

Discussion Paper on the Use of Experts in
Aboriginal Litigation in the Federal Court

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1. INTRODUCTION

The Federal Court Bench and Aboriginal Bar Liaison Committee is composed of members of the Federal Court, the Canadian Bar Association (Aboriginal Law Section) (“CBA”), Indigenous Bar Association (“IBA”), and the Department of Justice (“DOJ”). The Committee is looking at various ways the Federal Court can better manage Aboriginal litigation.

At the inaugural Committee meeting held on September 30, 2005, a discussion paper by Peter Hutchins on pre-trial and trial management of expert evidence was circulated.¹ In the ensuing discussion, Committee members noted that all parties face some challenges related to the role of expert witnesses and the use of expert evidence in Aboriginal litigation. The IBA representatives raised a related issue, namely the role of elders and whether elders should be considered expert witnesses. During the Committee’s second meeting on March 11, 2006, it was agreed that the CBA, IBA and DOJ would each endeavor to prepare discussion papers setting out the key issues and identifying potential solutions that warrant further exploration for presentation at the Committee’s next meeting on October 21, 2006.

The first part of this paper contains an overview of the current *Federal Courts Rules* governing expert evidence and the proposed amendments, as well as the provisions on expert evidence in other jurisdictions. The second part of the paper identifies some concerns with the management of expert evidence in Aboriginal litigation and makes some suggestions for improvement.

It is important to emphasize at the outset that this paper has not been submitted for formal approval within the Department of Justice. Accordingly, the views expressed in this paper do not represent the Department of Justice’s formal position or legal opinion.

2. THE EXISTING RULES ON EXPERT EVIDENCE & THE PROPOSED AMENDMENTS

At present, Rules 279 to 281 of the *Federal Courts Rules* govern the introduction of expert evidence at the trial of an action. These provisions are set out in the table below.

In September 2004 the Federal Courts Rules’ Committee issued a discussion paper that relating to the timing of expert evidence. The paper proposed that the admissibility of expert witnesses’ evidence be conditional upon the service of expert affidavits before the

¹ See Appendix 1: Peter Hutchins. “Should the Expert be a Mediator – Pre-Trial and Trial Management of Expert Evidence,” Paper originally presented at the National Judicial Institute, Federal Court Education Seminar on Dispute Resolution and Case Management in Complex Litigation involving First Nations. September 14-16, 2005. Montebello, Quebec.

holding of the pre-trial conference.² Proposed rule amendments were also included in the discussion paper.

On February 11, 2006 revised proposed amendments were published in the *Canada Gazette*.³ The net effect of these amendments will be to require the parties to serve their expert affidavits earlier in the litigation process. More specifically, the amendments will require that the evidence of expert witnesses is to be served prior to the pre-trial conference. In contrast, admissibility of an expert's evidence at trial currently hinges on serving the affidavit at least 60 days before the commencement of the trial, or 30 days in the case of rebuttal evidence of an expert. As will be noted below, the Court's flexibility will be preserved in the proposed amendments in terms of the Court being able to grant relief from the stipulated requirements.⁴

The following table sets out the current *Rules* governing expert evidence, along with the proposed amendments (amendments highlighted in italics):⁵

Current Rule	Proposed Amendment
Documents 258(4) A pre-trial conference memorandum shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance in settling the action.	Documents 258(4) A pre-trial conference memorandum shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance <i>at the pre-trial conference, including all affidavits or statements of expert witnesses.</i> Expert affidavit or statement 258(5) <i>An affidavit or a statement of an expert witness must set out in full the proposed evidence of the expert and, in the case of a statement, must be in writing, signed by the expert and accompanied by a solicitor's certificate.</i>

² Discussion paper entitled *Service of Expert Witnesses' Affidavits Prior to the Pre-Trial Conference* by the Federal Courts Rules' Committee, September 2004. The discussion paper may be found on the Federal Court website at www.fct-cf.gc.ca/bulletins/notices/notices_e.shtml.

