

**National Judicial Institute
Federal Court Education Seminar
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**“Dispute resolution and Case Management
in Complex Litigation involving First Nations”**

***Should the Expert be a Mediator – Pre-Trial
and Trial Management of Expert Evidence***

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I. *Sui generis* Nature of Aboriginal Litigation

- Interdisciplinary issues at stake;
- Cross-cultural and multicultural character of the issues;
- The importance of oral tradition histories;
- The evolving understanding of relevant and appropriate expertise;
- The extreme dependence upon historical analysis;
- The presence of complex linguistic issues;
- The challenges for valuation – historic claims, *sui generis* interest in land, the cultural importance of land, etc.
- A unique legal context with several legal systems applicable in any one case:
 - Aboriginal customary law;
 - Common law;
 - Constitutional law;
 - Civil law;
 - Federal common law;
 - International law;

II. Some Problems for Litigators

- The adversarial and winner take all nature of the process;
- Preparation of evidence to satisfy the Court while avoiding extraneous inquiry and expense;
- Shrinking pool of “willing” experts;
- The presence of “career” Court experts;
- Prohibitive cost of meeting the ever increasing “evidentiary burden” (almost inevitably borne by Aboriginal Plaintiffs);
- Management of documents:
 - Disclosure and production of historical/archival documents: is it a wasteful exercise – duplication of research, no context or analysis;
 - Should the Court consider and what weight should the Court give to documents that:
 - . are not identified by experts;
 - . are not contextualized by experts;
 - . are not analysed by experts;

III. Possible Alternative Approaches and What the Court Might Do

- A code of ethics for experts;
- Rethinking the expert witness categories (e.g. how to classify Aboriginal elders)
- Court appointed experts acting as “friends of the Court”;
- Early identification and disclosure of potential experts;
- Early pre-trial Court involvement in structuring evidence;
- Require Case Management Conferences prior to commissioning expert evidence – to encourage or order:

- Joint commissioning of evidence;
- Collaboration of experts;
- Peer review of Expert Reports;
- Selection from a predetermined pool of experts;
- Require participation of experts prior to closing pleadings;
- The use of a panel of experts in Court to ‘air’ the issues;
- Collaboration of Parties’ experts prior to preparing Reports;
- Collaboration of Parties’ experts after Plaintiffs’ Reports are filed;
- Collaboration of Parties’ experts after preparation of Reports and filing of Plaintiffs and Defendants Expert Reports;
- Peer review of Expert Reports;
- Possible limited use of experts at the Appellate level;
- Education of the Judiciary in the methodology of diverse disciplines;

IV. **Some Models and Materials**

- The Academy of Experts – Code of Practice for Experts, June 22, 2005;
- Part 35 of the British Civil Procedure Rules and Practice Direction, February 2005;
- The Quebec Code of Civil Procedure – Arts. 413.1 – 424;
- Extract from the Guidelines for the Rules of Practice for the Environmental Review Tribunal, Government of Ontario:
<http://www.ert.gov.on.ca/pdf%27s/ERT-Guidelines.pdf>;
- *Anthropology and Indian Land Claims Litigation: A Symposium*, May 5, 1955;
- Bibliography.

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