paper
  - What constitutes oral history?

        - there are different categories – a key challenge is when a witness strays from one category to instead provide personal views / opinions
        - Difficult for some witnesses to separate testimony regarding evidence from testimony about opinions – need more judicial guidance
    - Pre-trial discovery – a key issue for Crown to have before trial at least a summary of what to expect
        - Particularly for large claims, settlement opinions must be put to Treasury Board – need assessment of evidence – if there is no knowledge yet of oral history evidence, it is difficult to move to settlement – more advance knowledge would assist
        - If Crown lawyers had better sense of what to expect at trial (e.g., via will-say statements) along with discussions with counsel regarding relevance of testimony, there is less likely to be objections / debate at trial regarding relevance
        - Sometimes there is resistance to providing will-say statements, either based on assertion of privilege or confidentiality
    - Relevance is also an issue – reference to ***Benoit*** case to ensure broader perspective regarding the scope of relevance for disclosure
    - Reference to situations where a plaintiff has access but not control over recording of oral history prepared by separate community – in many cases the Crown does not even have knowledge of existence of such records
    - Many recordings of oral history now have restricted access
    - In situations where evidence has information of a confidential nature, counsel should explore ways to get this evidence before Court (such as counsel agreement on confidentiality or Court order)
    - typically the Chief will be deponent – however, with respect to oral history, the Chief may be reluctant to transmit evidence that is kept by Elders – instead, there may be many Elders who might have this knowledge, but examination of so many individuals may be problematic in a pre-trial process – will-say statements would be better
    - there are proposed changes to BC rules in this area (BC task force) which provide useful framework – a rule amendment might bring more consistency to content of will-say statements (reference to ***Sawridge*** example of problems regarding will-say statements)
    - BC task force recommendation – updated will-say statements must be provided if there are intervening changes
    - Commission evidence – some of the issues that arise might best be included in a practice direction – rules are not always clear to counsel unfamiliar with FC Rules
    - For instance, need to consider interpretation issues – extra time needed
    - Should hire someone with experience with video-taping – e.g., sound quality for large band hall – although the venue is more comfortable for the witness, it may not be feasible to actually understand the results at trial
    - Objections – typically a judge is not present – there are cases that deal with objections

- Use of evidence – should make reference in practice direction re de bene esse quality of evidence – if the Elder is available for trial, though, the jurisprudence requires personal testimony and the commission evidence is disregarded
- Cross-examination of Elders
    - Tension between ensuring comfort-level for Elder to provide evidence and also to have process to test evidence in objective manner
    - Some proposals to have local community members facilitate testimony – there will be some level of concern if those involved in the process have an interest in the outcome
    - For DOJ, the proposal is to maintain the cross-examination process but find ways to improve it
    - Example – can wait for Elder to provide evidence uninterrupted and raise questions only at end
    - Notes numerous remarks in papers / orally that cross-examination is found to be vigorous – personal experience has been that it is not aggressive – if so, Court has authority to intervene
    - Other measures possible – change of venue, use of appropriate ceremony
    - Useful to provide education in Court re cultural practices / behaviour to be expected (e.g., 'knowledge forum' before Ipperwash inquiry)
    - Note re ICC inquiry process – concern expressed by some Justice counsel that there is sometimes insufficient testing of evidence – questions that are proposed are in some cases either not asked or are re-framed
    - New Specific Claims Tribunal Act proposes new process that allows direct questions by parties adverse in interest
- Question whether Elders should be viewed as experts
    - Concern within DOJ to classify Elders as experts – they don't fit within current model of expert witnesses being objective, third-parties with no interest in outcome
    - Elders typically are members of community involved in litigation
    - Also, experts provide opinions, whereas Elders generally provide factual information
    - If Elders are considered experts, then they should be required to follow same rules (i.e., production of reports)
    - What is underlying concern? – if it is that there needs to be greater respect afforded to them different from simply lay witness, is there some other option?
    - E.g., introduction of Elder – this is not provided, for example, for simple lay witness