³ See *Rules amending the Federal Courts Rules*, pre-published in Part I of the *Canada Gazette* on February 11, 2006, volume 140, no. 6. The proposed amendments may be found on the Federal Court website at www.fct-cf.gc.ca/bulletins/notices/notices_e.shtml.

⁴ See Rule 279 of the proposed amendments: "Unless the Court orders otherwise ...".

⁵ The existing rules and proposed amendments regarding expert evidence in simplified actions have not been included in this table because very few actions raising Aboriginal issues proceed by way of a simplified action.

Current Rule	Proposed Amendment
Pre-Trial Conference Memoranda 262. Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum at least seven days before the date fixed for the conference.	Pre-trial conference memoranda 262. Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum <i>within 30 days after being served with the requisition.</i>
Current Rule	Proposed Amendment
Scope of pre-trial conference 263. Participants at a pre-trial conference must be prepared to address ... (c) definition of any issues requiring the evidence of expert witnesses;	Scope of pre-trial conference 263. Participants at a pre-trial conference must be prepared to address ... (c) <i>any issues arising out of any affidavits or statements of expert witnesses, and the need for any additional or rebuttal expert witness evidence;</i>
Current Rule	Proposed Amendment
Order 265. At a pre-trial conference, (a) a judge may make any order respecting the conduct of the action; and (b) a prothonotary may make any order respecting the conduct of the action other than an order under a motion referred to in any of paragraphs 50(1)(a) to (i).	Order 265. At a pre-trial conference, (a) a judge may make any order respecting the conduct of the action; and (b) a prothonotary may make any order respecting the conduct of the action other than an order under a motion referred to in any of paragraphs 50(1)(a) to (i). Service of expert affidavit or statement (2) <i>If applicable, an order under subsection (1) shall set out the time for service of any additional or rebuttal affidavits or statements of expert witnesses.</i>
Current Rule	Proposed Amendment
Where expert may testify 279. Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issue unless (a) the issue has been defined by the pleadings or in an order made under rule 265;	Where expert may testify 279. Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issue unless (a) the issue has been defined by the pleadings or in an order made under rule 265;

(b) an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, that sets out in full the proposed evidence, has been served on all other parties at least 60 days before the commencement of the trial; and (c) the expert witness is available at the trial for cross-examination.	<i>(b) an affidavit or statement of the expert witness prepared in accordance with subsection 258(5) has been served in accordance with subsection 258(1) or rule 262, or an order made under rule 265; and</i> (c) the expert witness is available at the trial for cross-examination.
Current Rule Tendering of expert evidence at trial 280. (1) Evidence in chief of an expert witness may be tendered at trial by (a) the reading into evidence by the witness of all or part of an affidavit or statement served under paragraph 279(b); (b) testimony by the witness explaining any of the content of an affidavit or statement that has been read into evidence; and (c) with leave of the Court, other testimony by the witness. Affidavit taken as read (2) With leave of the Court and the consent of all parties, all or part of an affidavit or statement served under paragraph 279(b) may be taken as read into evidence by the witness. Prohibition on pretrial cross-examination (3) Except with leave of the Court, there shall be no cross-examination before trial on an affidavit or statement served under paragraph 279(b).	Proposed Amendment No amendments are being proposed to Rule 280.
Current Rule Admissibility of rebuttal evidence 281. Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement served under paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the	Proposed Amendment Admissibility of rebuttal evidence 281. Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement <i>referred to in</i> paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the

rebuttal evidence has been served on all other parties at least 30 days before the commencement of the trial.	rebuttal evidence has been served on all other parties <i>within the time set out in an order made under rule 265</i> .
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The underlying rationale for the proposed amendments is described as follows in the Regulatory Impact Analysis Statement accompanying the proposed amendments:⁶

