FEDERAL COURT

FEDERAL COURT ~ ABORIGINAL LAW BAR

LIAISON COMMITTEE

ABORIGINAL LITIGATION PRACTICE GUIDELINES

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PART I - PREAMBLE

The *Federal Court ~ Aboriginal Law Bar Liaison Committee* brings together representatives of the Federal Court, the Indigenous Bar Association, the Department of Justice (Canada), and the Canadian Bar Association to provide a forum for dialogue, review litigation practice and rules, and make recommendations for improvement. Other organizations have also participated from time to time, including members of various Canadian Courts, academics, and the National Judicial Institute. Committee minutes may be found on the Federal Court web site at: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Liaison_Committees

Over the course of its meetings, *Liaison Committee* participants have discussed numerous issues relevant to aboriginal litigation:

- need for greater dialogue
- repeated amendments to pleadings
- excessive documentary evidence
- minimal or no pre-trial disclosure of oral history evidence
- insufficient notice of expert witness qualifications
- inconsistent approach to recognition of Elders
- suitability of the adversarial process
- adaptation of judicial process to cross-cultural context
- delay & cost

Although this edition of the guidelines is focussed on *actions*, many recommendations may be equally relevant to *applications*. Parties and their legal counsel are encouraged to draw from the recommendations where they are found to be helpful. The guidelines are a "living document" and will be updated with the benefit of further deliberations by the committee and additional experience as a litigation reference tool. Upon completion of this second edition, which now includes litigation practice issues involving oral testimony and the role of Elders, the committee continues its work with a focus on litigation practice issues involving applications for judicial review.

Feedback & Compilation of Litigation Best Practices

Comments, suggestions and experience with these Practice Guidelines are welcome and may be sent either to the member organizations or else to the Secretary of the Committee:

> Legal Counsel, Federal Court
> media-fct@fct-cf.gc.ca
> (613) 947-3177

The *Liaison Committee* aims to develop best practices for all stages of legal disputes in this area. Parties are invited to submit noteworthy examples of orders, agreements, schedules, protocols, etc. that have been found to be helpful in the context of specific cases, which can then be considered either for inclusion in a future annex to this Practice Guidelines or else as a stand-alone on-line resource.

PART II - FLEXIBLE PROCEDURES

As a superior court of record established under section 101 of the *Constitution Act, 1867*, the framework for the Federal Court's jurisdiction and procedure are set out primarily in the *Federal Courts Act* and the *Federal Courts Rules*. Although this formal structure is necessary to ensure a common procedural reference point for both litigants and the Court, it is at the same time *necessarily flexible* so as to reach its ultimate goal: *the just, most expeditious and least expensive determination of every proceeding on its merits.*

This flexible procedural framework for the resolution of litigation involving aboriginal peoples also advances the goal of reconciliation, the importance of which has been affirmed by the Supreme Court of Canada in numerous cases.

The Federal Courts Rules provide significant flexibility to allow litigants and the Court to tailor the proceedings to meet special circumstances when required:

- Rule 3. "These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

- Rule 53. (1) "In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just."

- Rule 53. (2) "Where these Rules provide that the Court may make an order of a specified nature, the Court may make any other order that it considers just."

- Rule 54. "A person may at any time bring a motion for directions concerning the procedure to be followed under these Rules."

- Rule 55. "In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule."

- Rules 380 – 391. Case Management Rules – The core element within the Federal Courts Rules that provides procedural flexibility is the case management framework, which allows for a case management judge to work with parties to facilitate the just, most expeditious and least expensive determination of the proceeding on its merits.

PART III - PRACTICE RECOMMENDATIONS

1. The Pre-Claim Phase

Where practical, *before* filing a proceeding with the Court, parties should make every effort to:

- review the anticipated claim with potential or retained witnesses, including expert witnesses or Elders, so as to clarify the ultimate factual and legal issues in dispute
- exchange with other parties a *draft* statement of claim, case brief, or similar document
- engage in discussion with other parties to clarify the ultimate factual and legal issues in dispute

For discussions with the Department of Justice (Canada), contact should be made to the Director of the Aboriginal Law Section of the appropriate Regional Office, or the Director General of the Civil Litigation Section (Ottawa), who may assign legal counsel for the purpose of pre-claim discussions.

If a claim is filed *after* such pre-claim discussions are held (or after a period of earlier pre-claim negotiations), parties should integrate, where possible, into the litigation process the participants, documentary record, and any progress achieved on issues in dispute. Considering the confidential nature of pre-claim discussions, the parties should discuss whether, and to what extent, any of the pre-trial discussions are subject to privilege.

