FEDERAL COURT

PRACTICE GUIDELINES FOR ABORIGINAL LAW PROCEEDINGS

SEPTEMBER 2021 (4th EDITION)

PART I - PREAMBLE

When legal disputes arise between individuals, communities, organizations, or governments, there are usually three possible outcomes:

- unresolved – the dispute becomes ongoing and may lead to further disputes
- resolved by agreement – the dispute is resolved through dialogue between the parties leading to a settlement agreement, which may be endorsed by a Court Order
- resolved through litigation – the dispute is addressed through adversarial litigation resulting in a Court Order that determines the legal issue

A core purpose of these practice guidelines is to assist with the resolution of disputes by providing information about Court procedure, options for resolution, and resources that may be available to assist in settlement discussions as well as to make litigation more efficient.

The *Federal Court ~ Indigenous Bar Association ~ Aboriginal Law Bar Liaison Committee* ("Liaison Committee") brings together representatives of the Federal Court, the Indigenous Bar Association, the Department of Justice (Canada), the Canadian Bar Association, and the Advocates' Society to provide a forum for dialogue, review litigation practice and rules, and make recommendations for improvement. Other organizations have also participated from time to time, including members of various Canadian Courts, academics, and the National Judicial Institute. In addition, the Liaison Committee regularly consults with Indigenous Elders from across the country. Their input and advice was particularly important with respect to the Protocol on Elder Testimony and Oral History evidence found at Part D of the Guidelines. Committee minutes may be found on the Federal Court web site at: https://www.fct-cf.gc.ca/en/pages/about-the-court/liaison-committees/indigenous-bar-association---aboriginal-law-bar-liaison-committee#cont.

About the 4th Edition

This 4th edition includes:

- new guidelines with respect to the appointment of an assessor as a neutral advisor to the court regarding Indigenous law or traditions, pursuant to Rule 52 of the *Federal Courts Rules (the "Rules")*;
- a Protocol to balance the appropriate reception of Elder testimony and oral history evidence with the practical needs of the justice system in a manner that promotes fairness and truth-seeking in civil litigation;
- a pilot framework for parties to request a summary of a Court decision in an Indigenous language;
- a checklist of matters to consider when preparing an indigenous law case; and
- notice of the option for a party to request remote video access to a Court hearing.

This 4th edition complements the previous version, which provided dispute resolution options and practice guidelines for *applications for judicial review and actions* (including litigation practice issues involving oral testimony and the role of Elders). Parties and their legal counsel are encouraged to draw from the recommendations where they are found to be helpful. The guidelines are a "living document" and will be updated with the benefit of further deliberations and additional experience as a litigation reference tool.

For the purposes of the English version of these Practice Guidelines:

> **"Aboriginal" (law or litigation)** is the term as typically used by lawyers when referring to the body of Canadian law in this area commonly practiced in Federal Court;
>
> **"Indigenous" (people or law)** will refer to the people, *including First Nations, Inuit, and Métis,* who are involved in Aboriginal law matters before the Federal Court, or the term as typically used by lawyers when referring to those laws created by Indigenous peoples.

In French, the word "*autochtone*" is used as a translation for both "Aboriginal" and "Indigenous." Thus, in the French version of these Guidelines, "*droit autochtone*" is used as the equivalent of both "Aboriginal law" and "Indigenous law."

Feedback & Compilation of Litigation Best Practices

Comments, suggestions and feedback regarding experience with these Practice Guidelines are welcome and may be sent either via representatives on the Liaison Committee from the Canadian Bar Association, Indigenous Bar Association, Advocates' Society, or Department of Justice or else directly to the Secretary of the Committee:

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

The Liaison Committee aims to compile examples of helpful practices for all stages of legal disputes in this area. Parties are invited to submit noteworthy examples of orders, agreements, schedules, protocols, etc. that have been found to be helpful in the context of specific cases, which can then be considered for inclusion in the Annex B to these Practice Guidelines.

PART II - FLEXIBLE PROCEDURES

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

This flexible procedural framework for the resolution of litigation involving Indigenous peoples also advances the goal of reconciliation, the importance of which has been affirmed by the Supreme Court of Canada in numerous cases.[1]

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

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

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

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

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

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

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

[1] *R.v. Van der Peet*, [2006] 2 S.C.R. 507, *R. v. Sparrow,* [1990] 1 S.C.R 1075, *Delgamuukw* v. *British Columbia,* [1997] 3 S.C.R 1010, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, *Manitoba Metis Federation Inc.* v. *Canada (Attorney Genera!),* [2013] 1 S.C.R 623

A. APPOINTMENT OF A NEUTRAL ADVISOR TO THE COURT REGARDING INDIGENOUS LAW OR TRADITIONS

The Liaison Committee recently proposed the use of Rule 52 as a potential procedural mechanism to assist the Court in considering Indigenous laws or traditions that may come before the Court.