- (a) There is currently no requirement to prepare the affidavits of expert witnesses for the pre-trial conference. Some or all of such affidavits could still be admissible at trial so long as the relevant affidavits have been served on other parties at least 60 days, or 30 days in the case of rebuttal, before the trial's commencement.
- (b) The parties should be ready for trial at the pre-trial conference. Such readiness facilitates the setting of earlier trial dates. All expert reports need to be available at the pre-trial conference to ensure that the parties are ready for trial.
- (c) Full and candid settlement discussion is only possible at the pre-trial conference stage if all expert reports are available.
- (d) The expense inherent in obtaining expert reports may assist in drawing to the attention of litigants the benefits of settlement at an earlier stage in the process if the reports are required to be available at the pre-trial conference.
- (e) Judges and prothonotaries are now abridging the time for the exchange of expert reports because of concern regarding the late dates on which the reports will otherwise be provided.

Interested parties were invited to make representations on the proposed amendments by April 12, 2006. To date these proposed amendments have not yet come into force.

3. **RULES ON EXPERT EVIDENCE IN OTHER JURISDICTIONS**

In preparing this discussion paper, we reviewed the procedural rules relating to expert evidence in other jurisdictions (see Appendix 2). We also reviewed those portions of the *Report of the Task Force on the Discovery Process in Ontario* released in November 2003 that deal with expert evidence (see Appendix 3). These materials are cited throughout the remainder of this paper.

⁶ See *Rules amending the Federal Courts Rules*, pre-published in Part I of the *Canada Gazette* on February 11, 2006, volume 140, no. 6 which may be found on the Federal Court website at www.fct-cf.gc.ca/bulletins/notices/notices_e.shtml.

4. CONCERNS WITH THE CURRENT & PROPOSED FEDERAL COURT RULES

4.1 Introduction

In this section we identify some concerns with the existing *Federal Courts Rules* governing expert evidence and with the proposed amendments, as well as some suggestions for improvement. We begin, however, by describing the methodology used to gather information.

4.2 Methodology

From May 2006 to September 2006, we conducted informal interviews and gathered comments from a small, random sampling of counsel who have represented the federal Crown in Aboriginal litigation. We canvassed several DOJ regional offices as well as external counsel who have acted as agents for the Crown. We also conducted informal interviews with a small, random sampling of experts who had been retained by the federal Crown in previous Aboriginal litigation. It must be emphasized that we did not conduct a broad survey of either group. Further, as stated at the beginning of this paper, the views expressed do not represent the formal position of the Department of Justice.

Both groups provided valuable information and insight based on their work experience. We have summarized and collated their responses to various questions. In order to protect confidentiality, individual interviewees are not identified in this paper.

As will be seen, there were not uniform views on all issues by all counsel or experts who were interviewed. This is not surprising since perceptions necessarily vary based on the unique experiences of the particular individuals who were interviewed. The views ranged from general satisfaction with the existing *Rules* (but a desire by some interviewees for more rigorous and consistent application of them), to the identification of some concerns with the current *Rules* and suggestions for improvement.

The following topics were discussed with counsel and experts:

1. difficulties encountered in the use of experts in Aboriginal litigation under the current regime;
2. suggestions for improvement under the current regime;
3. alternative approaches to expert evidence;
4. the “shrinking” pool of experts; and
5. whether elders should be considered as “experts”.

4.3 Concerns Respecting Pre-trial Disclosure of Expert Evidence

Several counsel expressed the view that the *Rules* governing experts should be framed to provide for complete, efficient, and timely disclosure of expert opinion evidence. They offered the following suggestions about what should be disclosed, when it should be disclosed, and how it should be disclosed.

4.3.1 Scope of Pre-Trial Disclosure Related to Expert Evidence

Rule 279(b) of the current *Federal Courts Rules* requires that a party intending to rely on expert evidence must serve the other parties with an affidavit or signed statement in writing by the expert “that sets out in full the proposed evidence”.⁷ The proposed amendments make no change to this requirement in terms of the content of pre-trial disclosure of expert evidence (Rule 258(5)).