2. Filing a Claim

- A party instituting complex proceedings in the Court should pay special attention to the drafting of the statement of claim so as to avoid the need for parties thereafter to request amendments to the claim / defence.
- *If it is anticipated that the proceeding will not be completed within one year*, parties should *immediately* file a request to the Chief Justice that the proceeding be specially managed under the Rules, allowing for early involvement of the Court [see Case Management below].
- In special cases where a party wishes to file a claim with the Court *to avoid prescription*[1] but is not ready to advance according to the time-line under the Rules (e.g., filing of a defence and exchange of affidavits), the party may wish to file a 'protective' claim accompanied by a request under the Rules to the Chief Justice that:
    - the case immediately be specially managed [see Case Management, below]; and
    - the deadline for filing a defence and other steps be suspended as appropriate.
- parties are encouraged to initiate claims and file documents electronically[2]

3. Case Management

The management and expeditious disposition of court proceedings, particularly complex proceedings in aboriginal actions, can be facilitated not only by co-operation between the litigants and their counsel but by effective use of the Rules of the Court and case management. To ensure that there is awareness as to some of the Rules applicable and flexibility offered through case management. The following Rules may be of assistance in aboriginal law matters.

Case Management Procedure

- In order to apply for case management (either immediately upon filing a claim or at some later date), a letter under Rule 384 should be sent to the Chief Justice, requesting that the case be specially managed.[3] The letter should address the following issues:

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[1] For example, where negotiations between the parties are on-going.

[2] For more information, see: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing

- the reasons for which immediate case management is required, under Rule 3
- whether a case management judge is required on an urgent basis, and if so, why
- a joint proposal for managing the case, including an indication whether the parties intend:
  (a) to move the proceeding forward expeditiously, for which the case management judge will normally have a more *active* role, depending on the degree of cooperation between parties; or
  (b) to defer proceeding with the case, for which the case management judge will normally take a longer-term *monitoring* role, such as when there is an on-going negotiation or mediation outside the Court [ex., Rule 390]

  Note: the joint proposal may include a procedural time-frame that varies significantly from the normal schedule in the Rules, such as a proposal to have sequenced disclosure of expert reports, to hold the case in abeyance for a certain period, etc.

  Disagreement: if the parties do not agree, the Court normally will take an active role, according to the circumstances of the case.
- the parties should indicate whether they wish immediately to hold a case management conference with the case management judge, and if so:
  (a) their availability in the following 2 weeks;
  (b) a list of issues they wish to address at this conference.

- Rules 383, 383.1 and 384 provide that case management may be provided at any time during a proceeding. When all parties consent, case management will almost always be provided. When not all parties consent, those seeking case management are required to demonstrate that it will provide, as stated in Rule 3, the just, most expeditious and least expensive determination of the proceeding on its merits.

- Rules 380 to 382.1 provide that if six months after proceedings have commenced the Court file reveals no apparent activity, the parties will be required to advise the Court as to the status of the matter. If one year has passed with no apparent activity, the Court is required to impose case management.

- *Depending on the sufficiency of the written materials and the circumstances of the case,* the case management judge may issue case management directions or orders without the need to hold a case management conference. A conference will be held only if necessary, such as if insufficient information is provided to the Court or if the parties do not agree on a joint case management proposal.

- The case management judge deals with all matters that arise prior to the trial or hearing of a specially managed proceeding and has considerable flexibility, as noted in part II above, to allow litigants and the Court to tailor the proceedings to meet special circumstances when required, including the authority pursuant to Rule 385(1) to:

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

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[3] Requests for case management are reviewed in a timely manner by the Chief Justice, and where warranted he will immediately assign a case management judge.

(*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.

Issues to Address under Case Management

Upon assignment of a case management judge, the following issues should be addressed as soon as possible either in writing or via case management conferences:

(a) scheduling framework for:
- amendment to pleadings and filing of a defence
- pre-trial discovery
- any other procedural issues that parties anticipate will require determination by the Court

(b) identification of issues for trial(s) or summary disposition
- Consider whether:
  (i) one or more issues may be resolved by summary disposition;[4]
  (ii) the trial should be split into phases (i.e. presenting evidence and argument by issue rather than presenting the case in the conventional format); or
  (iii) formal severance of one or more issues in the action is appropriate – Rule 107
- If the case is heard in phases and where the nature of the facts and issues permits, consider:
  (i) whether the judge sitting on Phase 1 is seized of any subsequent phases, particularly where there is a delay contemplated between phases;
  (ii) whether judgment will be rendered after each phase or following the entire trial; and
  (iii) if the former, whether judgment on each phase may be appealed and whether the remainder of the action may be stayed pending the outcome.
- Where issues are heard at separate trials, it is recommended that each trial be scheduled to last no longer than one year, and if possible, approximately 6 – 8 months.

