



June 30, 2011

The Honourable François Lemieux
Federal Court
Ottawa, ON K1A 0H9

By fax : 613-947-4679

The Honourable Leonard S. Mandamin
Federal Court
Ottawa, ON K1A 0H9

Via email: leonard.mandamin@fct-cf.gc.ca

Dear Justice Lemieux and Justice Mandamin,

Re: Elder Testimony and Oral History

I am responding on behalf of the National Aboriginal Law Section of the Canadian Bar Association (the CBA Section) to your request for comments on the *Phase II Aboriginal Litigation Practice Guidelines Discussion Paper: Elder Testimony and Oral History*, presented to the Liaison Committee in April 2011.

The development of Phase II of the Guidelines and issues relating to oral history and Elder evidence have been extensively canvassed, both at Liaison Committee meetings and in written submissions by committee members. CBA Section members have shared discussion papers and suggested guidelines with the committee. In preparing these comments, we welcomed input from the CBA Nunavut Branch Aboriginal Law Section. Their comments were consistent with those raised throughout the Committee's discussions. In addition, the Court has met with Elders from across Canada to discuss indigenous experiences with Elder evidence and oral history, work which continues. Although the subcommittee formed in 2010 to work on the Phase II guidelines was not able to complete a draft, we believe the discussion paper presented by Justice Mandamin in April 2011 is a careful consideration and compilation of the extensive treatment of this issue at the committee level. We understand that this paper will form the basis for the Phase II practice guideline on Elder testimony and oral history, informed by the Liaison Committee members' comments.

General Comments

Firstly, the CBA Section strongly recommends that the guidelines recognize the diversity amongst indigenous nations and groups. Cultural norms and communication styles vary greatly among First Nations, Aboriginal and Métis peoples across Canada. The guidelines should incorporate flexibility to allow the parties to agree on an approach that fits the Elder involved and the type of evidence to be given. The guidelines should encourage making inquiries and accommodations to take into account those differences.

Secondly, we encourage the Court to take a leadership role in communicating with Elders about their role in the proceedings and ensuring appropriate respect and consideration is given to the Elder in providing evidence to the Court.

Thirdly, we suggest additional processes that may assist in attenuating the difficulties surrounding the cross-examination of Elders. These entail considering alternative and respectful modes of putting questions to the Elders. For example, Counsel for the opposing party could make a list of questions that would be asked by counsel for the First Nation. The questions could be altered from traditional cross-examination style to more closely resemble direct examination. In some circumstances counsel for both parties could make a joint list of questions, with questions not on the agreed list asked separately by each party.

We have attached a copy of the original document, marked with some suggested modifications. We would be pleased to provide any further information or clarification that you may require.

We also attach an open letter from the Nunavut Court of Justice to Nunavummiut on the Importance of Traditional Justice Values, dated May 6, 2011.

In closing, the CBA Section is encouraged by the Court's initiatives in this area and we look forward to further discussions to implement the Practice Guidelines at the Federal Court.

Yours truly,

(original signed by Tamra Thomson for Aimée Craft)

Aimée Craft
Vice Chair, National Aboriginal Law Section

Enclosure available on request