4. Draft Discussion Paper for Development of Practice Guidelines

- **Justice Lemieux** noted that the IBA protocol could be addressed in the practice direction
- With reference to the DOJ paper, he noted that pre-trial disclosure of oral evidence could promote settlement
- Wide scope of discovery at present – will-say statements could fit in this process

- In the Competition Tribunal, rules require will-way statements 60 days before hearing, though earlier disclosure would be required in aboriginal litigation
- **Justice Vertes** noted that numerous Courts have rules that require pre-trial disclosure of will-say statements (doesn't apply to experts)
- Counsel must provide a summary, signed by witness, and must provide updates if changes are expected
- Cost-sanctions may apply if there are deviances from statements
- Supreme Court of NWT is general jurisdiction – civil / criminal
    - 11 official languages (9 aboriginal)
    - allow individual with no E/F to sit on jury
    - many cases conducted with interpretation – in principle, all can be interpreted, though in practice some are quite challenging
    - there was intensive course to train many interpreters across region regarding legal terminology – a standard lexicon was developed – provides confidence in interpretation process – very useful
    - there is no other jurisdiction in Canada with such a significant requirement for interpretation
    - this goes hand in hand with Court tradition to go out to community and hold hearings in community halls, schools, etc. – results in greater understanding of justice system among aboriginal communities
    - interpretation is always provided for audience even if not needed for the court process – important that the public understand what is going on
    - this is key element of numerous studies over last 30 years to assist with understanding
- reference to early jurisprudence regarding oral testimony – caveat filed in 70's and hearings were held throughout Mackenzie Valley to hear witnesses – there was no question about receipt of evidence from Elders – cross-examination was allowed
- the issues are not unique – every approach has potential difficulties
- need flexibility in case management and different thought-process by judges and lawyers in how to deal with these problems
- **Ms. Hanly** noted numerous Commissions and Inquiries regarding the same issues – over 35 years there has been agreement on accommodation and flexibility, yet each generation of judges has to learn from scratch
- these are core issues that should be known
- **Justice Lemieux** noted efforts to codify these issues
- However, a remaining key issue relates to cross-examination
- **Justice Vertes** noted that in civil cases, particularly in family law cases, the N.W.T. Courts try to accommodate the situation much more than in urban Courts
- For example, custom adoption is common issue – need objective witnesses to talk about expectations, norms
- Have adapted the hearing model, not to go to the inquisitorial model, but to lessen the adversarial approach – use of outside processes more frequently (e.g., mediation, dispute resolution, etc.)
- If parties are willing, the Court has ability to do this

- Does not feel that traditional model of cross-examination is entrenched in stone – there have been numerous changes, including in criminal code (e.g., changes regarding rights of accused to cross-examine victim / child) – sometimes the court assigns counsel to cross-examine a witness
- There is a right to test the evidence of the other side – but how the right is exercised is open to re-assessment
- **Justice Mandamin** noted that there is an issue with leading questions on cross-examination when the person who asks is seen to be in a position of authority – sometimes there is too much deference to authority, resulting in corruption of evidence
- Another key issue – *does the person really understand the question?*
- Especially with Elders, it is important to understand how the person thinks – often the person thinks in an aboriginal language and then translates
- Critical that the person understand the question
- **Justice Vertes** added that he always travel with interpreters to assist
- Has seen situations of 'suggestability' by authority figures
- This is helped by interpretation process – acts as block to complex leading questions
- **Mr. Nahwegahbow** noted a akey issue regarding the use of the 'record' – often statements are not as precise as they might be – shows in part the difference between oral vs. written culture
- There is concern re will-say statements that they will be used against party and that will-say statement are a departure from oral tradition
- **Ms. Ring:** Perhaps this requires discussion with Elder so that the whole process will be written / interpreted more precisely
- **Mr. Nahwegahbow** noted that early cases (e.g., Calder) were very short
- Now, cases are battles, with very long, protracted issues – there is great difficulty maintaining precision for such long trials

- A question was asked regarding cross-examination – *is it the fact of cross-examination or manner of cross-examination?*