(c) possible use of dispute resolution services available under the Rules, including:
- pre-hearing conference, which may lead to settlement discussions – Rule 315
- mediation – Rule 387(a) [Rules 389, 419, and 420 govern settlement]
- early neutral evaluation – Rule 387(b)
- mini-trial – Rule 387(c)
- stay of proceedings pending alternate means of dispute resolution – Rule 390
- review of a request, if any, by a party for assignment of a judge or prothonotary with specific mediation and / or cross-cultural experience

(d) pre-trial discovery - discovery of documents
- possible agreement by counsel to limit the scope of document disclosure (from that established by the *Peruvian Guano* test),[5] or to seek a Court order to this effect, having

[4] See Rule 213.

[5] A more narrow scope of disclosure is common in several jurisdictions, such as:
- Alberta: the test is "relevant and material" – a document is relevant and material only if it could reasonably be expected (a) to significantly help determine one or more of the issues raised in the

regard to the issues in play, and in particular the possibility of narrowing the scope of disclosure to those documents that are *directly relevant to the material issues*, subject to the requirement that production at trial requires advance discovery
    - the Federal Courts Rules allow for dispensation of the requirement to produce relevant documents, and so a party can seek an exemption from the obligation to produce documents, either generally or by category of document, for example[6]
    - it is recommended that the trial judge, if already assigned, should be consulted with respect to the discussion regarding disclosure and any direction / order of the Court regarding the scope of disclosure
    - time-line for disclosure of evidence, including the possibility of sequenced disclosure to allow for staged research, having regard to the complexity of the issues and agreed scope of disclosure and the consequent time required for full review and preparation of expert reports

(e) pre-trial discovery - examinations for discovery and interrogatories
    - time-line for examinations
    - consent of the parties or leave of the Court is required to permit discovery to be conducted both by written interrogatories and oral examination[7]

(f) document management
    - protocol for electronic exchange of discoverable documents between the parties[8]
    - parties are encouraged to file documents electronically[9]

(g) scheduling experts
    - many experts called to testify in aboriginal cases teach at universities. As such, they may require a fixed date to testify in order to accommodate their teaching schedule. (see also Trial Management – Trial Schedule below)
    - Limitations on availability should be communicated to Court at the pre-trial conference.

(h) scheduling of trial date

4. Trial Management

As soon as the trial judge is assigned, trial management conferences should be scheduled to allow the trial judge to address those issues that can be resolved in advance of the trial, including:

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pleadings, or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings (Rule 186.1)
- British Columbia: the proposed rule changes would require parties to disclose all documents that could "be used by any party at trial to prove or disprove a material fact"
- Manitoba: QB Rule 30.02(1) "Every relevant document in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this Rule, whether or not privilege is claimed in respect of the document."

[6] See Rule 230.

[7] See Rule 234(1).

[8] For reference, several jurisdictions have developed practice directions regarding the preparation, management and presentation of electronic evidence, as well as generic protocol documents:
- B.C. Supreme Court's Electronic Evidence Practice Direction (July 1, 2006);
- Alberta Court of Queen's Bench Civil Practice Note No. 14 (May 30, 2007);
- Nova Scotia's new Civil Procedure Rules also address this issue;
- Canadian Judicial Council's National Model Practice Direction for the Use of Technology in Civil Litigation.

[9] For more information, see: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing

(a) document management

- for proceedings with large-scale filing of documentary evidence, the adoption of protocols for document management format, numbering, etc.
- use of document management technology during the trial
  - format / coding / assignment of exhibit numbers / etc.
  - possible directions from the Court – Rule 33
- preparation of a short-form cover page to assist with organization of documents received during the hearing (see Annex A)
  - abbreviated style of cause
  - short description of motion / document