> ASSESSORS
> 52 (1) The Court may call on an assessor
> (a) to assist the Court in understanding technical evidence; or
> (b) to provide a written opinion in a proceeding.
> (2) An order made under subsection (1) shall provide for payment of the fees and disbursements of the assessor.
> (3) All communications between the Court and an assessor shall be in open court.
> (4) Before requesting a written opinion from an assessor, the Court shall allow the parties to make submissions in respect of the form and content of the question to be asked.
> (5) Before judgment is rendered, the Court shall provide the parties with the questions asked of, and any opinion given by, an assessor and give them an opportunity to make submissions thereon.

To the extent that oral traditions evidence requires an understanding of a particular knowledge system, that evidence may be seen as 'technical', perhaps requiring the assistance of someone familiar with the knowledge system. The "assessor" could be an Elder or another community member with knowledge of Indigenous Law and/or oral traditions. The following pilot process was developed by the Liaison Committee in consultation with an external advisory group of Indigenous knowledge keepers and academics.

PROCESS FOR SEEKING ADVICE IN THE APPOINTMENT OF ASSESSORS IN RELATION TO ISSUES RELATED TO THE RECEPTION, INTERPRETATION OR APPLICATION OF INDIGENOUS LAW OR TRADITIONS

Purpose: To establish a process to assist the Federal Court in appointing assessors under Rule 52 of the *Federal Court Rules* in cases where issues of Indigenous Law or tradition have arisen or are likely to arise.

No Fettering: Nothing in this process binds or fetters the power of the Court to make any order that may be made under Rule 52 of the *Federal Court Rules*.

Establishment of Indigenous Law Advisory Committee: In consultation with members of the Liaison Committee, the Federal Court will appoint a committee, to be known as the Indigenous Law Advisory Committee, of persons who are knowledgeable in Indigenous Law to assist the Court in cases where the Court is considering the appointment of an assessor as a neutral advisor to the court. Among other things, such assistance might relate to the reception, interpretation or application of Indigenous Law or traditions. The Indigenous Law Advisory Committee will appoint a Chair.

Process When Court Determines an Assessor May be Appointed: When the Court, at its own initiative or on the request of a party or parties, is considering appointing an Assessor pursuant to Rule 52, it may apply the following process to seek the advice of the Indigenous Law Advisory Committee:

1. It will seek parties' submissions on whether an assessor should be appointed and the matters to be included in a written request to the Indigenous Law Advisory Committee.
2. It will draft a written request to the Indigenous Law Advisory Committee setting out the following:
    a. The name of the case;
    b. A list of all parties;
    c. The community, group, or nation whose Indigenous Law may be at issue in the proceeding;
    d. If applicable, the community, group, or nation of which any party in the litigation is a member;
    e. A summary of the issues likely to require the assistance of an assessor and advising whether the assistance is:
        i. In relation to procedural issues;
        ii. In relation to substantive issues; or
        iii. Both.
    f. A request for recommendations for a qualified assessor; and
    g. Such other matters as the Court may deem appropriate.
3. The Court will allow the parties to make submissions on the form and content of the written request before it is sent.
4. The written request will be sent to the Chair of the Indigenous Law Advisory Committee who will:
    a. Review the request;
    b. Appoint a sub-committee of three members of the Indigenous Law Advisory Committee to respond to the written request.
5. The subcommittee shall consider the written request and shall:
    a. Nominate one or more potential assessors; or
    b. Decline to nominate an assessor; and
    c. Provide a brief explanation as to why it has nominated or declined to nominate an assessor or assessors.
6. In nominating an assessor the subcommittee will:
    a. Consider the qualifications and experience of the assessor;
    b. Consider the availability of the assessor;
    c. Consider the impartiality and independence of the assessor;
    d. Not, unless otherwise agreed by the parties and the Court, nominate a person who is a member of the community, group, or nation of any of the parties, if applicable; and

e. Not, unless otherwise agreed by the parties and the Court, nominate a person who is a close personal relation of any of the parties.

7. The Chair of the Indigenous Law Advisory Committee will communicate the response of the subcommittee to the Court.
8. The Court will disclose the response of the committee to the parties and allow the parties to make submissions on any potential assessor nominated.
9. The Court may, subject to the provisions of Rule 52 of the *Rules*, consider the recommendation in making an order under that Rule.

