Federal Court ~ Indigenous Bar ~ Aboriginal Law Bar
Liaison Meeting
Saturday, October 21, 2006, 9:00 a.m. - 5:00 p.m.
Saskatoon, Saskatchewan

MINUTES

PARTICIPANTS

Ms. Maria Campbell	Elder
Dr. Arthur Ray, *FRSC*	History Department, University of British Columbia
Chief Justice Allan Lutfy	Federal Court
Justice François Lemieux	Federal Court
Justice James Russell	Federal Court
Prothonotary Roger Lafrenière	Federal Court
Justice Tony Mandamin	Alberta Provincial Court
Ms. Delia Opekokew	Indigenous Bar Association
Ms. Candice Metallic	Indigenous Bar Association / Assembly of First Nations
Mr. Jeff Hewitt	Indigenous Bar Association (President)
Mr. David Nawhegabow	Indigenous Bar Association
Ms. Kathy Ring	Department of Justice
Ms. Erin Tully	Department of Justice
Mr. Christopher Devlin	CBA Chair National Aboriginal Law Section
Mr. Peter Hutchins	CBA Member National Aboriginal Law Section
Mr. Wayne Garnons-Williams	Registrar, Federal Court
Mr. Andrew Baumberg	Executive Officer, Federal Court
Professor Brad Morse	Faculty of Law, University of Ottawa
Mr. Marcel Balfour	Chief, Norway House Cree Nation

Note: *As this was an open meeting, many other participants came and went throughout the day and are not specifically noted in the minutes.*

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PART I OPENING PRAYER & WELCOME

Elder Ms. Maria Campbell offered an opening prayer & welcome, and each person present then provided a brief introduction. **Justice Lemieux** noted the goal for the committee: *namely, to be a practical forum aiming to establish a consensus with concrete results for practice in the Court.*

PART II CONTEXT

The Role of Elders in Aboriginal and treaty rights litigation

Ms. Metallic noted that the IBA was continuing with a review of their submissions regarding the role of Elders, a subject of particular importance, and that this would be available for the next meeting in March 2007.

Ethnohistorical evidence and experts in Aboriginal and treaty rights litigation

Dr. A. Ray, *FRSC*

- noted his experience in numerous cases as an expert witness and academic over 41 years and provided various insights from this work:
- Courts are re-writing Canadian history – process of historical interpretation and revisionist historical analysis, especially by Aboriginal peoples

- "older histories" lead to prejudicial interpretation for aboriginal peoples
- There is a difficulty in assessing the validity of new vs. old research in Court even before it is assessed in universities
- Courts must reach a decision, whereas academics sometimes never agree – these issues are on the table for a long time
- few jurisdictions have been successful in addressing the challenge of expert evidence
- when reviewing primary material, there are new insights each time – this is soft science – "a fact today is not necessarily one in 10 years"
- **Important:** need expert evidence brief – a backgrounder re basis for evidence
    - example: in *Delgamuukw*, there was suspicion of "case-driven" evidence
    - however, pre-case evidence, which was accepted, was driven by earlier litigation
- theoretical framework is important to understand approach / emphasis
    - example: *Bear Island* case – ongoing academic rivalry played out in Court
    - smart lawyers know what buttons to push - some of these battles are frightening
- **Key problem:** *adversarial environment*
    - Advice received re role of expert: "do your best and give honest evidence"
    - However, polarization leads to extreme views and alienation
    - Example: goal of U.S. Indian Claims Commission was to avoid 'court approach' / adversarial process
    - However, between 1946-78, only 650 cases were completed – in the end, it was more adversarial than courts – U.S. anthropologists were split in 2 camps – native side vs. non-native
    - Canada is just as bad – few academics willing to take part in court process
    - often see historians with 'social sciences' training in court – ethno-historians tend to focus on few groups – difficult to change focus for a trial
- courtroom as classroom: *give lecture to judge, others ask questions, then judge decides!*
- difficulty in planning litigation: people think they know where they are going, but there is often a "right turn" in litigation – issues come up in adversarial environment
- expert evidence is presented across a series of theoretical boundaries: refuted theories / leading edge / far-fetched / generally accepted: "*some academics make things up!"*
- don't enjoy being expert witness: *"stressful - but interesting questions"*
- often, the judge needs to make ruling, but can't deal with these questions - if the same case were to come up 10 years later with new data, it might lead to different result

