



June 30, 2011

By fax: 613-947-4679

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

Dear Justice Lemieux,

**Re: Judicial Review Applications and ADR Project involving First Nations**

The Canadian Bar Association's National Aboriginal Law Section appreciates the opportunity to comment on the draft Practice Note you circulated to the Federal Court Liaison Committee at the meeting in April 2011. We would like to commend the Court on the initiative, and agree with the stated goals of ensuring cost effective and timely resolution of matters that are the subject of judicial review proceedings before the Federal Court.

We have provided some general comments on the draft Practice Note. In addition, 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.

**Federal Court Specialized ADR**

As I mentioned at the Liaison Committee meeting in April 2011, special consideration should be given to developing expertise in aboriginal ADR amongst the Federal Court judges. We suggest that a pool of judges be trained in aboriginal ADR processes, to develop enhanced knowledge and sensitivity required for this work. The parties should then be able to select from this pool of judges for assistance with the resolution of disputes through an ADR process.

**Application of ADR to Matters Involving the Crown**

We suggest that the Court strongly encourage ADR proceedings in judicial review matters that involve the Crown, as well as for internal First Nations matters. The goals of timeliness and cost effectiveness are as pressing (if not compounded) in matters involving First Nations and the Crown as parties.

**Existing and Potential First Nations Dispute Resolution Resources**

We suggest that the Court consider, in the first step, whether existing dispute resolution mechanisms are mandated to apply to the particular circumstances (for example, election appeal review bodies). In addition, we suggest that the Court seek information about how existing mechanisms (possibly created for another purpose) may apply in the circumstances or whether the

community is prepared to develop a mechanism that applies directly to the circumstances (and which may be used later as an established community dispute resolution mechanism).

### **Dispute Resolution Mechanisms and Elders**

Although Elders play an important role in governance and dispute resolution in many communities, the Elders' role in dispute resolution cannot be assumed. We suggest caution in the use of the terminology relating to community dispute resolution mechanisms (which may vary from community to community) and the role of Elders (which in many cases will overlap or coexist with community dispute resolution mechanisms).

### **Dispute Resolution Examples**

We suggest that examples be divided into "mix and match" categories, to allow for elements of different categories to be called upon to create or enhance a community dispute resolution process. For example, we have suggested that elements relating to the format of the proceedings (for example, circle or community hearings), guidance or leadership of the dispute resolution (for example, federal court mediator, community Elders), participation in the process (for example, Elders, parties, community at large) and sources of knowledge (for example, traditional or customary knowledge, non-judicial remedies, indigenous laws) be considered independently and concurrently in formulating an appropriate alternative dispute resolution process.

The CBA Section is encouraged by the Court's initiatives in this area and we look forward to implementing the practice recommendations for alternative dispute resolution of matters on judicial review at the Federal Court. We would welcome the opportunity to discuss further models for indigenous ADR processes that the Court may consider as examples when engaging parties in potential ADR processes.

Yours truly,

*(original signed by Tamra Thomson for Aimée Craft)*

Aimée Craft  
Vice Chair, National Aboriginal Law Section

Enclosure available on request

**DISCUSSION DRAFT**

**Federal Court – Aboriginal Bar Liaison Committee  
Practice Note**

**Judicial Review Applications/ADR Project involving First Nations**

- [1] This Practice Note relies heavily on Sheila Read’s Paper entitled “First Nation Elections and Government Disputes brought by way of judicial review applications in the Federal Court”. It also reflects the contribution of the [Canadian Bar Association](#), Indigenous Bar Association and the Elders who have participated in the Committee’s process.
- [2] It is noted that the Federal Court is increasingly faced with applications concerning governance issues and election disputes arising from its exclusive original jurisdiction in judicial review matters against federal boards, commissions and tribunals which has been held to include First Nations Councils, some types of Elders Councils and Appeals Tribunals in contested elections.
- [3] This Practice Note is premised on the belief that it is possible under the Federal Courts Rules to harness the internal resources of a First Nation community and bring those resources to bear upon election and governance disputes. It is also based on the notion that Elders of that First Nation could have an important role to play in promoting internal solutions to such disputes and that there is real scope for indigenous legal traditions to inform the process and outcomes.