B. INDIGENOUS LANGUAGE DECISION SUMMARIES

The Court has recently launched a pilot project for the translation of summaries of selected decisions into one or more of the Indigenous languages spoken by the parties to a Court proceeding and/or by members of the First Nation, Band, community or group of which the parties are members. In addition to a written summary, a recording of the summary would be prepared and made available on the Court website. Examples from recent proceedings are available at https://www.fct-cf.gc.ca/en/pages/media/webcast#cont Translation work would normally be completed on contract with the Courts Administration Service or Translation Bureau.

Parties who wish to request that the Court prepare one or more such summaries in their case are therefore invited to make written submissions, if any, regarding:

(a) whether they wish to have a proceeding included in the pilot; and

(b) the appropriate Indigenous language(s), including details regarding a preferred dialect (if applicable); and

(c) an appropriate translator (optional).

C. WEBCASTING OF HEARINGS

Although the Court regularly conducts hearings and conferences (such as mediation) within Indigenous communities and in urban centres, the Court is open to requests to provide for remote video access. Such requests should be submitted as soon as possible either in writing or orally at a case management or trial management conference.

PART III - PRACTICE GUIDELINES

A. DISPUTE RESOLUTION THROUGH DIALOGUE

Indigenous Elders: *Emphasis on Dialogue to Resolve Disputes by Agreement*

In 2009, the Federal Court hosted a *Symposium on Oral History and the Role of Indigenous Elders*, opening a dialogue with Elders from across Canada along with representatives of the public and private Bar. In turn, these same Elders hosted a historic meeting in 2010 at Turtle Lodge to promote a better understanding of the Indigenous perspective. This led to a judicial education seminar at Kitigan Zibi in late 2013, developed in collaboration with the Elders, on Indigenous dispute resolution. Throughout, the Elders who were consulted have shown their preference for dispute resolution through dialogue: *talking things out to resolve disputes by agreement.*

To better assist with the efficient resolution of disputes involving Indigenous people, the Court is moving to facilitate dispute resolution between parties other than through adjudication, though without preventing parties from pursuing judicial adjudication. The Court will typically encourage parties to reach a settlement or narrow their issues in dispute through agreement. However, it is ultimately for the parties to decide whether they want to pursue this avenue. In so doing, they will consider the potential costs associated with settlement discussions, which do not always lead to a settlement of the dispute. It is recognized that if successful, settlement by agreement helps to restore the relationship and trust between the parties, a form of reconciliation.

It is important to keep in mind that there is often overlap between settlement and judicial adjudication: many disputes that begin as adversarial proceedings may shift over to dialogue and resolution by agreement, even if only for some of the issues in dispute. Moreover, the experience of the Court is that many parties who are at first unwilling to enter into a dialogue later discover they are able to find common ground and a shared interest in reaching a resolution, leading to an acceptable resolution for all parties.

Parties enter a dialogue process on a “without prejudice” basis, meaning that if the dispute is not resolved by agreement, they can return to a process of adversarial litigation without compromising their initial position. Through such dialogue, parties often gain a much better understanding of their own legal position as well as that of the other parties. Among other things, this allows for a more efficient and less costly litigation process if a mediated agreement is not reached.

Court Framework for Dispute Resolution through Dialogue between Parties
In 2012, by Practice Direction, the Court launched a pilot project to facilitate more expeditious, cost effective and satisfactory resolution of *judicial review* applications dealing with First Nations governance disputes. The ‘pilot’ is now an established Court

practice and is integrated into these Practice Guidelines, which now also extend the practice, *in a flexible manner*, to all Aboriginal law proceedings in Federal Court.

The process starts with an initial assessment ("triage") by a member of the Court. *In appropriate cases*, the Court may informally invite the parties to consider alternative means of proceeding, including mediation away from the Court or judicially assisted dispute resolution (by either a judge or a prothonotary).

The assessment, initiated by either the Court or a party, typically proceeds as follows:

Assessment on Request by a Party

- When filing a statement of claim or notice of application, a plaintiff / applicant may include a letter requesting that the proceeding be specially managed pursuant to Rule 384. Such letters should include relevant facts and submissions. If an *expedited* special case management process is requested, this should be noted in the letter.

- A defendant / respondent may make such a request at any time after receiving notice of the proceeding.

- Either party may also request a 'standstill' order, which, if all parties consent, would allow the parties to consider all options for resolution of the dispute without the pressure of being subject to normal time-lines for proceeding with adversarial litigation.

- Upon such request by either party, the Registry will immediately refer the file for timely assessment by the Court.

Assessment on Referral by the Registry of the Court

- Even if neither party has made a request described above, the Registry may refer any file for assessment by the Court if it considers that the file *may* fall within the scope of this framework.