(b) trial venue

- consider having parts of the trial in the aboriginal community
- assess the advantages / disadvantages arising from the choice of venue, including:
  - the effect that the venue may have on the ability/ease of witnesses to testify in open court, and in particular where Elders are being called to testify
  - whether some issues / testimony might be more appropriate in a specific venue
  - whether the hearing could proceed in different locations, both on the land and in the city
  - availability of a suitable hearing room or expense of adapting / constructing one
  - facilitation of access by members of the community(ies) affected by the litigation
  - availability of suitable accommodation for the judge, Court staff, counsel, and others
  - travel time to the proposed venue
  - any other relevant factors
- the discussion regarding choice of venue should include any special preparation required for hearings not held in existing Court facilities, such as:
  - reservation of facilities on a reserve
  - construction of special Court facilities, including responsibility for costs
  - advance visits by trial judge, the judge's law clerk, Registry staff, counsel, and others

(c) trial schedule

- daily / weekly schedule
- long-term scheduling, including the scheduling of breaks in the trial
- scheduling of experts - many experts are academics who teach at universities, and they may require a fixed date to testify in order to accommodate their teaching schedule (limitations on availability should be communicated to Court at the pre-trial conference) [see also Case Management – Scheduling of Experts, above]

(d) interpretation

- identification of witnesses who wish to testify in an indigenous language and any special issues regarding interpretation
- procedures that may facilitate interpretation and preparation of a transcript
  - identification of witnesses who may testify in English / French but who will be using some words (such as place names) that are in an indigenous language, and any special process for preparation of a transcript
  - preparation of a list of unique terms for the Court and the Court Reporter
  - attendance of a word speller at trial
  - confirmation of the timing & procedure for preparation of transcripts (whether daily, weekly, or otherwise)
  - review process of interpretation / transcript (e.g., overnight review by interpreter)
  - possible audio / video recording of testimony at trial

- process for entering the translated transcript into evidence (mark as exhibit)
- though difficult to achieve, simultaneous interpretation is more efficient than sequential interpretation for court trials when a great deal of evidence is given in the language

- options for appointment of interpreter(s)
  - under the Rules, the party who calls a witness normally pays for interpretation, though in some cases the parties may wish to pool interpreters, or the Court may consider an order appointing an interpreter(s) upon submissions from parties (subject to consideration of the responsibility for costs)
  - parties may also wish to have independent interpreters (not used as the official transcript)
  - qualifications –, ideally, the person should be trained as a legal interpreter and have no interest in the outcome of the litigation, though noting that this is not always possible given the varying languages and dialects of Canadian aboriginal peoples
  - possible orientation regarding the interpretation process for inexperienced interpreters

(e) special ceremonies
- ceremony details - in particular, whether it involves fire / smoke, as some advance attention will be required for fire alarms, restrictions under building insurance contracts, etc.
- timing, frequency, duration
- who will attend
- whether other parties have provided their consent
- possible offering of gifts to counsel / Court at end of trial
- whether the ceremony is part of the formal trial or separate from the trial
- advance education on ceremonies would be helpful

(f) cultural orientation
- opportunities for cultural orientation in advance of the trial
- depending on the scope of the orientation, a transcript may be advisable for the record
- for site visit – advance agreement as to what would be discussed
- for a long trial, it might involve taking a view – Rule 277
- possible orientation for community by counsel or court representative

(g) witnesses
- witness list – it is recommended that the trial judge be provided with a witness list and, if there are many witnesses, a photo of each, to facilitate the recall of testimony in long trials
- communications with witnesses – counsel are to observe the practices of the Federal Court respecting communications with witnesses giving evidence. In particular, between the completion of cross-examination and the commencement of re-examination, the lawyer who is going to re-examine the witness is not to have any discussion respecting evidence that will be dealt with on re-examination without leave of the court.

(h) evidence
- individuals in historical record – it is recommended that the trial judge be provided with a list of names and key relationships
- limitations, if any, on the scope of evidence on which the trial judge intends to rely for rendering judgment
- receipt of expert reports – whether received directly or formally read into evidence
- disclosure of experts' working papers
  - whether any counsel will be bringing a motion for disclosure of working papers (a motion may not be necessary if one party requests the expert's working papers and the other party accedes to that request)
  - if working papers are disclosed by consent, establish a schedule for disclosure

- can these determinations be made right away, or if not, can a schedule be established for raising the issues
- ancient document rule – the rule establishes authenticity, not admissibility
  - encourage the use of a documents agreement to facilitate introduction of documents into evidence (i.e., a common method by which many documents to be relied upon at trial are authenticated and introduced in evidence is by agreement of all parties through a documents agreement)
  - the document agreement may provide that all documents covered by the agreement are authentic and admissible (e.g., for the truth of their contents or some other limited purpose) (i.e. that all objections to the documents based on hearsay are removed)
- preparation of a common book of documents that contains all documents that are covered by the parties' document agreement
- handling "read-ins" from examinations for discovery and / or interrogatories
- use of Requests to Admit – Rule 255
- possibility of an Agreed Statement of Facts