***Expert evidence : a practitioner's perspective* – Mr. Peter Hutchins**

- reference to 2 papers presented on this subject in past year:
    - Federal Court Aboriginal Law Seminar in Fall 2005
    - BC CLE "Aboriginal Law Litigation Issues" in Fall 2006
- a key quotation was read from his second paper: *"The pervading problem … "*

- "crisis situation with aboriginal litigation"
    - there is a systemic problem in "how we try to get to answers"
    - judges are appointed for long time, whereas there is significant change in society
    - we are product of time / training - how to re-program vis-à-vis new truths
    - judges who have never experienced, worked with, or thought about these issues are nevertheless called on to make key procedural / substantive decisions
- increasing sentiment: *Federal Court is not a friendly place for aboriginal litigants*
- similar experience for experts - some will never, never come back
    - also a problem for lawyers to address, but judge has to control courtroom
    - counsel will often keep going if not restrained

- review of paper delivered in Fall 2005:
  - *sui generis* nature of litigation
  - linguistics have especially been under-used
  - key treaty issue re assessment of whether there was an "understanding"
  - reality of language differences
  - extreme dependence on history – marriage of history / law – need to focus on methodology
  - several legal systems involved, including customary law

- Why 5-year trials?
  - *Van de Peet* test
  - burden of proof re history / contact / distinct society requires proof from oral society
  - few individuals can hope to do this – litigation requires millions of dollars
  - shrinking pool of experts – yet litigants want best people to provide evidence, not those who "make it a career"
  - problem with management of documents
    - many cases include many 100,000's of documents
    - often only look at 1-2% at most
    - What are we doing? Where is it all going? – can't deal with documents unless contextualized
    - need experts to identify key documents
    - at present, practice is to copy everything – at extreme cost (money / time) – spend 3-4 years on document discovery
    - Learned Hand (1901 Harvard Law Review) recommended reform of adversarial use of expert witnesses, to be replaced by a panel of experts

- There is an incremental development of law
  - reference to *Mitchell* re use of Elder's evidence, in particular Justice Binnie's decision re "shared sovereignty" – interesting issues raised in dissent
  - now at Inter-American Court on this issue – passed admissibility stage
  - Experts contributing to the process

- a number of expert witnesses to provide some feedback regarding their experience:
  - willingness to work with courts but many with very troubling experiences
  - some very hurt
  - in some cases, contradiction arises after 3 weeks of examination, sometimes just due to fatigue at end of day – *do fundamental rights rest on this?!*
  - aboriginal cases are "highly problematic"
    - burdened by Eurocentric values
    - lack of written evidence
      - for example, half of written record in Saskatchewan is lost
      - however, need conclusive evidence to raise a challenge
    - extremely stressful, because adversarial
    - no one believes in 'non-biased perspectives'
    - "experts treated as criminals"

In conclusion, Mr. Hutchins hopes to consolidate this material along with sources.

Dr. Ray
- if expert witnesses knew they were "friends of Court", things would be different

- need to meet before trial -- sit down and address issues
- is there a need to recognise two kinds of experts?
    - pre-trial vs. trial experts (similar to litigation lawyers vs. non-litigation)
    - pre-trial hearings should be non-adversarial

Prothonotary Lafrenière

- pre-trial is already too late - need to start at pleadings stage - exchange between parties?
- Dispense with need to exchange *all* documents – huge waste
- why argue over discovery of documents that aren't relevant?
- let parties agree on relevance, subject to rule that production at trial requires discovery
- dispense with defence until these issues are addressed or mediate them

Mr. Hutchins

- timing essential – mediation won't delay trial, but rather cut off years
- experts should be engaged before pleadings
- re qualification of experts
    - qualification phase should be long before trial
    - competing experts' reports should be coordinated – should not be adversarial
    - make reports sequential

Ms. Opekokew

- "if experts feel beaten up, imagine how Elders feel"
    - training of Elders is not to debate, but to tell story, trace relatives, interpret – for treaties signed more recently, connection still quite fresh
    - oral history fairly current – still living this history
    - some individuals illiterate, but there is important dialogue taking place
    - an example was given of an Elder taught by a person taught by witness of treaty process re education component of treaty agreement
- as oral historian, there is less background, fewer sources
- completely different culture – but there is a bridge
    - often issue is one of weight
    - Elders don't speak English well – challenge with interpretation (for example, it may take many sentences to explain one word in Cree)
    - meeting of minds "not happening"
    - cross-cultural problems – different views of history in adversarial process
    - however, "it can be done"