Assessment by the Court

- A judge or prothonotary of the Court will review each file that has been referred and, in appropriate cases, may invite the parties to an informal meeting in person or by conference call.

- The judge or prothonotary will consider whether the file should continue as a specially managed proceeding pursuant to Rule 384. Where the potential for a streamlined court-assisted resolution is identified, an Order will be issued and a case management judge assigned.

- Where a prothonotary and judge are assigned jointly to case manage the file, the prothonotary will have day to day carriage of the case unless otherwise stipulated.

The objective of an informal meeting of the parties and Court will be to identify the parties' preferred approach to resolving the dispute in the most timely, cost-effective and satisfactory manner for those involved, and the manner in which the Court may facilitate that process.
The options available for parties include, but are not limited to:

- special case management of the proceeding under Rules 383 to 385;
- a consent standstill order;
- a stay of proceedings under Rule 390, including the suspension of filing requirements pending alternate dispute resolution processes outside the Court;
- utilization of Indigenous dispute resolution processes acceptable to the parties;
- formalization of settlement agreements by consent Order, if appropriate;
- arrangements for mediation, judicial dispute resolution and attendance at hearings, if feasible;
- focused organization of facts, documents, and other evidence, and identification of issues;
- separation of the issues in dispute, pursuant to Rule 107, allowing for some issues to be adjudicated by the Court and others to be settled by agreement;
- dispute resolution services offered by the Court, including:
    - review of a request, if any, by a party for assignment of a judge or prothonotary with specific mediation and / or cross-cultural experience
    - mediation – Rule 387(a) [Rules 389, 419, and 420 governing settlement]
    - early neutral evaluation – Rule 387(b)
    - mini-trial – Rule 387(c)

A core group of judges and prothonotaries is available for assignment to conduct a judicially-assisted dispute resolution or mediation process.

Where judicially-assisted resolution by the parties is unsuccessful or not pursued, or settlement is reached only with respect to some issues in dispute, the remaining issues will then be heard by a judge / prothonotary who has not been involved in the matter, unless there is consent between the parties to continue with the same judicial officer.

> **Rule 389(2)** Where a settlement of only part of a proceeding is reached at a dispute resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication.
> (3) Where no settlement can be reached at a dispute resolution conference, the case management judge shall record that fact on the Court file.
>
> **391.** A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.

Dispute Resolution through Dialogue: *Additional Considerations*

- ***Confidentiality: Discussion Regarding Possible Publication of Settlement***

Settlement discussions are generally privileged, meaning that unless there is agreement among the parties otherwise, they are without prejudice and not to be entered into evidence or disclosed to the Court (see exception in Rule 422).

Settlement discussions are also generally kept confidential. Subject to special agreements for response to media inquiries or public education, the parties may not broadcast or disclose to third parties what is discussed.

> **Rule 388.** Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.

Although settlement discussions held under the *Federal Courts Rules* are typically kept confidential, in some cases there may be some value to the parties in Aboriginal law proceedings to have the terms of the settlement agreement, or at least a *summary* of the process and final agreement, made public. In addition to providing transparency for the wider communities affected by the agreement, publication can also provide a model – both *process* and *outcome* – for other communities who may be open to resolving similar disputes by way of a settlement. In some cases, a settlement may be accompanied by a Court order that endorses the settlement outcome and which provides legal finality to the proceeding. If appropriate in the circumstances of the case and with all parties' agreement, such an Order could include a summary of the settlement and be placed on the public record of the Court.

- ***Barriers to Settlement by Agreement***

In some cases a mediated settlement may offer many advantages for all parties as compared to an adjudicated outcome. However, it is important to consider barriers that may exist to a successful dialogue so that parties can engage in the dialogue with realistic expectations. The following factors, though not an exhaustive listing, should be considered:

- *cost* – although a mediated settlement is nearly always much less costly than full adversarial litigation, there are nonetheless some costs for all parties, which must be balanced with the prospect of reaching a settlement of at least some of the issues in dispute.

- *knowledge of the claim* – in early days of a claim or a judicial review, litigators may not have sufficient knowledge of the facts or issues in a claim to recommend settlement. In judicial review proceedings in particular, the respondent is not required under the rules to provide a substantive response to the application, making it difficult for the applicant to know the respondent's view of the application and what potential defenses may be raised.

- *approval process to get mandate to settle* – many claims have significant legal, practical, and financial implications for parties. These may need to be considered in a lengthy approval process, which may in turn preclude formal settlement discussions at early stages of a proceeding.

- *timing* – there are barriers to *early* attempts to settle, as noted above. However, if parties commit considerable financial and human resources into the adversarial path without seriously considering settlement options, this too can create a barrier to

settlement. Experience has shown that parties are often reluctant to 'change course' once they have committed significant time and resources to adversarial proceedings. This may be so even if settlement may still offer some benefits over an adjudicated outcome.