5. Trial

The following recommendations are proposed for management of the trial in progress:

(a) integrity of Court proceedings
- it is ultimately the Court's responsibility to ensure that appropriate standards of conduct are maintained throughout the proceedings
- in particular, during cross-examination, counsel are expected to treat all witnesses with respect, and the Court should intervene as necessary to avoid excessively confrontational or disrespectful cross-examination

(b) explanation / direction to witnesses regarding their role in the proceeding
- counsel should provide an appropriate explanation to witnesses when they are selected to testify (i.e., far in advance of the actual trial)
- at trial, the judge may add a further explanation to witnesses before they take the oath

(c) at the beginning of the trial, and possibly again during final submissions, the trial judge should advise parties of limitations, if any, on the scope of evidence on which the trial judge intends to rely for rendering judgment

(d) opening submissions – it is recommended to receive comprehensive opening submissions from all parties as the trial starts rather than hear the respondent's position many months later, though allowing a summary "refresher" opening when the respondent begins

(e) closing submissions – parties are encouraged to provide joint authorities

6. Post-Trial

The following matters should be discussed with the trial judge regarding the post-trial phase:

(a) if the process began with a ceremony, there may be a ceremony at the end or after the trial

(b) if conducted on the First Nations territory, whether there may be an offering of a gift to the participants

PART IV: Elder Testimony and Oral History

1. Background

The Canadian legal system relies on the parties to present useful, reliable and fair evidence, in order to allow an impartial judge to decide the facts and the law that resolve their dispute, either through a court proceeding or mediated process.

In the Federal Court, the process is governed by rules of evidence and procedure. The *Federal Courts Rules* are designed to ensure opposing parties have access to information necessary for the preparation of their case and to offer them a forum where they may argue their cases fairly. However they do not specifically address the unique nature of Elder testimony and oral history.

Aboriginal peoples in Canada have unique rights protected by the Constitution. Historical evidence often forms the basis of these rights; however the written historical record from the Aboriginal perspective is scant because the history of Canada's First Nations is mostly recounted orally. Oral history is therefore often an important element in Aboriginal litigation and may be the only means by which Aboriginal litigants can prove and thereby exercise their rights.

Aboriginal Elders are the primary source of evidence about Aboriginal perspectives and Aboriginal oral history. Their testimony about the Aboriginal perspective, touching on indigenous customs, traditions and identities, conveys the context that informs the Court's understanding about indigenous normative values and the significance of events. The Elders' accounts of oral history convey their historical evidence as understood from the Aboriginal perspective.

Elder testimony and oral history is often required to allow the written documentary record and the unwritten Aboriginal perspective together to provide a complete picture. Elder testimony may touch upon historical facts, Aboriginal land occupation, land use, customs, practices, laws, spirituality and identity. Aboriginal ceremony may be part of the process of telling. Such Elder testimony may require interpretation by persons knowledgeable in Aboriginal oral history. Elder testimony can contribute to a better understanding of Aboriginal history from the Aboriginal perspective.

Reconciliation requires the courts to find ways of making its rules of procedure relevant to the Aboriginal perspective without losing sight of the principles of fairness, truth-seeking and justice. This can be accomplished by adopting an approach rooted in respect and dignity. One way to show respect and enable Aboriginal witnesses to be heard is to have regard for Aboriginal ceremony and protocols.

These guidelines seek to balance appropriate reception of Elder testimony and oral history evidence with the practical needs of a justice system in a manner that promotes fairness and truth-seeking in civil litigation. Where the *Rules* do not clearly address matters of Elder testimony or oral history, parties should apply to the Court for a direction or order under the case management or trial management processes.

2. Guiding Principles

Principle 1: The *Federal Courts Rules* must be applied flexibly to take into account the Aboriginal perspective.

Principle 2: Rules of procedure should be adapted so that the Aboriginal perspective, along with the academic historical perspective, is given its due weight.

Principle 3: Elders who testify should be treated with respect.

Principle 4: Elder testimony and oral history should be approached with dignity, respect, creativity and sensitivity in a fair process responsive to the norms and practices of the Aboriginal group and the needs of the individual Elder testifying.

