

DISCUSSION DRAFT (Version 2)

**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 involving 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 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 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 the ADR processes in these disputes between the Crown and First Nations.

- [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 a First Nation's custom process. Some First Nations have written constitutions, codes of conduct and protocols; others are unwritten or customary. Some First Nations may have specific and unique traditions of governance and participatory democracy. Some First Nations use Elders Councils as means of supervising a Chief and Council or 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 internal dispute.

Step 1: Pursuant to a letter sent to the Chief Justice, a Case Management Judge and/or Prothonotary would be assigned to the Federal Court proceeding, pursuant to Rule 383 in appropriate circumstances.

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..

- 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 could be applied in the circumstances; of
 - 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 dispute.
- 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 the established dispute resolution process or a process adopted for the purpose by the community in which community members and Elders of the community, 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 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 review proceeding. Some examples include:

- 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.

N.B.: The CBA made the following comment:

We suggest further discussion on the elements of the alternative dispute resolution. The elements could be discussed and listed in accordance with the following themes:

FORMAT:

- Community sessions
- Hearings
- Circles

GUIDANCE/LEADERSHIP:

- Elders
- Federal Court Mediator
- Circle Keepers
- Traditional/Spiritual leaders
- Indigenous Elders from other communities
- First Nations mediators

PARTICIPATION:

- Parties

- General membership
- Leadership
- Elders
- Special councils (youth representatives, women's representatives)
- Community at large

SOURCE OF KNOWLEDGE:

- Traditional or customary dispute resolution
- Non-judicial remedies
- Traditional indigenous knowledge
- Indigenous laws

APPENDIX A

<i>Specially Managed Proceedings</i>	<i>Instance à gestion spéciale</i>
Case management judges — Federal Court	Juge responsable — Cour fédérale
383. The Chief Justice of the Federal Court may assign	383. 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.
Case management judges — Federal Court of Appeal	Juge responsable — Cour d'appel fédérale
383.1 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. SOR/2004-283, s. 23.	383.1 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. DORS/2004-283, art. 23.
Order for special management	Ordonnance de poursuivre à titre d'instance à gestion spéciale
384. The Court may at any time order that a proceeding continue as a specially managed proceeding.	384. 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

(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.

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

(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

(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.

Ordonnance

(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 subséquemment.

Order for dispute resolution conference

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.

Ordonnance de la Cour

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

(2) Unless the Court orders otherwise, a dispute resolution conference shall be completed within 30 days.

Durée de la conférence

(2) Sauf ordonnance contraire de la Cour, la conférence de règlement des litiges ne peut s'étendre sur plus de 30 jours.

Interpretation

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

(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;

(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

(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.

Confidentiality

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

Définition

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) 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) 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) 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.

Confidentialité

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, by order, stay a proceeding, including a proceeding that has previously been stayed, for a period of not more than

Suspension de l'instance pour favoriser le règlement

390. Un juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) peut, sur requête, ordonner la suspension d'une instance pour une ou plusieurs

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.

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.