Several counsel expressed the view that the scope of pre-trial disclosure of expert evidence was not sufficient. It was noted, for example, that the current *Federal Courts Rules* contain no requirement to provide the following information:

- (a) The qualifications of the proposed expert (for example, by means of providing a resume or CV);
- (b) The proposed expert’s area of expertise (for example: “The Defendants will propose at trial that this expert witness be qualified as an expert in Canadian history, specializing in the history of the Indigenous peoples of Canada”, etc.);
- (c) The facts upon which the expert relied in forming his opinion (for example, that might be a list or copies of documents for an historian, or it might be field studies or similar information for other disciplines).

In contrast, some or all of the above-noted requirements are required in most other Canadian jurisdictions.

Turning first to the issue of the expert’s qualifications, the procedural rules on experts in most other jurisdictions require pre-trial disclosure of the expert’s qualifications.⁸ Several counsel were of the view that there should likewise be a mechanism in place in the *Federal Courts Rules* to compel opposing counsel to provide an expert’s qualifications at an earlier stage in the litigation process so that an expert’s qualifications could be assessed in advance of trial.

⁷ Rule 279(b).

⁸ Alta. Rules, Rule 218.1(1)(a) & Rule 218.6(1)(b)(i) (“Very Long Trial Actions”); Man. Rules, Rule 53.03(1); N.S. Rules, Rules 31.08; Ont. Rules, Rule 53.03; B.C. Rules, Rule 40A(5)(a); N.B. Rules, Rule 52.01(1); N.W.T. Rules, Rule 279(1); P.E.I. Rules, Rule 53.03(1); Sask. Rules, Rule 284D(1); Nunavut Rules, Rule 279(1).

In addition to the expert's qualifications, several jurisdictions also require pre-trial disclosure of the proposed area of expertise for which qualification as an expert will be sought,⁹ the facts and assumptions on which the opinion is based,¹⁰ and a summary of the grounds for each opinion.¹¹

In 2003 the Task Force on the Discovery Process in Ontario recommended the development of best practices regarding the content of expert reports to assist counsel in the discovery planning process and to encourage a cooperative approach to the discovery of expert evidence. The Report recommended that the content of expert reports should, at a minimum, include:¹²

- the expert's name, address and current curriculum vitae;
- a detailed description of the expert's area of expertise;
- a list of questions that the expert will answer in the report;
- a description of research conducted by the expert to be able to answer the questions;
- a description of the factual assumptions on which the opinion is based;
- a list of documents relied upon by the expert in formulating the opinion; and
- answers to or opinions on each of the questions and the reasons for each.

Several counsel expressed the view that the *Federal Courts Rules* should be amended to expand the pre-trial disclosure required by experts to include the matters encompassed in the rules on expert evidence in the other jurisdictions and/or the recommended reforms as noted above. Doing so would strengthen all counsels' ability to address concerns regarding an expert's qualifications and/or the evidence intended to be given by the proposed expert in advance of the trial, either in case management or in chambers, and should shorten the length of the trial itself.

By way of illustration, the Alberta Rules governing "Very Long Trial Actions" contain a mechanism within the case management process for disclosure of expert evidence and for resolution of many of the issues that tend to arise in relation to such evidence. Rule 218.6 provides:

218.6(1) At a time as may be directed by the case management judge, each party shall deliver to the other party or parties a document known as an "Experts Document".

(2) The Experts Document shall

(a) be signed by the proposed expert, and

⁹ Alta. Rules, Rule 218.1(1)(a) & Rule 218.6(1)(b)(ii) ("Very Long Trial Actions");

¹⁰ N.S. Rules, Rule 31.08(1); B.C. Rules, Rule 40A(5)(b); N.W.T. Rules, Rule 279; P.E.I. Rules, Rule 53.03(1) Nunavut Rules, Rule 279(1).

¹¹ N.S. Rules, Rule 31.08(1); P.E.I. Rules, Rule 53.03(1).

¹² Report of the Task Force on the Discovery Process in Ontario, November 2003, p. 134.