These guidelines address procedures that may facilitate the presentation of an Aboriginal Elder's evidence in keeping with the Court's requirements and in recognition of Aboriginal sensibilities. They allow, in a case by case process, for an appropriate accommodation of Aboriginal approaches under the *Rules* in cases before the court concerning Elder testimony and oral history. The overarching theme permeating these guidelines is that the Aboriginal perspective provided by Elders can assist the Court by providing context for the matter before the Court.

It should be remembered that there is considerable diversity amongst the Aboriginal cultures across Canada. These guidelines are a means for achieving flexibility suitable for the Aboriginal Elder involved, the testimony to be heard, and the issues that have been raised in the proceeding.

3. Calling an Elder to Testify

The decision of whether an Elder should testify or whether oral history should be placed in evidence is a matter to be decided by the party that desires to introduce such testimony or evidence. This decision is decided by the party in consultation with their legal counsel and the Elder.

Consideration should be given to these guidelines when it is decided Elders are to testify. The parties may consider a case management or trial management conference to settle on a flexible, appropriate procedure for hearing the Elders' testimony.

4. Questions of Admissibility of Elder's Testimony

The admission of an Elder's testimony is a matter for the trial judge to decide on a case by case basis. Elder testimony informs the Court of the Aboriginal perspective and will usually be admissible where an Elder is a person recognized by his or her community as having that status.

5. Preliminaries to Elder Testimony and Oral History

(a) Disclosure

The party calling an Elder to testify should provide information about the Elder and the basis of his or her knowledge about the subject matter of the testimony. Given the differing dynamics and logistical issues that may be associated with having an Elder testify, this disclosure need not necessarily coincide with document disclosure as long as it is timely.

The disclosure should also provide information about the Aboriginal community's practices or protocols for requesting Elder testimony. Elders often refrain from describing themselves as elders and the party calling an Elder may have a community member to introduce the Elder and confirm his or her status as an Elder.

The disclosure should also summarize the proposed evidence, keeping in mind both that Aboriginal respect for Elders may involve not directing an Elder's words and that an Elder unfamiliar with court proceedings may respond on unexpected topics.

Where issues arise between parties over the adequacy of the disclosure, the parties should seek assistance through case management or trial management for a direction or ruling on the disclosure to be provided and its timing.

(b) Consultation

The party calling Elders, or both parties, where appropriate should consult with the Elders beforehand to give them an understanding of what generally is expected of them in court and what may be asked of them in court and enable them an opportunity to reflect on their contribution. Such consultation may also seek Elders' recommendations on Aboriginal protocols or on matters touching on Aboriginal sensibilities.

Where both parties are involved in consultation with Elders, the Court may also become involved through the case management or trial management process. Involvement by the Court gives the consultation a demonstrated element of respect and importance for hearing Elders in court.

6. Commission Evidence

A party who intends to tender oral history evidence through Elders who are elderly, infirm, or who may be otherwise unavailable at trial, may seek an order for the out-of-court examination of that Elder before trial. The following should be considered in taking of commission evidence:

- identification of elderly or infirm witnesses from whom commission evidence may be required;
- the language in which the examination will be conducted and necessary interpretation;
- the procedure for recording testimony, whether by Court reporter, audio or video;
- the procedure for raising objections without disruptive interruption (such as uninterrupted hearing of the Elder's evidence before raising objections);
- the location of the commission evidence and length of sessions.

Such evidence is usually taken *de bene esse*, and the general rule is that the commission evidence will be disregarded if the witness is available at the time of trial. However, the parties may apply to the Court to use the recorded evidence where both parties have had opportunity to participate in the taking of commission evidence and sufficient reason exists for not requiring Elders to testify twice.

7. Protective Measures when Warranted

If the Aboriginal oral history evidence to be tendered at trial contains sensitive information, the party tendering such evidence may consider an application to Court for measures that may be required to maintain confidentiality or ownership of the information.

The *Rules* provide for handling of confidential material:

- Filing of Confidential Material – Rule 151
- Marking of Confidential Material – Rule 152(1)
- Access to Confidential Material – Rule 152(2)
- Hearing *in camera* – Rule 29(2)

The party that seeks to protect the confidentiality of Aboriginal evidence should indicate the reason why in advance of tendering the evidence.

8. Demonstrative Evidence

Elders' evidence may be presented in a demonstrative manner: songs, dances, culturally significant objects or activities on the land.

The parties may apply to the Court for a direction or order in relation to the presentation of demonstrative evidence.