Dr. Ray

- by the time the expert is hired, there is already a big problem
    - statement already filed / theory of case decided before reviewing the evidence
    - in an exceptional case, he was approached *before* filing the claim
- Question: does every community have to make same evidence? What about neighbouring communities? – *huge replication of effort*
    - can't keep doing this over and over – be realistic
    - regional history cases?
- need guidelines for way lawyers treat experts (their own *and* others)
    - tone of court set by judge – varies
    - if guidelines existed, could help raise level of conduct
    - Elders find court alien environment
    - "*disastrous* experience in some cases"

Mr. Devlin

- Reality for litigants: must follow *Van Der Peet*
- However, there are other legal tests that are impossible, especially re document discovery (Peruvian Guano, 1898 House of Lords)
- In reality, only a few 100 documents needed, yet we disclose 1000's – it is a waste – in some cases $10M for plaintiff alone
- proposal: "hot tub" method – group decides what is relevant, where to do research
- bring university into court – 'academic advisory committee' from day 1 - academic disputes continue, but at least get consensus re goal
- use mediation to deal with issues
- each jurisdiction can deal with Peruvian Guano more creatively
    - for example, the Lord Wolfe reforms in the UK: *file statement of claim with maximum of 100 documents then defence follows suit – additional documents allowed on consent or with leave*

Chief Justice Lutfy

- noted the similarity between the current version of Rule 223 (*Federal Courts Rules*) and Lord Wolfe's recommendation in the U.K.

Mr. Nawhegabow

- Congratulates Mr. Hutchins on his remarks
- Federal Court avoided due to perceived unfriendliness
    - this initiative is a step in right direction to change perception
    - builds bridges
- agrees with Mr. Hutchins' proposals, but has concern with shortcuts / possible delay in Crown filing statement of defence
    - Crown takes highly adversarial position
    - don't always get good faith from Crown – sometimes very personal
    - issue with Department of Justice: *litigation group vs. reconciliation group*
        - no communication between these groups within same department
    - don't move too hastily to short cuts: in theory, good if everyone committed to finding truth / justice – not always true

- regarding Dr. Ray's reference to the prevailing notions of history vs. revisionism:
    - rules favor views of history that are acceptable by community
    - the revisionist has an impossible task
    - how to address? -- in SCC jurisprudence
    - however, cost is big factor – tests very difficult
    - even as there are successes, the bar is raised ever higher for succeeding cases
    - e.g., must show occupation, then "how intensely one occupies, and then …"

- Department of Justice's job is to de-legitimize rights
    - can prove rights in small area but not elsewhere
    - application of Eurocentric view required to establish land ownership

- alternatives?
    - rule 51/52 re assessors – *is this an option?*
    - Rational: area of law with narrow range of experts
    - role to assist finder of fact

- might assist, especially if there are contradictory reports

Dr. Ray

- revisionist history
  - First Peoples have burden of proof to challenge older histories which supported dispossession process
- courts are interested in finding the result with most limited social upheaval
- older histories support this result

Ms. Ring

- idea of involving experts earlier is good
- involving them at the pleadings stage is good *in principle*
  - practical question – probably means statement of defence later in process
  - contracting process to hire experts presents challenges
    - may take 6 to 12 weeks or more to obtain approval of an expert's contract

- re document production / narrowing the scope of relevance
  - need orders under case management or a change to Rules (unless jurisprudence misinterpreted?)
  - client would love to reduce scope of production – *too costly*
  - can all parties agree to narrow issues?
  - scope of document production can be restricted by agreement of counsel in some cases, but not possible if there is distrust amongst counsel
  - need court intervention if one counsel doesn't give support

- re Dr. Ray's comment regarding different theoretical frameworks
  - is it feasible to have a single expert?
  - there are some legitimate disagreements
  - Australian model – an expert would advise court on different frameworks
  - important for different views to be presented

- re Peter Hutchin's comment regarding use of expert witnesses to reduce scope of document production
  - obligation rests with counsel – must work with experts
  - counsel is responsible for content of affidavit of documents – *how can this responsibility be put on expert witnesses?*
  - need to explore when / how to incorporate expert into legal team
  - question whether expert witness is best artitrator of what is relevant

Dr. Ray

- agrees that there should not be a single expert
  - theoretical frameworks must be set out – this needs to be done up-front

PART III: DISCUSSION AND PROPOSALS RE SPECIFIC ISSUES

Note: The following discussion touched on numerous issues raised in papers submitted by the Department of Justice and by Professor Ray. However, there remain some issues raised in these papers which were not addressed in the discussion.

