

DRAFT

Phase II Aboriginal Litigation Practice Guidelines

Elder Testimony and Oral History

Federal Court Aboriginal Law Bar Liaison Committee

May 25, 2012

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 often 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* or these guidelines 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 Aboriginal sensibilities. They allow, in a case by case process, for an appropriate blending of Aboriginal approaches and court procedural rules in cases before the court concerning Elder testimony and oral history. In addition, 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 and the testimony to be heard.

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 and Weight 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 of 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 is 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:

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

Such evidence is usually taken *de bene esse*, and the general rule is that it is 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:

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

The party that seeks to protect 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, although 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*¹ 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 signal 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

¹ William et al. v. British Columbia et al., 2004 BCSC 148

questions put to the Elder, so they have a clear understanding of the question they are asked to answer. Where Elders 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 care to ensure the Elder first understands the question 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.
- Alternative ways of questioning on cross-examination should be explored. In one case, a party had the other include questions to which the first desired answers; in

another type of proceeding, Elders were questioned by a third counsel retained because of his knowledge of and acceptance by the Aboriginal community; and in a third, questions were simply put in a courteous manner.

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.² 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

² See Federal Court web site at www.fct-cf.gc.ca

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 are not recommended 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.