9. Special Hearing for Receiving Elder Testimony

The Court may consider holding a special hearing to receive Elder testimony and oral history. The Elder testimony given in the special hearing may be evidence at trial, subject to admissibility.

This special hearing may be held at any stage in the trial, though it is best at an early stage. An early special hearing may allow the parties to consider their positions, having heard the Aboriginal perspective, and allow the parties to revisit mediation or negotiation for some, if not all, issues.

The special hearing also has the benefit of preserving Elders' evidence that may not be available later, should the trial be delayed or prolonged.

Aspects of the procedure for a special hearing may be worked out in the case management process or in the trial management process. The approach adopted by Justice Vickers in the *Williams* Order[10] may be a guide but must be informed by the requirements of the Elders and the Aboriginal community involved. There is not one standard practice among Aboriginal groups for hearing Elders or oral history. The approach adopted should be in keeping with the practices of the Aboriginal community concerned.

The parties should address the disclosure of Elder testimony, the location of the court hearing, the use of Aboriginal languages and interpretation, and Aboriginal protocols early in the case management or trial management processes. Discussions about hearing Elder evidence, admissibility and weight of that evidence should be conducted beforehand rather than when an Elder is on the witness stand. Other than immediate issues, such as an objection because of privilege, challenges to admissibility may be deferred on a without prejudice basis to completion of the Elder's testimony while questions of the weight may be left for later argument.

10. Elder Testimony

The procedures adopted for hearing Elder testimony should be chosen to achieve the best environment to receive that testimony. These may include use of the Elder's native language, observance of cultural protocols, choice of a suitable venue, mode of testimony, viewing of sites and admission of demonstrative evidence. These subjects should be addressed beforehand in the case management or trial management processes.

(a) Language and Interpretation

The Aboriginal perspective derives much from the Aboriginal language. Interpretation that is both accurate and effective is essential. The party calling the Elder to testify should address the need for interpretation and propose the manner in which the interpretation is to be carried out.

- Simultaneous interpretation is likely the most efficient method of entering lengthy Elder testimony in the native tongue. Sequential interpretation may suffice where the Elder narratives are not long.

- Elders may be willing to testify in English or French even if their command of the language is limited. An interpreter should be available to assist if they need to better express themselves in their own language. In such cases, it is best to first interpret the questions put to the Elder, so they have a clear understanding of the question they are asked to answer. Where Elders

[10] William et al. v. British Columbia et al., 2004 BCSC 148

choose to testify principally in English or French, they may still use individual terms in their native tongue for specific places or ideas. A glossary of Aboriginal terms should be provided to the court reporter.

- Under the rules, the party calling a witness provides for the interpreter. Parties may have their own interpreters to assist counsel whose interpretations are not part of the record. In some cases, the Court may wish to appoint interpreters with apportionment of interpretation costs. The Court may require an orientation for interpreters touching on the approach to interpretation (word for word or sense of), duty to interpret accurately, court procedure, and legal language.

(b) Venue

The Court may consider, at a party's application, holding part or all of the trial in the Aboriginal community. The rationale for going to an Aboriginal community venue should be considered as well as the answers to such questions as:

- What effect will a community or other special venue have on the ability/ease of Elders to testify in the trial. Are some issues or testimony more appropriately heard in a community venue or in a court room?

- What facilities are available? Are they suitable? Do members of the community have ready access to the chosen venue? Does the public?

- What facilities and accommodations are available for the judge, court staff and counsel for the parties? What are the anticipated challenges with respect to travel, accommodation, court equipment and records that may arise in a community venue away from established court locations?

(c) Examination

The direct and cross-examination of Elders in court is a challenging subject, given that Aboriginal respect for Elders manifests in a cultural norm of not interrupting or questioning an Elder. In addition, Elders may, in telling teaching stories or describing sacred objects or events, invoke Aboriginal spirituality such that their account may be more in the nature of prayer as opposed to telling of personal experience or witnessed events. That is not to say that questions may not be asked of Elders after they have been heard since they are generally disposed to share knowledge and explain to listeners.

Elders have frequently said their experience in court has not been favourable. The formalities of the court and the adversarial aspect of litigation do not accord with Aboriginal approach to sharing knowledge and stories.

The process of receiving Elder testimony in court may be better managed by approaching the process respectfully in keeping with Aboriginal sensibilities, while observing the requirements of the adjudication process.