- ***Class or Representative Proceedings***

Special rules are applicable to settlement discussions in *class proceedings* (Rules 334.1 and following) or *representative proceedings* (Rules 114 and 115):

> **Rule 114 (4) –** The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.
>
> **Rule 334.29(1) –** A class proceeding may be settled only with the approval of judge.
>
> **Rule 334.3 –** A proceeding commenced by a member of a class of persons on behalf of the members of that class may only be discontinued with the approval of judge.

- ***Costs***

Settlement agreements should consider the question of costs. In the alternative, the question of costs may be put to the Court, either by way of written submissions or, instead, at an oral hearing. See, for example, the costs Order following settlement in the case of *Knebush v. Maygard*.[2]

"Costs" refer to the legal fees for a party's lawyer(s) as well as disbursements (such as the printing costs, filing fees, interpreter's fees or witness travel expenses). Although the general rule in legal proceedings, if adjudicated by the Court, is that costs are allocated to the parties in accordance with the outcome of the case, there is no fixed rule that the successful party will automatically be entitled to costs. In many cases the successful party may be awarded some, *though rarely all*, of their litigation "costs. There are many factors, set out in Rule 400, that are considered by the Court when deciding costs:

> **Rule 400.** (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.
> (2) Costs may be awarded to or against the Crown.
> (3) In exercising its discretion under subsection (1), the Court may consider
> (*a*) the result of the proceeding;
> (*b*) the amounts claimed and the amounts recovered;
> (*c*) the importance and complexity of the issues;
> (*d*) the apportionment of liability;
> (*e*) any written offer to settle;
> (*f*) any offer to contribute made under rule 421;
> (*g*) the amount of work;
> (*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;
> (*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

[2] *Knebush v. Maygard*, 2014 FC 1247.

(*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;
(*k*) whether any step in the proceeding was
(i) improper, vexatious or unnecessary, or
(ii) taken through negligence, mistake or excessive caution;
(*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;
(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;
(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;
(*n.1*) whether the expense required to have an expert witness give evidence was justified given
(i) the nature of the litigation, its public significance and any need to clarify the law,
(ii) the number, complexity or technical nature of the issues in dispute, or
(iii) the amount in dispute in the proceeding; and
(*o*) any other matter that it considers relevant.

The effective use of offers to settle (that is, an effort to settle the dispute by agreement) is an important consideration. Parties who are able to show they made a genuine effort to reasonably settle their dispute, particularly early on, are able to have such efforts considered as a factor in any Court assessment of costs (if there is a *written* offer to settle). The *cost* implications of offers to settle are set out at Rules 419 to 421.

Note that Rule 334.39 provides for costs related to a class proceeding. Generally, absent special circumstances, there are no costs awarded in respect of the certification motion, which is a significant undertaking.

B. ACTIONS

An "Action" is a type of Court proceeding to enforce, redress, or protect a right. The party bringing an action is called the "Plaintiff" and the opposing party is called the "Defendant." In addition to any documentary evidence that might be put before the Court, it is normal to have witnesses who give oral testimony at the hearing (the "trial") of an action, including expert witnesses[3] and Indigenous Elders (for whom special guidelines are provided in Part D).

Where relief is claimed against the Crown, the plaintiff may bring the action either in Federal Court or in a provincial court.[4]

1. The Pre-Claim Phase

[3] See Rules 52.1 to 52.6 and 279 – 280.
[4] See section 17, *Federal Courts Act*, as well as section 21, *Crown Liability and Proceedings Act.*

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

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

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

If a claim is filed *after* such pre-claim discussions are held (or after a period of earlier pre-claim negotiations), parties should attempt to streamline the pre-trial and trial phases to reflect any progress achieved on issues in dispute. Considering the confidential nature of pre-claim discussions, the parties should discuss whether, and to what extent, any of the pre-trial discussions are subject to privilege.

2. Filing a Claim

A party instituting complex proceedings in the Court should pay special attention to the drafting of the statement of claim so as to avoid the need for parties thereafter to request amendments to the claim / defence.

If it is anticipated that the proceeding will not be completed within one year, parties should *immediately* file a request to the Chief Justice that the proceeding be specially managed under the Rules, allowing for early involvement of the Court [see Case Management below].

In special cases where a party wishes to file a claim with the Court *to avoid prescription*[5] but is not ready to advance according to the time-line under the Rules (e.g., filing of a defence and exchange of affidavits), the party may wish to file a 'protective' claim accompanied by a request under the Rules to the Chief Justice that:

- the case immediately be specially managed [see Case Management, below]; and
- the deadline for filing a defence and other steps be suspended as appropriate.