(b) contain the following information with respect to each expert proposed to be called by the party submitting the document:

(i) the name and qualifications of the proposed expert;

(ii) the proposed expert's area of expertise;

(iii) any report prepared by the proposed expert on which any party proposes to rely at trial;

(iv) where a report referred to in subclause (iii) has not been prepared, a detailed statement of the evidence proposed to be given.

(3) Within 60 days after having been served with an Experts Document, a party shall deliver to the party who served the Experts Document a document known as a "Reply to Experts Document".

(4) The Reply to Experts Document must contain the following:

(a) a statement as to whether or not the qualifications of the proposed expert are accepted;

(b) if the qualifications of the proposed expert are not accepted, the reasons for non-acceptance;

(c) a statement as to whether or not the party disagrees with any of the evidence intended to be given by the proposed expert;

(d) if the party disagrees with any of the evidence intended to be given by the proposed expert, the reasons for that disagreement.

4.3.2 Timing of Pre-Trial Disclosure of Expert Evidence

The existing *Rules* require that expert evidence in chief be served at least 60 days before the commencement of trial and that expert evidence in rebuttal be served at least 30 days before trial.¹³ Some counsel perceived this time frame as being too short in terms of not permitting counsel sufficient time to review expert reports while doing all the other tasks necessary to prepare for trial in the usual case. By way of comparison, it was noted that the corresponding requirement in Alberta, in the usual case, is twice as long: 120 days and 60 days (Rules 218.1 and 218.12).

Several counsel agreed that the proposed amendments to the *Rules* on expert evidence, which move the disclosure deadline forward so that it occurs before the pre-trial conference, should facilitate earlier disclosure of expert evidence. It was noted, however, that a pre-trial conference does not always occur when a case is being specially case managed (the case management judge may simply fix a trial date), or it may take place

¹³ Rule 279(b) & Rule 281.

close in time to the commencement of the trial. In those circumstances, the proposed amendments may not always have their intended effect of timely disclosure of expert evidence.

It was noted that one method to ensure earlier disclosure of expert evidence, which is currently under discussion in Alberta, is to make the disclosure deadline for such evidence flow from the conclusion of discovery rather than working backward from the trial date.

However framed, the objective of the disclosure requirements for expert evidence, in terms of timing of such disclosure, should be to ensure that the parties have a meaningful opportunity to consider the opposing parties' expert reports and prepare rebuttal reports if necessary.

Finally, some counsel also expressed the view that if there is going to be earlier production of expert evidence, oral history facts should also be fully disclosed earlier, and well in advance of the deadline for expert evidence, as experts need to have it in hand in preparing their evidence.

4.3.3 Sequential vs. Simultaneous Disclosure of Expert Evidence

The current *Rules* require a party to serve his expert affidavits setting out his proposed "evidence in chief" within 60 days before the commencement of trial, and to serve his expert affidavits setting out his proposed rebuttal evidence at least 30 days before the commencement of trial.¹⁴ As such, these provisions contemplate simultaneous disclosure of expert affidavits of proposed evidence "in chief" and in rebuttal.

The proposed amendments appear to take a slightly different approach. They require the plaintiff to include all expert affidavits in the plaintiff's pre-trial conference memorandum, which must, in turn, accompany the requisition for a pre-trial conference.¹⁵ All other parties are required to serve and file a pre-trial conference memorandum within 30 days after being served with the requisition.¹⁶

Arguably, the proposed amendments may be said to be an abbreviated form of sequential pre-trial disclosure of expert affidavits since the defendants deliver their expert affidavits 30 days after being served with the plaintiff's expert affidavits. Several counsel expressed concern, however, that 30 days does not provide adequate time for a defendant's experts to review the plaintiff's expert affidavits, conduct research, and prepare responsive expert reports. The preparation of expert reports is typically a very time-consuming task that can take a number of months to complete. This is because most Aboriginal litigation involves historical issues that require the expert, who is typically a busy professional with a full-time teaching position at a university, to research large volumes of documents covering a long time period.