- **Mr. Nahwegahbow** noted that there are different types of cross-examination
    - Issues re customs / laws – this might be less subject to testing – it is like testing the judge / law-maker – you can question the merits, but can you question that it is actually there
    - Questions of geneology can certainly be questioned
    - But really, not an issue of the fact of testing, but the manner
- **Ms. Craft** noted that she has heard some Elders who have raised concern about the fact of being questioned**,** as it diminishes their role in community
- There is also a need to consider the physical component to re-telling a story – how to bring this into a written record
- **Ms. Hanly** noted that there are many facets of testimony – will get different responses at different times
- The goal of achieving a linear narrative is problematic – actually, it is more a 3-dimensional process

- **J. Lemieux** noted that normally the cross-examination is provided with context provided by earlier direct testimony
- **Ms. Jeeroburkhan** often noted concern among Elders regarding cross-examination (e.g., *why am I being questioned on this again?*)
- **J. Mactavish** indicated that there must be accommodation from both sides – need to prepare the witnesses for the process
- **Ms. Jeeroburkhan** replied that in past she had prepared will-say statements with Elders, but these were often found not to be detailed enough
- However There is a problem with the requirement for detailed will-say statements – in *Sawridge* case, many witnesses were not allowed to testify as a result
- Another fear with detailed will-say statements and cross-examination is that there will be expert witnesses who will assess testimony and prepare reports as to reliability of witnesses, based in part on the will-say statements
- **J. Mandamin** indicated that he has seen different side of the issue
    - The purpose of testing evidence is to get at truth
    - Normally one would provide testimony and uses other evidence to corroborate
    - This other evidence can be documentary or else it could be other witnesses, each providing a small piece, all of which together provides a consistent whole
    - there is concern with preparation of will-say and then having detailed requirement of corroboration with testimony by a different category of witness
    - can be used to provide an advance understanding, but for an Elder should not be written in stone
- **Ms. Ring** noted that part of the need for will-say statements is to help defendant prepare case, and part is to facilitate settlement
    - Need some degree of specificity – isn't to be used for prior inconsistent statements except for black and white issues
    - Objective of will-say is to help know the case
- **Ms. Hanly** questioned whether a without-prejudice will-say statement for *settlement* purposes was possible
- She noted that experts are entirely partisan
- **J. Lemieux** noted that, for mediation purposes, the judge doesn't see material – this might be feasible
- **J. Vertes** added that there are ways to deal with issue of use of will-say statements for prior inconsistent statements
- This is normal situation even for counsel's own witness: how to deal with unexpected statements
- Is there prejudice to other side?
- In some cases, Justice Vertes has seen them used as prior inconsistent statements – but there must be substantive inconsistency on material issue
- It is always up to judge to determine if there is really an inconsistency
- This begs the question: what is whole purpose of testimony of Elder?
    - Not necessarily to speak to very specific history
    - Why not video-tape the advance dialogue between counsel and Elders?

- **J. Mactavish** noted that if there is additional testimony that was not in the will-say statement, is it not possible simply to allow extra time for counsel for Justice to respond
- **Mr. Nahwegahbow** noted the challenge to prepare significant will-say statements – financial cost is enormous
- **J. de Montigny** queried whether such statements would not help to focus the testimony of the Elder
- **J. Mactavish** queried whether one might video-tape the evidence in advance of trial and then use this as the evidence for trial
- **J. Mandamin** noted that at the Cold Lake ICC hearings, they went to Cold Lake with sound technicians to tape some elders in that setting
- This helps to familiarize all parties with the context – similar to the Ipperwash knowledge forum
- **Mr. Nahwegahbow** expressed support for such measures that help reduce the adversarial nature / cost and accommodate the aboriginal perspective as much as possible
- **J. Lemieux** noted that the witness's counsel should intervene to protect witness – raise with judge
- **J. de Montigny** added that there needs to be more education for judges
- **Ms. Hanly** agreed that there was a significant need for education – part of which is to recognize issues of bias
- **J. Mactavish** added that for large cases, one needs very specialized education tailored to the individual case
- **Ms. Jeeroburkhan** noted the concerns regarding bias – need to assess this
  - Similar with traditional experts – the more they know of a community, their objectivity is challenged because they are seen to become too subjective
- **J. Mandamin** noted that Elders hold a respected place in First Nations communities across the country
  - one thing that community looks for in Elder is guidance – opinion as to what should be done – they are in the business of offering *opinions*
  - Usually use personal experience as lesson – this is a form of opinion
  - That an Elder is telling a story, this is actually a form of opinion – Elders use their own experience to teach
  - There is at times diversity of opinion – everyone provides own account
  - There are core elements of cultural / spiritual story that cannot be challenged
  - It is the role of counsel to bring together various threads of story to put before the Court
- **Ms. Jeeroburkhan** added that these are in some sense expert opinions
- **J. Lemieux**
  - Proposal to incorporate comments so far into existing guidelines with suggestions for discussion – this will be circulated to all participants for input
  - This is not an easy process and so will take time