Parties are encouraged to initiate claims and file documents electronically.[6]

3. Case Management / Mediation

The management and expeditious disposition of court proceedings, particularly complex proceedings in Aboriginal law actions, can be facilitated by co-operation between the parties and by case management. To ensure that there is awareness as to some of the

[5] For example, where negotiations between the parties are on-going.
[6] For more information, see: https://www.fct-cf.gc.ca/en/pages/online-access/e-filing

Rules applicable and flexibility offered through case management, the following Rules are highlighted:

- In order to apply for case management (either immediately upon filing a claim or at some later date), a letter under Rule 384 should be sent to the Chief Justice requesting that the case be specially managed.[7] The letter should address the following issues:
  - the reasons for which case management is sought
  - whether a case management judge is required on an urgent basis, and if so, why
  - a joint proposal for managing the case, including an indication whether the parties intend:
    a) to move the proceeding forward expeditiously -- this will normally require the case management judge to have a more *active* role, depending on the degree of cooperation between parties; or
    b) to defer proceeding with the case – this will normally result in the case management judge assuming a longer-term *monitoring* role, such as when there is an on-going negotiation or mediation outside the Court [ex., Rule 390]

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

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

- Rules 383, 383.1 and 384 provide that case management may be provided at any time during a proceeding. When all parties consent, case management will almost always be provided. When not all parties consent, those seeking case management are required to demonstrate that it will provide, as stated in Rule 3, the just, most expeditious and least expensive determination of the proceeding on its merits. According to Court practice, there must be a good reason to remove a proceeding from the normal timetables set out in the Rules. However, a party that refuses to consent should normally explain why special case management is not considered appropriate in the circumstances.

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

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

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

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

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

  (*b*) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;

  (*c*) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and

  (*d*) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

- In October 2020, the Court issued an updated Notice to the Profession[8] to provide additional guidance with respect to application of the Rules in case management of complex proceedings in all practice areas (and in particular with respect to complex actions). A key objective of that Notice was to facilitate increased proportionality in proceedings before the Court.

Case Management Checklist[9]

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

i. Timelines

a) amendment to pleading
b) filing defence
c) pre-trial discovery (document exchange schedules)
d) scheduling for examinations for discovery
e) scheduling for delivery of and responses to interrogatories
f) procedural issues that the parties anticipate will require determination by the Court and scheduling for hearing

[8] Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the PM(NOC) Regulations – available at https://www.fct-cf.gc.ca/en/pages/law-and-practice/notices#cont

[9] This checklist is designed as a guide to assist litigants before the Federal Court on Aboriginal matters to ensure that case management is effectively used to assist in the framing of claims and narrowing of issues requiring judicial determination.

g) scheduling experts
h) scheduling trial dates

ii. Potential for phased approach and summary disposition

a) the potential for the trial to be bifurcated into phases or for evidence and argument to be presented by issues rather than in the conventional format - Rule 274, 278
b) whether it would make sense for a single judge to deal with all phases of the proceeding
c) the timing of judgments pertaining to each of the phases, if any
d) how appeals of a determination in a phase may impact the hearing of the remaining phases of the trial
e) severance of one or more issue – Rule 107
f) agreed statement of facts
g) whether one or more issues may be resolved by summary disposition - Rule 213

Additional Notes - Where issues are heard at separate trials, it is recommended that each trial be scheduled to last no longer than one year, and if possible, no longer than approximately 6 – 8 months.

iii. Dispute resolution

a) Use of a pre-hearing conference – Rule 315
b) Use of mediation tools – Rule 257, 387(a), 389, 419 and 420
c) Early neutral evaluation of some or all issues – Rule 387(b)
d) Stay of proceeding to pursue alternative dispute resolution – Rule 390

Additional Notes - The Court will consider a request, if any, by a party for assignment of a judge or prothonotary with specific mediation and / or cross-cultural experience.
For additional information on dispute resolution services, see Section A - Dispute Resolution Through Dialogue (above).

iv. Pre-trial discovery of documents

a) Agreements to limit the scope of document disclosure or a court order to limit document disclosure based on a narrowing of the issues
b) Timelines for disclosure – sequencing of disclosure to permit research on particular issues
c) Use of ancient documents – authenticity not admissibility
d) Use of a common book of documents

Additional Notes

- possible agreement by counsel to limit the scope of document disclosure (from that established by the *Peruvian Guano* test)[10] or to seek a Court order to this effect,

[10] A more narrow scope of disclosure is common in several jurisdictions, such as:

- Alberta: the test is "relevant and material" – a document is relevant and material only if it could reasonably be expected (a) to significantly help determine one or more of the issues raised in the pleadings, or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings (Rule 186.1)

- in particular the possibility of narrowing the scope of disclosure to those documents that are *directly relevant to the material issues*
- subject to the requirement that production at trial requires advance discovery

o the *Rules* allow for dispensation of the requirement to produce all relevant documents
- a party can therefore seek an exemption from the obligation to produce documents, either generally or by category of document, for example[11]

o it is recommended that the trial judge, if already assigned, should be consulted with respect to issues pertaining to the scope of disclosure

o time-line for disclosure of evidence, including the possibility of sequenced disclosure to allow for staged research and preparation of expert reports

v. Pre-trial discovery - examination for discovery and interrogatories

a) Timelines for examinations
b) Consent or leave from court to use both oral examination and written interrogatories
c) Timelines for delivery of written interrogatories
d) Timelines for delivery of responses to interrogatories

Additional Notes - consent of the parties or leave of the Court is required to permit discovery to be conducted both by written interrogatories and oral examination – Rule 234(1)

vi. Document management

a) Electronic document management protocols

Additional Notes

o protocol for electronic exchange of discoverable documents between the parties[12]

o parties are encouraged to file documents electronically[13]

o Pursuant to Rule 141, parties may consent to electronic service so that documents can be served by email or other electronic service upon one another.

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

[11] See Rule 230.

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

[13] For more information, see: https://www.fct-cf.gc.ca/en/pages/online-access/e-filing#cont

vii. Experts

a) Scheduling of experts (based on availability of experts)

Additional Notes - Many experts called to testify in Aboriginal law cases teach at universities. Accordingly, the trial schedule may need to accommodate their teaching schedule. (See also Trial Management – Trial Schedule below) Limitations on availability should be communicated to the Court at the pre-trial conference.

viii. Oral History and Elder Evidence

a) Development of an Oral History Protocol
b) Consideration of special ceremonies – timing, frequency, duration, venue, consent of parties and the Court
c) Cultural orientation – background for parties and the Court, possible site visits, background information on witnesses (will-says/ summary of anticipated evidence)
d) Commission evidence – timing, venue
e) Use of demonstrative evidence
f) Use of translators and "word spellers"

4. Trial Management

As soon as the trial judge is assigned, a trial management conference should be scheduled to allow the trial judge to address those issues that can be resolved in advance of the trial. These may include:

(a) document management

- for proceedings with large-scale filing of documentary evidence, the adoption of protocols for document management format, numbering, etc.
- use of document management technology during the trial
  - format / coding / assignment of exhibit numbers / etc.
  - possible directions from the Court – Rule 33
- preparation of a short-form cover page to assist with organization of documents received during the hearing (see Annex)
  - abbreviated style of cause
  - short description of motion / document
- Parties may rely on Rule 70(2.1), which exempts parties from having to file a complete paper version of most authorities.[14]

(b) trial venue

[14] Book of authorities

Rule 70 (2.1) In respect of reasons for judgment, the book of authorities shall contain

(a) in the case where the book is filed in paper copy and the reasons are available from an electronic database that is accessible to the public at no charge, the relevant extracts of the reasons — including the head note, if any, and the paragraphs immediately preceding and following the extracts — with a reference to the database clearly marked on the page containing the extract; and

(b) in any other case, the reasons for judgment in full with the relevant extracts clearly marked.

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

(c) trial schedule
- daily and weekly schedules
- long-term scheduling, including the scheduling of breaks in the trial
- scheduling of experts (see part 3(vii) above)

(d) interpretation
- identification of witnesses who wish to testify in an Indigenous language and any special issues regarding interpretation
- procedures that may facilitate interpretation and preparation of a transcript
  - identification of witnesses who may testify in English / French but who will be using some words (such as place names) that are in an Indigenous language, and any special process for preparation of a transcript
  - preparation of a list of unique terms for the Court and the Court Reporter
  - attendance of a word speller at trial
  - confirmation of the timing & procedure for preparation of transcripts (whether daily, weekly, or otherwise)
  - review process of interpretation / transcript (e.g., overnight review by interpreter)
  - possible audio / video recording of testimony at trial
  - process for entering the translated transcript into evidence (mark as exhibit)
  - though difficult to achieve, simultaneous interpretation is more efficient than sequential interpretation for court trials when a great deal of evidence is given in the language
- options for appointment of interpreter(s)
  - under the Rules, the party who calls a witness normally pays for interpretation, though in some cases the parties may wish to pool interpreters,