¹⁴ Rules 279(b) & 281.

¹⁵ Proposed Rule 258(4).

¹⁶ Proposed Rule 258(4).

Under the current *Rules*, therefore, all parties of necessity tend to simultaneously engage and instruct their experts, and simultaneously exchange their expert reports “in chief” and their expert reports in rebuttal. This approach is problematic for the defendants and frustrating for their experts, as it requires them to speculate as to the contents of the plaintiff’s expert reports, and can result in the defendant’s expert reports including some matters that may not, in fact, turn out to be in issue in the plaintiff’s expert reports.

To address this problem, and promote a narrowing of the issues, several counsel who were interviewed suggested that the *Federal Courts Rules* governing experts should be amended to require sequential exchange of expert affidavits. The reports would then be more responsive, and there would be less irrelevant material. It was noted that the Alberta Law Reform Institute, which is engaged in a project to amend and update the Alberta Rules of Court, supported the concept of sequential exchange of expert reports for the following reasons:¹⁷

1(2) Should the reports be exchanged simultaneously or sequentially?

The committee reached a consensus that expert reports should be exchanged sequentially. This is the more common method utilized in Alberta presently and most counsel are comfortable with this process. Simultaneous filing is inefficient as it requires unnecessary speculation on the contents of the expert report from the opposing party. This can lead to a party including matters that are not really in issue in the initial expert report, which can create additional delay and increase costs of the expert opinion. Having sequential exchange should assist parties to focus on the actual matters in issue for which expert opinions are required. While superficially sequential exchange may appear more cumbersome than simultaneous exchange, overall it is the most efficient way of identifying issues which ought to be the subject of expert reports and responding to the initial expert opinions.

4.4 Concerns Respecting Expert Evidence at Trial

4.4.1 Number of Experts

Under the current *Federal Courts Rules*, there is no limit to the number of experts that may be called on any issue by any party. As a result, some counsel perceived that a party may “over call” their expert evidence by calling many different experts that give very similar opinions, thereby unduly lengthening a trial. While section 7 of the *Canada Evidence Act* provides that not more than five expert witnesses may be called on either side without leave of the Court, counsel noted that this provision is often not observed.¹⁸

¹⁷ Alberta Law Reform Institute, Alberta Rules of Court Project, Consultation memo #12.3, Expert Evidence and Independent Medical Examinations, February 2003.

¹⁸ Section 7 of the *Canada Evidence Act* reads:

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law

They suggested that perhaps the *Rules* could be amended to allow the Court to limit the number of experts that may be called. For example, in several of the Maritime provinces the rules allow the Court to order that the number of expert witnesses to be called at trial be limited.¹⁹ The Alberta Rules governing very long trials impose a limit of one expert per party on a subject matter without leave of the court.²⁰

4.4.2 Disclosure of Communications with Experts

Some counsel expressed concern that it is becoming increasingly more difficult to instruct experts as a result of the recent developments in the jurisprudence to permit disclosure of communications with experts, drafts of expert reports and experts' working papers.²¹ The concern is that communications with an expert may be taken out of context. It was felt that if an expert strays into an area that is not in issue in the lawsuit, counsel should be able to advise the expert and have the offending portion removed without risk of the communication being misinterpreted at a later time.

It was suggested that a codification of the law in a rule may address this. For example, the rule might provide that drafts are to be provided but it is only after a party has shown a *prima facie* case of improper interference in the opinion (i.e. credibility of the expert is engaged) that the communications will be ordered to be provided.

4.4.3 Relevance of Expert Evidence

According to some counsel, part of the challenge with expert evidence in Aboriginal litigation is that the evidentiary net is sometimes being cast extremely wide by a party and irrelevant evidence is being permitted to be entered when it should not be allowed. One of the problems for the cross-examiner is that if all of the evidence in a report is allowed to be entered, he has to decide whether to cross-examine on all or a portion of it and risk a Court relying on something that is irrelevant but wrong.