There followed a general exchange:

- counsel often first have contact at filing of the statement of claim
    - usually a press conference - opposing counsel provided advance notice
    - before this, there is usually advance negotiation and efforts to reach accommodation – often only when this doesn't work that courts are involved
- reconciliation vs. litigation – evidence disclosed to DOJ reconciliation group, but they have no communications with litigation group
- **proposal:** advance copy of statement of claim (like a mise-en-demeure)
- members of the Court questioned whether the Court might be engaged before the statement of claim is filed
    - there was encouragement for early involvement of the Court
- it was noted that the defence can be taken by surprise – have only 30 days to file defence
- **proposal:** hybrid discovery process, including oral evidence / "will-say" statements to help define issues and a possible "notice of claim" – *new type of process*
    - this is similar to environmental impact assessment – government must give notice of intention – all parties are then on notice
- experience with Indian Specific Claims Commission
    - the case already has gone through government process, legal opinion, etc. – first step – "planning conferences" - potential to settle some issues early
    - claims commission has 2 routes – quasi-judicial or mediation
    - many cases in Federal Court are in abeyance in parallel with specific claims process - flexible case management
    - parallel process between Court / Commission has been found to be very useful, in particular the "report to Court," which assists progress in the claims process

- **document production**
    - what is purpose of affidavits in record? -- need <u>contextual</u> assessment
    - for example: content for treaty process - very important / huge inquiry - shouldn't have to re-litigate same issues – need integration of work
    - re court deciding on theoretical framework - difficult to leave up to judge - huge impact on outcome – *is this suitable question for judge? Are they equipped?*

- **Court policy of neutral Rules** – is this appropriate?
    - Effect is uneven as a result
    - dealing with historical evidence – *are counsel able to assess relevance?*
        - If yes, why have experts? If not, how are counsel able to decide?
    - Rules committee bias towards *neutral* rules providing framework with flexibility
    - **proposal:** a practice direction would be useful – counsel reluctant to request exception to Rules unless they know this will be welcomed
    - Rule 3: "Rules shall be interpreted and applied so as to secure the just, most expeditious and lest expensive determination of every proceeding on its merits"
        - 10 years to get to trial is "unconscionable" – this is not Court's fault – "there is often resistance from counsel"
    - not all cases are large / complex – if special rules were created for aboriginal litigation, there might be a tendency to put aboriginal spin to get into these rules
    - **proposal:** special rules for <u>complex trials</u>

- **expert qualification**
  - in some jurisdictions, rules include obligation to set out expert qualification
  - it was noted that pre-qualification is included in *Federal Courts Rules*, though perhaps a practice direction is needed
  - Some lawyers send a CV with expert report – most other jurisdictions *require* qualifications
  - need highlight of *relevant* part of CV
  - Although this can be requested at the pre-trial conference**,** it was suggested that it is better to have earlier disclosure

- **designation of judge to conduct case management *and* trial**
  - reference to Federal Court of Australia, where the judge is involved from beginning of claim to end of trial
  - **proposal:** upon filing of statement of claim, the Court could be asked for a single judge to do both case management and trial (with assistance of a prothonotary), and trial dates could even be requested
  - it is important for the trial judge to hear qualification of expert
  - alternative – the case management judge could make ruling in writing, though the preference is for the trial judge to make rulings early on in the process

Consensus: early qualification / disclosure
  - refer this to Rules Committee
  - develop Practice Notice

- **minimum qualifications**
  - difficult to set bar at PhD level
  - whole area problematic – PhD is *research* degree – not required, but needs to be understood – many expert witnesses are in fact merely acting as clerks: "find materials and regurgitate" – often just reporting what's there
  - in ethno-history, there are complex methodologies – need theoretical sophistication and knowledge of academy – otherwise just a reporter
  - experts are often not expressing opinion: *"what in CV is relevant to this case?"*
  - some people feel they are qualified to testify on anything
  - significant range in quality
  - courts are listening to these people – they do a lot of damage
  - tough issues – assessment of evidence / giving weight: "if an error – appeal"
  - for some, appeal not meaningful due to doctrine of 'deference to trial judge'
  - qualification of expert is key event - question: "*who are we dealing with?"*
  - some 'experts' not involved in academic community – however, "once qualified in court as expert, you're in"
    - an expert shouldn't "publish" in court if s/he can't publish outside
    - expert witnesses are sometimes recognized by court but no where else!
    - Response – this is a debate to be made in court
  - different situation in Canada than U.S., where there is a divided academy
    - here most of the academy works for First Nations
    - "peer review" on this side, but on other side there is "court review"
    - in U.S., arguments fought in / out of court – vitality of academy is challenged
    - here, expertise conferred by court!