5. Miscellaneous

Expert Evidence (Justice Anne Mactavish, Federal Court)

- Overview of process leading to report of sub-committee to go to Rules Committee in March – a summary was circulated
- amendments must be general enough to accommodate diverse Court jurisdiction
- rather than develop specific rules tailored to aboriginal litigation, the rules sub-committee decided to leave it to this Bench & Bar liaison group to develop more specific recommendations for implementation via practice direction in a flexible rules framework
- there was recognition of the issue regarding interest of experts – a new code of conduct is proposed as a schedule to the rules - counsel must explain the code to experts, with possible costs sanction if breached
- qualification process – recommend that a CV be included with the expert's report and that the expert identify the scope of expertise for the purpose of the trial
- need clarity (pre-trial) whether there is any objection to qualification of expert
- required content of the expert's report will be set out in more detail
- there will be authority to order competing experts to meet so as to identify points of agreement / disagreement and provide a joint statement with explanation – this should limit the time needed for experts at trial
- option to order experts to testify as panel – an analogy might be drawn for Elders to testify as a group
- recommended factors for consideration by judge to allow more than 5 experts per case
- regarding assessor rule – not touched as part of rules sub-committee review, though it was proposed to allow a single joint expert
- there was a modification to the rules subsequent to a decision of the Supreme Court – assessors are typically used in maritime case

Representative proceedings

- it was confirmed that the amendments requested by the Bar are now in-force as of December 2007

Pilot cases

- It was noted that there was support from the Chief Justice for 'test cases' in both judicial review and actions to explore creative approaches to litigation
- Active case-management with cooperation of parties
- **Ms. Ring** suggests duty to consult cases
- As for judicial review cases involving band elections, it would be better to work within the private Bar
- Questions whether *pro forma* claim will simplify matters or simply add another step
- **J. Mactavish** recommends that for complex judicial review cases, parties should ask for special case management
- In cases where parties feel that they could benefit from additional case management, it should be proposed
- **Ms. Jeeroburkhan** – noted that for judicial review cases, the 30-day time limit puts pressure on parties

- **Ms. Hanly** asked what the Bar can do to move this forward, given that the Court indicates that it is ready
- **J. Lemieux** recommended that committee participants report back to their respective Bar organizations the openness within Court

Common List of Authorities

- the Bar was asked to propose a list of jurisprudence that is commonly cited, as has been done by the Immigration and Refugee Law bar
- this could be formalized as a list of cases for which parties would not need to file copies in Court

E-Filing

- the Court's e-filing program is to be expanded shortly
- Mr. Baumberg will communicate with the Committee with an update when this occurs
- A key issue raised (by the Immigration and Refugee Law Bar) concerns public access to electronic files

Specific Claims Tribunal

- Membership by Superior Court judges – 6 full-time or up to 18 part-time
- The Canadian Judicial Council has expressed concerns about the Bill with respect to issues of judicial independence
- The CBA will make submissions on resourcing of the tribunal

6. Next Meetings

- Topics for agenda – aim to finalize guidelines for next meeting
- Interim Update via Conference Call (June / July 2008)
- Fall Meeting at Annual IBA Conference (Toronto)

7. Closing

- Expression of thanks to all participants