- [4] The Federal Courts Rules are flexible enough to promote the objective of trying to resolve such disputes within a First Nation with the assistance of the members of the community themselves based on that First Nation's laws, traditions, customs and practices. The specific applicable Federal Courts Rules are found in Part 9 and more specifically in Rules 383 to 385 dealing with Case Management and Rules 386 to 391 dealing with dispute resolution. For convenience, these Rules are reproduced in the **Annex A** to this discussion draft.
- [5] Set out below are various suggested steps designed to harness at an early stage the existing and potential resources of ~~the members of~~ a First Nation community in resolving challenging issues in their community.
- [6] These steps are intended to be applied in a flexible manner depending upon the circumstances of each case. Each step need not be undertaken nor in any particular sequence. For example, some elements can be called into play by a trial judge about to hear a judicial review application. Moreover, their application is not limited to resolving governance and election issues or other matters internal to a First Nation itself. Dispute Resolution has worked to resolve disputes between the Crown and a First Nation and the Court encourages the use of ADR processes in these disputes between Crown and First Nation parties.

[7] Flexibility in application is also called for because First Nations across Canada are governed in many different ways, i.e. the *Indian Act* (R.S.C., 1985, c. I-5) process or First Nation's custom process. Some First Nations have written constitutions, codes of conduct and protocols; others are unwritten or customary~~de not~~. Some First Nations may have specific and unique traditions of governance and participatory democracy. Some First Nations use Elders Councils or Community Councils as means of supervising ~~a~~ an Elected Band Government~~Chief and Council~~ or as a reviewing body in election appeals.

[8] Attached as **Annex B** to this discussion paper are recent examples of the use of dispute resolution which called upon the assistance of the members of a First Nation community.

[9] As noted, the process outlined below would be triggered as soon as a judicial review application is served and filed which relates to a challenge to a First Nation election, ~~or similar an internal dispute or a dispute involving the review of a Crown decision.~~

**Step 1:** A Case Management Judge and Prothonotary would be assigned to the Federal Court proceeding, pursuant to Rule 383.

**Step 2:** That Case Management Judge or Prothonotary would have all the powers set out in Rule 385(1), including:

- The power under (a) to give “any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits”; and
- The power under (c) to fix and conduct any dispute resolution conference the Judge or Prothonotary, consider necessary.

**Step 3:** The Case Management Judge or Prothonotary would ascertain whether the parties to the judicial review would be prepared to consent to attempting to resolve the dispute with the assistance of an existing or potential indigenous dispute resolution mechanism that would be appropriate in the circumstances. ~~Elders and other members within their own community.~~

- If the parties consent, the matter proceeds to the next step. Timelines for proceeding with judicial review are suspended.
- If the parties do not consent, the matter goes back into the usual stream for judicial review applications.

**Step 4:** The Case Management Judge or Prothonotary would convene a preliminary conference with the parties, preferably attended by the Elders of that community to explore whether:

- a) an existing dispute resolution mechanism applies in the circumstances;
- b) an existing dispute resolution mechanism could be applied in the circumstances;
- c) a potential dispute resolution mechanism could be adopted by the parties;

as alternatives to proceeding with the judicial review application over the matter in governance dispute, prior to taking any further formal steps with the judicial review application.

- If the parties all consent, the matter proceeds to the next step.

- If the parties do not consent, the matter goes back into the usual stream for judicial review applications.

**Step 5:** The Case Management Judge or Prothonotary would conduct either a dispute resolution conference or a mediation pursuant to Rule 387, in accordance with an established dispute resolution process or in a process adopted for this purpose by the community, in which community members, and preferably Elders of the community or related communities, participate directly. The Court may find it convenient to direct the parties to prepare and exchange a brief position paper as an initial step.

- If the dispute is resolved a number of outcomes are available: the judicial review application may be withdrawn, dismissed or allowed by consent, as appropriate. Alternatively, the option of a Court order confirming the agreed to resolution of the dispute may be desirable. The formal Court proceedings are ended.
- If the dispute remains unresolved, the matter goes back into the usual stream for judicial review applications on the Federal Court schedule. The formal Court proceedings resume.