- **Elders**
  - community will identify Elder
  - however, an example was provided of a case where an Elder was rejected on *best evidence* rule which requires concurrence of voices (+ other factors)
  - in community context, Elder may be chosen because able to speak English
  - communities try to balance various factors
  - "this is where we are struggling … how to best qualify Elders"
  - re venue of trial – it was noted that some members of court go to community / even home to hear testimony
  - in some cases, Elder's testimony must be told at special time / place
  - reference to some cases in Australian courts, where Elders have testified as group – a protocol exists for such testimony
    - **Proposal**: secretary to find / circulate Australian protocol(s)
  - Elder's testimony is more than a "recounting of historical facts"
    - Supreme Court has sanctioned the relevance of two perspectives: *aboriginal rights and title are a function of aboriginal law / common law*
    - mainstream lawyers and judges have no experience of independent legal perspective and legal tradition, which is therefore discounted
    - Elders in separate category: similar to expert witnesses but with knowledge of legal tradition
    - similar to review of foreign law in domestic court
    - on par with judges - need unique category: *sui generis*
  - IBA is continuing discussion regarding the proper way to classify / qualify Elders
  - one option is a special category of experts
    - ~~don't wan~~t Elders to be subject to same process, but evidence must be treated on same basis
    - to date, only lip service has been given to this principle of J. Lamer
  - question: "how to elevate evidence to ensure equal footing"
  - Indian Claims process is similar to Australian experience
    - Elders more at ease – process less formal – not subject to cross-exam
    - put questions through commission counsel to ensure level of respect
  - re interpretation
    - battle over translation – need to relax
  - re qualification of Elder – onus should be on system
    - texts are peer reviewed / rigorously tested by community
    - validation / verification of story: onus not on individual – need to understand how they get there via community
    - in *Samson* case – Elders were "introduced" – protocol with tobacco – however, judge heard Elders before other experts on evidence
    - in *Tsilhquot'in* the judge gave framework for qualification – 'less than expert, more than lay witness'

- **Scope of disclosure**
  - Rule 279 – affidavit must set out proposed evidence – should there be more?
  - **proposal:** disclosure of *area of expertise for which qualification sought, facts, assumptions, listing of documents reviewed, summary of grounds for opinion*
  - reference to Ontario Report (2003) – task force for discovery – best practice includes these items
  - **proposal:** theoretical framework should also be included – make this pre requisite – can know early what issues exist regarding the experts

        - although this can be addressed in case management, there should nevertheless be some <u>minimal requirements</u> so as to avoid debate
    - reference to Alberta Rules for very long actions
    - in case management, there may be discussion regarding qualifications and reasons for disagreement
    - timing – mostly addressed via recent amendments to Rules
    - new rules require disclosure by pre-trial conference (PTC), but in come cases there is no PTC, only a series of case management conferences, which must include this item for discussion

- **Timing of expert reports / sequential filing**
    - "30 days for filing of defence … never happens"
    - strongest request from counsel was for *sequential* filing – in place in Alberta
    - current system: defence's expert report makes guesses regarding content / issues, with result that much is included that may not be relevant
    - wait until receipt of the opposing party's report - response will be more relevant
    - why "he says/she says" approach? – Crown starts with negative
        - eventually need to agree – why does defence need to wait?
    - earlier conference of experts needed to scope out issues / mediation / consent, which would reduce the need for a sequential process
        - "after meetings, everyone knows what they need to do"
    - Paper war - enormous wasted effort – easier to have meeting with oversight
    - Rarely if ever is a report seen in under 6 months – usually 6-12 months
    - idea of sequential exchange: <u>*Sherstone vs. Westroc Industries Inc.*</u> (?)
        - Plaintiff files expert opinion, then defence files reply expert opinion, and then plaintiff files rebuttal opinion
        - statement of claim can be very wide – need to assume everything in play – "need to tighten scope"
    - **Consensus / Key message**: push timelines back, narrow issues – need exchange before reports written