Both counsel and experts who were interviewed indicated that the experts' task would be greatly simplified if there could be earlier identification of precisely which issues are to be litigated. The proposed amendments to *Federal Courts Rules* that would require expert reports to be submitted before the pre-trial conference might encourage earlier scoping of issues. This would assist all parties with regard to defining relevance.

or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

¹⁹ Nfld. Rules, Rule 46.05; Nova Scotia Rules, Rule 31.06.

²⁰ Alberta Rule 218.4 (1).

²¹ *Vancouver Community College v. Phillips, Barratt*, [1987] B.C.J. No. 3149 (S.C.), approved by the Federal Court in *Jesionowski v. Gorecki*, [1993] 1 F.C. 36, 55 F.T.R. 1 (T.D.) & *Canadian Council of Professional Engineers v. Memorial University of Newfoundland*, [1998] F.C.J. 816, 55 F.T.R. 1 (F.C.T.D.).

4.4 Additional Issues

4.4.1 Consistent Application of Rules Respecting Experts

Although various counsel identified a range of concerns with the current *Federal Courts Rules* governing expert evidence, other counsel indicated that their concern was not with the *Rules* as currently drafted (they consider the *Rules* to be satisfactory in their present form) but in the use and application of the existing *Rules*. They perceive that the *Rules* are not always being uniformly applied to all parties and/or are not being applied with sufficient stringency in Aboriginal litigation. It would be preferable, in their view, if the *Rules* were used more effectively and applied more generally by the Court to address some of the concerns identified above, and for the Court to impose sanctions for non-compliance.

4.4.2 Costs Sanctions for Non-Compliance with the Rules

Several counsel suggested that strengthening the costs rules and more stringently applying those rules could encourage more efficient pre-trial and trial management of expert evidence.

It was noted that a key aspect of the “Very Long Trial Actions” rules²² in the Alberta Rules of Court is automatic costs sanctions for non-compliance with the provisions aimed at saving trial time.²³ For example, those rules provide that if leave is granted for more than one expert to give opinion evidence on one subject on behalf of a party, and the trial judge determines that the opinion was unnecessary, costs will automatically be ordered against that party. Rule 218.5 reads:

Costs re unnecessary experts

218.5(1) When

(a) the leave of the Court is obtained for evidence to be given by an expert who is in addition to the number of experts that is permitted under Rule 218.4(1), and

(b) the trial judge is of the opinion that the additional evidence was unnecessary,

the trial judge shall require the party on whose behalf the evidence was given to pay to the other party or parties the costs unnecessarily incurred.

(2) Except where the trial judge is of the opinion that unusual circumstances exist, the trial judge shall direct that costs required to be paid under subrule (1) shall be calculated on a solicitor and client basis.

²² A “Very Long Trial” is defined as an action that is likely to take more than 25 trial days.

²³ See Part 15.1 of the Alberta Rules of Court attached as Appendix B to end of this memo.

(3) If more than one party is found responsible for calling unnecessary additional evidence, the trial judge shall determine the proportion of the costs to be paid and received.

[Emphasis added]

Similarly, the “Very Long Trial Actions” rules in the Alberta Rules of Court contain automatic costs sanctions in circumstances where the trial judge is of the opinion that a party was unreasonable in refusing to accept the qualifications of a proposed expert or the evidence intended to be given by the proposed expert,²⁴ or that expert rebuttal evidence was unnecessary.²⁵

5. ALTERNATIVES APPROACHES TO EXPERT EVIDENCE

5.1 Introduction

There was general consensus among all interviewees that with the exponential growth of Aboriginal litigation in Canada, there is a pressing need for practical remedies to ensure more effective pre-trial and trial management of expert evidence. Counsel and experts provided some suggested alternatives to the traditional adversarial approach to expert evidence. We list these suggestions below, but note that these are preliminary suggestions which require further research and consideration.