[10] The inherent flexibility of Federal Court dispute and mediation processes should permit a variety of roles for community members, and in particular the Elders of the community, to assist in resolving the dispute, as may be suitable in the different cases that present before the Court.

[11] Subject to consultation with the Case Management Judge or Prothonotary the alternative dispute resolution process could potentially include many elements

which are difficult to incorporate in a ~~traditional standard judicial~~ review proceeding. Some examples ~~include~~ are:

- A community session, where the input of the general membership is provided;
- Input from First Nations chiefs, councillors and members who are specifically affected by the dispute;
- A hearing with community Elders, who might describe how traditional knowledge or skills could be used to assist in resolving the dispute;
- A hearing with Elders from outside the community;
- A consideration of non-traditional remedies that may assist in helping communities move past a difficult situation; and
- The conduct of a Circle such as in the Yukon Sentencing Circle is in the hands of the keeper of the Circle and not the Federal Court mediator.
- In other circumstances, although the Federal Court Judge or Prothonotary is present, the mediation may be conducted by a First Nation mediator with the assistance of an Elder.

**APPENDIX A**

| <i>Specially Managed Proceedings</i>   | <i>Instance à gestion spéciale</i>   |
|--|--|
| <b>Case management judges — Federal Court</b>  | <b>Juge responsable — Cour fédérale</b>  |
| <b>383.</b> The Chief Justice of the Federal Court may assign  | <b>383.</b> Le juge en chef de la Cour fédérale peut :   |
| (a) one or more judges to act as a case management judge in a proceeding;  | a) affecter un ou plusieurs juges à titre de juge responsable de la gestion d'une instance;  |
| (b) one or more prothonotaries to act as a case management judge in a proceeding; or   | b) affecter un ou plusieurs protonotaires à titre de juge responsable de la gestion d'une instance;  |
| (c) a prothonotary to assist in the management of a proceeding.  | c) affecter un protonotaire pour aider à la gestion d'une instance.  |
| <b>Case management judges — Federal Court of Appeal</b>  | <b>Juge responsable — Cour d'appel fédérale</b>  |
| <b>383.1</b> The Chief Justice of the Federal Court of Appeal may assign one or more judges to act as a case management judge in a proceeding. | <b>383.1</b> Le juge en chef de la Cour d'appel fédérale peut affecter un ou plusieurs juges à titre de juge responsable de la gestion d'une instance. |
| SOR/2004-283, s. 23.   | DORS/2004-283, art. 23.  |
| <b>Order for special management</b>  | <b>Ordonnance de poursuivre à titre d'instance à gestion spéciale</b>  |
| <b>384.</b> The Court may at any time order that a proceeding continue as a specially managed proceeding.                                      | <b>384.</b> La Cour peut, à tout moment, ordonner que l'instance se poursuive à titre d'instance à gestion spéciale.                                   |

Class proceedings

**384.1** A proceeding commenced by a member of a class of persons on behalf of the members of that class shall be conducted as a specially managed proceeding.

Powers of case management judge or prothonotary

**385.** (1) Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(a) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;

(b) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;

(c) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and

(d) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

Recours collectif

**384.1** L'instance introduite par un membre d'un groupe de personnes au nom du groupe est une instance à gestion spéciale.

Pouvoirs du juge ou du protonotaire responsable de la gestion de l'instance

**385.** (1) Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut :

a) donner toute directive nécessaire pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

b) sans égard aux délais prévus par les présentes règles, fixer les délais applicables aux mesures à entreprendre subséquemment dans l'instance;

c) organiser et tenir les conférences de règlement des litiges et les conférences préparatoires à l'instruction qu'il estime nécessaires;

d) sous réserve du paragraphe 50(1), entendre les requêtes présentées avant que la date

d'instruction soit fixée et statuer  
sur celles-ci.

Order for status review

Ordonnance d'examen de l'état de  
l'instance

(2) A case management judge or a  
prothonotary assigned under  
paragraph 383(c) may, at any time,  
order that a status review be held in  
accordance with this Part.