- Sections 5 (b) and (c)
    - Tabled to next meeting

Section 6: Alternatives

- **Duty of expert**
    - Australian Rules have explicit indication of duty of expert – expert includes signed acknowledgment at end of report (Question: *is this cosmetic?*)
    - this would help, but it is also important for lawyers on both sides to treat expert witnesses according to this standard – *too much pressure to push envelope*
    - in court, it is easy for expert to forget overriding obligation / context
    - **proposal:** court should require explicit indication of expert's duty so it is clear that this is for court
        - retainer fees confuse issue for experts – perhaps include a reminder in rules / requirements of certification at end of report / code of ethics
    - there is possibly a need for a code of ethics for field research / those who work in native communities – this is a grey area which needs clarification
    - there is a model in Mr. Hutchins' material – code of practice for experts
    - **proposal:** the secretary should circulate this material

- **Court-appointed experts / pools of experts**
    - some discussion regarding the difficulty to get an "unbiased expert"
    - also reference to previous issues re different theoretical frameworks
        - is this a sole expert, or a complement to the parties' experts?
        - reference to J. Heerey's paper (Federal Court of Australia) which includes comments re court-appointed experts
    - ref. to Mabo case – pool of experts chosen from previous cases, with experts on rotation – worked well
        - small community of anthropologists – judge didn't feel comfortable without own expert – needed someone to assess frameworks at least minimally – "side-advisor"
    - issue at pre-trial: whether court should appoint expert – may be needed if experts opposed **–** important question: *who pays?*
    - issue re disclosure of judge's communications with court-appointed expert
    - experience in Federal Court with assessor – report will be used in trial
    - Quebec Code of Civil Procedure – judge can name up to 3 experts (Rule 414)
        - **Proposal**: *speak with other judges – how is it working*?
    - experience with railway costing -- expert appointed by each party – experts' task: where do you agree / where not / why → report
        - testimony only on issues where experts did not agree → further reports
        - work complete in one month – worked well – highly qualified experts didn't push envelope
        - counsel not involved – "hot tub" meetings of experts / questions placed to experts with limited opportunity to ask further questions
        - the Competition Tribunal has adopted this model from Australian experience – *can be implemented if all parties agree*
    - in current system, experts don't ever speak with other experts
        - **important:** "need contact among experts to avoid adversarial approach"
    - other approaches
        - mediation – bring experts – get it out on table
        - round-table approach – each gives evidence, go around table – opposing counsel to ask questions
    - this may be better than current practice, but it is difficult when all you can do is "respond" to questions
        - **important:** *need more flexibility so it is not so stilted*

Next Steps: draft minutes plus a partial synthesis for circulation

Next Meetings

- **Proposed agenda:** *to be discussed at planning meeting in early 2007*
- **Date**: in conjunction with CBA CLE: March 9-10 – Winnipeg – Fairmont
- **Options** re date: half day Fri. / Sat. or concurrently on Friday or full day Sun. or Thurs.
- **Consensus**: Thursday, March 8 – Mr. Devlin will confirm resource issue
- **Advance Planning Meeting**
    - Conference call in approximately one month

Varia

- Court plans expansion of e-filing project – to be discussed at a subsequent meeting
- Mr. Balfour noted for the record the helpful service received from the Registry

Adjournment: The meeting closed at approximately 5:00 p.m.

SUMMARY OF DISCUSSION POINTS / PROPOSALS

Note: *These proposals have not been formally adopted by the Committee as a whole. Furthermore, additional proposals were put forward in the discussion papers circulated before the meeting.*