Addressing the Elder

- The trial Judge can set the tone of the proceeding by expressing respect and appreciation to the Elder for coming to share their knowledge with the Court. The judge has the

opportunity to explain the process, providing the Elder with information and orientation about the Court's fact finding process.

- The trial Judge must be mindful to avoid statements which may be taken to be the detriment of one party or the other.

Examination in Chief

- Generally, counsel should address issues that may arise with an Elder's testimony in case management or trial management conference, advising the Court whether they have an agreed approach worked out amongst themselves or in the case management process. Alternatively, such issues can be addressed later in a trial management conference before the Elder is to testify.

- Special procedures may be adopted to govern Elder testimony and oral history evidence at trial, including:

    - Decorum and respect to be afforded an Elder in keeping with Aboriginal sensibilities for respecting Elders;
    - Whether examining counsel will need to direct the Elder's attention to testimony the party wishes to elicit;
    - How objections may be raised without disrupting the flow of an Elder's testimony;
    - Procedures for challenging the admissibility and weight of an Elder's testimony;
    - Being mindful of the Elder's age and physical health and the need for health breaks in the Elder's testimony so as not to tax the Elder's limitations in prolonged questioning.

Cross Examination

- All witnesses are entitled to respect. Questions put to Elders should be courteous in keeping with the respect afforded the Elder by his or her community.

- Counsel should take into account the cultural approach of the Elders in making best efforts to ensure that the Elder understands the questions asked.

- The Court should intervene where questions stray from the bounds of examination or cross examination, or where the Elder may have difficulty understanding the questions.

- The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination should be explored in appropriate cases. This exploration should be done on consent of the parties or on direction of the Case Management Judge.

Re-examination

- The usual practices regarding communications with witnesses giving evidence apply including during breaks in testimony and between the completion of cross-examination and the commencement of re-examination. This process should be explained to the Elder beforehand by counsel.

- The Court may grant leave for the discussion of certain subjects with a witness where it is necessary and where it is in the interest of advancing the trial process.

11. Alternative Modes of Testimony

An Elder may wish to testify in the presence of other Elders or in the presence of the community in accordance with their custom for truth telling. Elders may also prefer to testify as a panel or have someone accompany them while they testify.

Elders may also wish to testify in a traditional manner for which oral histories are transmitted or in a specific forum or setting such as on the land or in a circle setting.

12. Audio/Visual Recording of Testimony

The party calling an Elder must be mindful that the Court is a court of record. The Elder should be made aware that the testimony is recorded.

A party may wish to have its oral history recorded for posterity including recording by audio or video media. The taking of such recordings may be done in accordance with Federal Court Media Guidelines on recording in court.[11] If a recording is made, it may be shared with the other party or parties but not for use in the court proceeding unless specified by the court.

13. Ceremony

Aboriginal communities very frequently begin important meetings with a ceremony or a prayer. In keeping with Aboriginal practice, participation is voluntary.

Some such ceremonies or spiritual prayers are not to be recorded. On the other hand, Federal Court proceedings are a matter of record. These differing protocols may be reconciled by conducting the ceremony or prayer before Court is opened by the Court registry officer. Closing prayers may be done after Court is closed. The exception is when an Aboriginal witness chooses to take the oath by aboriginal practice, such as on an eagle feather or with a smudge, during Court. This is no different than a witness taking the oath on a holy book.

14. Expert Evidence

The Federal Courts Rules for expert witnesses typically are not considered suitable for Elders' testimony and oral history. Aboriginal Elders differ significantly from non-aboriginal academic experts in that Aboriginal Elders' knowledge comes directly from their own culture's traditions and teachings, and needs to be acknowledged accordingly.

Expert witness rules would apply to evidence on the topic of oral history by academic experts.

In those instances where an Elder has both traditional learning and an academic education, the guidelines and expert witness rules are to be adapted as necessary to meet the requirements of receiving the Elder's testimony and oral history evidence.

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[11] See Federal Court web site at www.fct-cf.gc.ca

ANNEX A – Sample Cover Sheet

File Nos. T-AA-YY; T-BB-YY; T-CC-YY, etc.

Motion Number ____(sequential number for motion)_____

This Motion for ____(short description of motion)_____

_____

This Motion Brought By (Plaintiff / Defendant)_____

This Document Filed By (Plaintiff / Defendant)_____

FEDERAL COURT

BETWEEN:

(NAME OF PLAINTIFF)

Plaintiff

- and -

(NAME OF DEFENDANT)

Defendant

WRITTEN REPRESENTATIONS OF (NAME OF PARTY)