(2) Le juge responsable de la  
gestion de l'instance ou le  
protonotaire visé à l'alinéa 383c) peut,  
à tout moment, ordonner que soit tenu  
un examen de l'état de l'instance en  
conformité avec la présente partie.

Order to cease special management

Ordonnance

(3) A case management judge or a  
prothonotary assigned under  
paragraph 383(c) may order that a  
proceeding, other than a class  
proceeding, cease to be conducted as a  
specially managed proceeding, in  
which case the periods set out in these  
Rules for taking any subsequent steps  
apply.

(3) Sauf s'il s'agit d'un recours  
collectif, le juge responsable de la  
gestion de l'instance ou le  
protonotaire visé à l'alinéa 383c) peut  
ordonner qu'une instance ne soit plus  
considérée comme une instance à  
gestion spéciale, auquel cas les délais  
prévus aux présentes règles  
s'appliquent aux mesures prises  
subséquentement.

Order for dispute resolution  
conference

Ordonnance de la Cour

**386.** (1) The Court may order that  
a proceeding, or any issue in a  
proceeding, be referred to a dispute  
resolution conference, to be conducted  
in accordance with rules 387 to 389  
and any directions set out in the order.

**386.** (1) La Cour peut ordonner  
qu'une instance ou une question en  
litige dans celle-ci fasse l'objet d'une  
conférence de règlement des litiges,  
laquelle est tenue conformément aux  
règles 387 à 389 et aux directives  
énoncées dans l'ordonnance.

Time limit for dispute resolution  
conference

Durée de la conférence

(2) Unless the Court orders  
otherwise, a dispute resolution  
conference shall be completed within

(2) Sauf ordonnance contraire de  
la Cour, la conférence de règlement  
des litiges ne peut s'étendre sur plus

30 days.

de 30 jours.

#### Interpretation

#### Définition

**387.** A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383(c), who may

**387.** La conférence de règlement des litiges est présidée par un juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c), lequel :

(a) conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute;

a) s'il procède par médiation, aide les parties en les rencontrant ensemble ou individuellement afin de susciter et de faciliter les discussions entre elles dans le but de trouver une solution au litige qui convienne à chacune d'elles;

(b) conduct an early neutral evaluation of a proceeding, to evaluate the relative strengths and weaknesses of the positions advanced by the parties and render a non-binding opinion as to the probable outcome of the proceeding; or

b) s'il procède par une évaluation objective préliminaire de l'instance, évalue les points forts et les points faibles respectifs des positions formulées par les parties et leur donne son opinion — à caractère non obligatoire — sur le résultat probable de l'instance;

(c) conduct a mini-trial, presiding over presentation by counsel for the parties of their best case and rendering a non-binding opinion as to the probable outcome of the proceeding.

c) s'il procède par mini-procès, préside la présentation des arguments des avocats des parties et leur donne son opinion — à caractère non obligatoire — sur le résultat probable de l'instance.

#### Confidentiality

#### Confidentialité

**388.** Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.

**388.** Les discussions tenues au cours d'une conférence de règlement des litiges ainsi que les documents élaborés pour la conférence sont confidentiels et ne peuvent être divulgués.

Notice of settlement

**389.** (1) Where a settlement of all or part of a proceeding is reached at a dispute resolution conference,

(a) it shall be reduced to writing and signed by the parties or their solicitors; and

(b) a notice of settlement in Form 389 shall be filed within 10 days after the settlement is reached.

Avis de règlement

**389.** (1) Si l'instance est réglée en tout ou en partie à la conférence de règlement des litiges :

a) le règlement obtenu est consigné et signé par les parties ou leurs avocats;

b) un avis de règlement, établi selon la formule 389, est déposé dans les 10 jours suivant la date du règlement.

Report of partial settlement

(2) Where a settlement of only part of a proceeding is reached at a dispute resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication.

Règlement partiel

(2) Si l'instance n'est réglée qu'en partie à la conférence de règlement des litiges, le juge responsable de la gestion de l'instance rend une ordonnance dans laquelle il fait état des questions litigieuses pendantes et donne les directives qu'il estime nécessaires pour leur adjudication.