"Pre-Claim" Procedure / "Modified Pleadings" procedure

- need parties to meet with experts *before* claim filed
  - "experts should be engaged before pleadings"
  - by the time the expert is hired, there is already a big problem: at present, the statement filed / theory of case decided *before* reviewing the evidence
- need parties to meet / exchange with each other before claim filed: "pre-trial is already too late" for exchange between parties – need to start at pleadings stage:
  - *dispense with need to exchange all documents – huge waste: why argue over discovery of documents that aren't relevant?*
  - *let parties agree on relevance, subject to rule that production at trial requires discovery*
  - *"academic advisory committee from day 1" - disputes continue, but consensus re goal*
  - *dispense with defence until these issues are addressed or mediate them ("mediation won't delay trial, but rather cut off years")*
  - *contra view (IBA):* concern with shortcuts / possible delay in Crown filing defence:
    - Crown takes *highly* adversarial position – 'split between *litigation/reconciliation groups*'
    - "don't move too hastily to short cuts: in theory, good if everyone committed to finding truth / justice – *not always true*"
  - DOJ: contracting process to hire experts presents challenges
    - may take 6 to 12 weeks or more to obtain approval of an expert's contract
- "notice of claim" – *new type of process?* – advance copy of statement of claim (reference to environmental impact assessment model, where government gives advance notice to all parties)
- *parallel* process between Court / Indian Claims Commission has been found to be very useful, in particular "report to Court," which assists progress in *claims* process while Court process in abeyance
- jurisdictional issue
  - whether Court can be "engaged" before the statement of claim is filed
  - encouragement for early involvement of the Court

Judicial Assignment

- it was proposed that, upon filing of statement of claim, the Court could be asked for:
  - a *single* judge (with assistance of a prothonotary) to do both case management *and* trial
  - trial dates
  - *alternative* – the case management judge could make ruling in writing, though the preference is for the trial judge to make rulings early on in the process

Pre-Trial Disclosure of Expert Evidence: *Timing*

- possible recognition of two kinds of experts
  - pre-trial vs. trial experts (similar to litigation lawyers vs. non-litigation)
  - *pre-trial process should be non-adversarial*
- "make reports sequential"(see, forexample, Alberta Law Reform Institute report[1])
- but: "earlier conference of experts needed to scope out issues / mediation / consent, which would reduce the need for a sequential process": *"after meetings, everyone knows what they need to do"*
- need *early* involvement of experts to narrow issues before reports are written
- "Paper war - enormous wasted effort – easier to have meeting with oversight"
- timelines for exchange of expert reports: push back – need more time to review / prepare reports
- "Rarely if ever is a report seen in under 6 months – usually 6-12 months"
- qualification of expert: "key event" – "important for the trial judge to hear qualification of expert" – "qualification phase should be long before trial"

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

Pre-Trial Disclosure of Expert Evidence: *Scope/Relevance*

- oral evidence: hybrid process include oral evidence / "will-say" statements to help define issues

- relevance: "the experts' task would be greatly simplified if there could be earlier identification of precisely which issues are to be litigated."
  - proposal: "hot tub" method – "expert group decides what is relevant, where to do research"
  - "competing experts' reports should be coordinated – should not be adversarial"
  - however, there are divergent views as to proper role of experts in assessment of *relevance*: (a) 'counsel *must* ultimately be responsible for evidence and application of relevance test' VERSUS (b) 'only experts really understand historical evidence *in context*'
    - "need to explore when / how to incorporate expert into legal team"
- Relevance test / Rule 223: (a) expansive Peruvian Guano test (considered excessive) VERSUS (b) narrower approach (considered much more realistic) as in UK reforms, where plaintiff files statement of claim with maximum 100 documents and defence follows suit – *additional documents allowed on consent or with leave*
  - "each jurisdiction can deal with Peruvian Guano more creatively"
  - "need orders under case management or a change to Rules to narrow scope of prduction"
  - "scope of document production can be restricted by agreement in some cases, but not possible if there is distrust amongst counsel – need court intervention if one counsel doesn't give support"

- qualification of expert
- DOJ paper recommends that the *Federal Courts Rules* be amended to expand the pre-trial disclosure required by experts to include the matters encompassed in the rules on expert evidence in other jurisdictions and/or the recommended Ontario Task Force reforms
- proposal to require *(via Rules Committee / Practice Notice)* disclosure of:[2]
  - *qualifications of expert (possibly via CV / résumé with relevant sections highlighted)*
  - *area of expertise for which qualification sought*
  - *expert evidence brief: facts, assumptions, listing of documents reviewed, summary of grounds for opinion*
  - *theoretical framework* – make this pre-requisite so parties know what issues exist regarding experts
  - although this can be addressed in case management, there should nevertheless be some minimal requirements so as to avoid debate
- Need special protocol for qualification of Elders
  - in *Tsilhquot'in* the judge gave framework – 'less than expert, more than lay witness'

Number of Experts

- The DOJ paper recommends consideration of a change to the *Rules* to allow the Court to limit the number of experts that may be called, as some provincial rules provide.