5.2 “Friend of the Court”

In the context of our discussions, a “friend of the court” refers to an adviser to the court on certain factual matters, who is not a party to the case, but would be chosen by the parties to the litigation. Therefore, an independent third party expert could serve as a friend of the court, providing objective expert evidence.

While many of the interviewees generally supported the concept of a friend of the court, there were concerns raised as to how effective a friend of the court would be in the context of Aboriginal litigation. Questions arose as to the inherent difficulty in obtaining unbiased experts. It was suggested that perhaps the friend of the court role would need to be filled by more than one expert. It might even be useful to have an expert involved who would perform a peer review function.

5.3 Court Appointed Expert

Alternatively, some counsel suggested that a court appointed expert could be useful in Aboriginal litigation. Unlike a friend of the court, who would be chosen by the parties to the litigation, a court appointed expert would be chosen by the judge.

While the concept of a court appointed expert was generally accepted, there were several concerns raised. The difficulty in obtaining unbiased experts was again raised as a

²⁴ Alta. Rules, Rule 218.7

²⁵ Alta. Rules, Rule 218.91.

concern. Further, counsel who had been involved in litigation which made use of a court appointed expert noted that the expert worked very slowly, and was not that effective.

5.4 Independent Panel of Experts

An option which was felt to be worthy of consideration was the creation of an independent panel of experts who govern themselves. It was observed that having a panel of experts may be an effective way to address concerns with the use of a single expert, including bias.

6. THE “SHRINKING” POOL OF EXPERTS

One of the matters raised in Peter Hutchin’s paper and canvassed with the interviewees was the “shrinking” pool of experts in the area of Aboriginal litigation. At the outset, it is important to note that not all counsel agree that there is a “shrinking” pool of experts. In fact, some completely disagreed with this statement.

For those who did see this as an issue, it was generally felt that there is a need to promote an “experts’ culture” wherein individual experts are not perceived as “taking sides”, but rather putting forward objective, scientific-based positions, based on the historic and ethnographic evidence.

Counsel also speculated that a negative court experience might make experts reluctant to again become involved in the litigation process. To resolve this issue, the experts interviewed suggested that there is a need to demystify the court process for potential experts because they may not understand how the adversarial legal system works. They may have heard about expert witnesses who have had very negative experiences in the courtroom, making them reluctant to become involved.

Experts were particularly concerned with the lack of institutional support in universities and colleges for litigation related research, despite the critical legal and public policy implications of Aboriginal litigation. It was suggested that support for expert publication of research could make litigation work more attractive to academics.²⁶

7. ELDERS

When specifically asked whether or not elders should be considered experts for litigation purposes, all counsel and academic experts indicated that elders should not be classified as “expert witnesses” in the litigation context. Some counsel expressed the view that the two types of witnesses have very different roles and functions. Expert witnesses provide opinion evidence on particular issues to assist the Court. Elders typically give evidence of oral histories of their communities. The Courts permit elders to relate hearsay evidence because, for some First Nations, these oral histories may be the only record of their past. Some counsel noted, however, that with respect to a particular point on which opinion evidence is sought, an elder may be an “expert” but only if he/she is qualified as having expertise in a particular area on which an opinion is sought.

²⁶ We note, however, that due to issues of privilege, it may not be practical.

The precise role that elders and elders' evidence should play in Aboriginal litigation is beyond the scope of this discussion paper. Many issues arise in this regard including the need for complete and timely pre-trial disclosure of oral history evidence in Aboriginal litigation. This could be the topic for discussion by this Committee at a future meeting.

8. CONCLUDING REMARKS

The focus of this discussion paper has been to address the fundamental question of how expert evidence can be more managed more efficiently in Aboriginal litigation in the Federal Court. We have identified some perceived concerns with the current *Rules* and some suggestions for improvement. While we recognize that the mandate of this Committee is not to put forward recommendations for formal amendments to the *Federal Courts Rules*, we hope that these comments may nevertheless be a useful catalyst for further discussion and consideration by this Committee.