Notice of failure to settle

(3) Where no settlement can be reached at a dispute resolution conference, the case management judge shall record that fact on the Court file.

Avis de non-règlement

(3) Si l'instance n'est pas réglée à la conférence de règlement des litiges, le juge responsable de la gestion de l'instance consigne ce fait au dossier de la Cour.

Stay of proceedings

**390.** On motion, a case management judge or a prothonotary assigned under paragraph 383(c) may,

Suspension de l'instance pour favoriser le règlement

**390.** Un juge responsable de la gestion de l'instance ou le

by order, stay a proceeding, including a proceeding that has previously been stayed, for a period of not more than six months, on the ground that the parties have undertaken to refer the subject-matter of the proceeding to an alternative means of dispute resolution, other than a dispute resolution conference referred to in rule 386.

protonotaire visé à l'alinéa 383c) peut, sur requête, ordonner la suspension d'une instance pour une ou plusieurs périodes d'au plus six mois chacune au motif que les parties se sont engagées à renvoyer l'affaire à un mode alternatif de règlement des litiges, autre qu'une conférence visée à la règle 386.

Case management judge not to preside at hearing

Juge d'instruction

**391.** A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.

**391.** Le juge responsable de la gestion de l'instance qui tient une conférence de règlement des litiges dans le cadre d'une action, d'une demande ou d'un appel ne peut présider l'audience que si toutes les parties y consentent.

## APPENDIX B

### Case Studies

1. *Ermineskin First Nation v Minde*, 2008 FCA 52 - This is a case where the Federal Court of Appeal held that the Ermineskin Elders Council had, under the First Nations' Written Constitution, supervisory power over the Chief and Council with the result that the Chief, who had been dismissed by the Ermineskin Tribal Council, sought judicial review against the wrong federal tribunal (the Tribal Council) rather than the Elders Council.
2. Justice Shore was the presiding judge in three judicial review applications which he helped to settle prior to the hearing on the merits being held. Elders were consulted by Justice Shore with the agreement of the parties. One case involved a contested First Nations election where a new election was agreed to on terms and conditions satisfactory to both parties. The second case involved a challenge to decisions made by the Presiding Officer of a contested election. The parties agreed that his acts were legitimate but agreed to hold a referendum on the issue whether to continue having elections by oral custom or under an electoral code prepared and presented by a Committee of Elders. The third case involved the settlement by the plaintiff of an unlawful dismissal charge on terms and conditions.
3. Two cases were mediated by Justice Lemieux. In both cases, counsel for the plaintiffs moved the Court, shortly after the judicial review proceedings were filed, for case management and mediation. On consent the judicial review proceedings were frozen and a satisfactory settlement was achieved between the Federal Crown and the First Nation in one case and is about to be settled in the other which involves another federal agency.
4. *The Temagami First Nation* decisions cited 2009 FC 548 (*Temagami First Nation v Turner*) – On April 27, 2009, Justice Hughes heard three related judicial review applications seeking to quash a decision of an Electoral Officer denying an appeal from the results of an election for Chiefs and Council. He delayed rendering his decision until after the completion of a mediation process being conducted by Justice Mandamin. That mediation did not succeed.
5. In issuing his reasons Justice Hughes found that the fatal flaw in the contested decision was that the authority in respect of election appeals was not the Electoral Officer but the Council of Elders established under the Written Constitution of the First Nation whose mandate was to advise Chief and Council in Tribal Traditions and

to render final judgment in election appeals. The problem was that there was no Council of Elders in place to which the Electoral Officer could provide a required report.

6. Justice Hughes quashed the election and ordered a new election must be held, prior to which, a Council of Elders must be in place.
  
7. An election for First and Second Chief was held; appeals were lodged with the three person Council of Elders, two of whom were challenged on grounds of reasonable apprehension of bias. Justice Mandamin was called again to mediate. He met the entire community in a Circle and met with the Elders Council. The Elders Council dismissed both appeals and the matter was accepted by the community without any appeals to the Federal Court.