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[2] There was reference in the DOJ paper to the 2003 *Task Force on the Discovery Process in Ontario* which 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:

- 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.

Experts' Obligations

- duty of expert: court should require explicit indication of expert's duty so it is clear that this is for court
- options include:
  - reminder in rules
  - requirements of certification at end of report
  - code of ethics (including code of ethics for field research / those who work in native communities)
- Question: *is this cosmetic? – this would help, but it is also important for lawyers on both sides to treat expert witnesses according to this standard*

Alternate Models

- "friend of the Court" appointed by the parties
  - issue re selection process / bias – might need more than one

- court-appointed experts
  - Quebec Code of Civil Procedure – judge can name up to 3 experts (Rule 414)
  - Federal Court of Australia "Assessor" (see reference paper)
  - Federal Court (Canada) Rule 51/52 assessors
    - Rational: area of law with narrow range of experts
    - role to assist finder of fact – might assist, especially if there are contradictory reports
  - issue re selection process / bias
    - reference to Mabo case – pool of experts chosen from previous cases, with experts on rotation – worked well (context: small community of anthropologists – judge didn't feel comfortable without own expert – needed someone to assess frameworks at least minimally – "side-advisor")
  - funding issue
  - issue re disclosure of judge's communications with court-appointed expert

- independent panel of experts / joint reports / "hot tubbing" models (reference to Federal Court of Australia paper)
  - "need contact among experts to avoid adversarial approach"
  - experience with railway costing (Justice Lemieux) -- expert appointed by each party – experts' task: *where do you agree / where not / why* → report
    - testimony only on issues where experts did not agree → further reports
    - work well – complete in one month – highly qualified experts didn't push envelope
    - counsel not involved – "hot tub" meetings of experts / questions placed to experts with limited opportunity to ask further questions
    - the Competition Tribunal has adopted this model from Australian experience – *can be implemented if all parties agree*
- "is it feasible to have a single expert?" importance of having different expert views presented – legitimate disagreements exist within academic community – a friend of Court / Court-appointed expert would advise court on different frameworks

Communications with Experts

- The DOJ paper noted that it is 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.
- 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.

General Issues re Rules of Court

- special rules for complex trials

- exceptions to rules: a practice direction would be useful – counsel are reluctant to request exception to Rules unless they know this will be welcomed
- Rule 3: "*Rules shall be interpreted and applied so as to secure the just, most expeditious and lest expensive determination of every proceeding on its merits"*

- Consistent application – the DOJ paper indicated that some counsel find the *Rules* are not always being uniformly applied to all parties and/or are not being applied with sufficient stringency in Aboriginal litigation and that it would be preferable if the *Rules* were used more effectively and applied more generally by the Court to address some of the other issues identified, and for the Court to impose sanctions for non-compliance.

- Costs Sanctions for Non-Compliance with the Rules – the DOJ paper suggested that strengthening the costs rules and more stringently applying those rules could encourage more efficient pre-trial and trial management of expert evidence.

Impact of Court Procedures on Experts: the "shrinking pool of experts"

- Significant problem with adversarial process: *polarization leads to extreme views and alienation*

- for consideration:
    - promotion of an "experts' culture" / "friend of Court" model, wherein individual experts are not perceived as "taking sides"
    - guidelines for way lawyers treat experts (their own *and* others) to raise level of conduct
        - judge must control court room
    - earlier meetings of experts required to discuss / address issues
    - collaboration between experts – e.g., joint reports / "hot-tub" collaboration
    - demystification of court process for potential experts

- Re Elders
    - Need special protocol for testimony by Elders (reference to Australian model)
    - similar to expert witnesses but with knowledge of legal tradition: *need unique category*
    - Indian Claims process is similar to Australian experience: Elders more at ease – process less formal – not subject to cross-examination
        - put questions through commission counsel to ensure level of respect
    - interpretation process too adversarial

Systemic Issues

- need for recognition, understanding, and integration of :
    - sui generis nature of litigation
    - multiple frameworks: legal / linguistic / cultural / academic
    - choice of framework – *and process of adaptation to framework* – have huge impact on results

- need larger procedure to carry forward evidence for use in related cases: *huge replication of effort*
    - *"regional history cases?"*

- litigation cost – significant factor in access to justice*: 10 years to get to trial is "unconscionable"*

- understanding of revisionist historical model*:* "First Peoples have burden of proof to challenge older histories which supported dispossession process"