- the Court may consider an order appointing an interpreter(s) upon submissions from parties (subject to consideration of the responsibility for costs)
- parties may also wish to have independent interpreters (not used as the official transcript)
- qualifications – ideally, the person should be trained as a legal interpreter and have no interest in the outcome of the litigation – it is recognized that this is not always possible
- possible orientation regarding the interpretation process for inexperienced interpreters

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

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

(g) witnesses
- witness list – it is recommended that the trial judge be provided with a witness list and, if there are many witnesses, a photo of each, to facilitate the recall of testimony in long trials
- communications with witnesses – counsel are to observe the practices of the Federal Court respecting communications with witnesses. For example, there should be no communications with a witness who has started to testify, until the completion of cross-examination of the witness. Similarly, there should be no communication between the completion of cross-examination and the commencement of re-examination. These examples are subject to the leave of the Court.

(h) evidence
- individuals in historical record – it is recommended that the trial judge be provided with a list of names and key relationships
- limitations, if any, on the scope of evidence on which the trial judge intends to rely for rendering judgment
- receipt of expert reports – whether received “as if read” or formally read into evidence

- disclosure of experts' working papers
  - whether any counsel will be bringing a motion for disclosure of working papers (a motion may not be necessary if one party requests the expert's working papers and the other party accedes to that request)
  - if working papers are disclosed by consent, establish a schedule for disclosure
  - establish a schedule for the determination of these issues, if they cannot be resolved right away
- ancient document rule – the rule establishes authenticity, not admissibility
  - encourage the use of a documents agreement to facilitate introduction of documents into evidence (i.e., a common method by which documents to be relied upon at trial are authenticated and introduced in evidence is by agreement of all parties through a documents agreement)
  - the document agreement may provide that all documents covered by the agreement are authentic and admissible (e.g., for the truth of their contents or some other limited purpose)
- preparation of a common book of documents that contains all documents covered by the parties' document agreement
- handling "read-ins" from examinations for discovery and / or interrogatories
- use of Requests to Admit – Rule 255
- possibility of an Agreed Statement of Facts

5. Trial

(a) civility and the integrity of Court proceedings
- counsel are expected to treat all witnesses with respect -- the Court may intervene as necessary to avoid excessively confrontational or disrespectful cross-examination

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

(c) issues regarding the scope of evidence should be addressed at the beginning of the trial, and possibly again during final submissions

(d) opening submissions – it is typically helpful to receive opening submissions from all parties at the outset of the trial

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

(f) compendia – parties are encouraged to provide a succinct and, where possible, joint compendium

(g) costs – parties are encouraged to reach an agreement on costs, prior to the end of the trial

6. Post-Trial

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

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

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

C. APPLICATIONS FOR JUDICIAL REVIEW

An "Application for Judicial Review" is a type of Court proceeding to review the decision of a "federal board, commission or other tribunal."[15] The party bringing an Application is called the "Applicant" and the opposing party is called the "Respondent." Although most Applications are heard in Federal Court, the decisions of some federal administrative tribunals are reviewed directly by the Federal Court of Appeal.[16]

According to the *Federal Courts Act*, an Application for Judicial Review must normally be filed within 30 days of the date of the decision to be reviewed. Subject to possible delay in proceeding to allow for settlement discussions, it is then meant to be heard and determined "without delay and in a summary way" – meaning that it is to proceed quickly to the hearing. The evidence at such hearings typically is that which was before the original decision-maker (whose decision is brought for review). Thus, there are usually no witnesses allowed to present oral testimony at the hearing before the Court.

An Application for Judicial Review may relate to review of a First Nation's election or other governance dispute, review of a decision of a federal government office, or review of a decision of a federal administrative tribunal (including those related to the energy sector, environment, or human rights laws).

1. The 30-day Pre-Notice Phase

Pursuant to paragraph 18.1(2) of the *Federal Courts Act*, an application for judicial review must be made within 30 days after the time the decision or order was first communicated:

> 18.1(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy

[15] See section 2, *Federal Courts Act*, for a definition of this term, as well as section 18 and 18.1, which provide a framework for these Applications.
[16] See section 28, *Federal Courts Act*.

> Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Given the statutory 30-day time limit for filing an *application*, there is only limited opportunity for pre-application discussions between parties. Further, approval processes for parties to obtain a settlement mandate may preclude or limit pre-application discussions.

2. Filing a Notice of Application

When filing a notice of application, the Applicant may include a letter requesting that the proceeding be specially managed [see Case Management below] under Rules 383 to 385. The letter should also provide a summary of the relevant facts and submissions. The respondent may also make such a request with the notice of appearance. Such a request may be made, for example:

- if the parties anticipate that a requisition for hearing will not be filed within 180 days (R380(2)
- if parties wish to explore the possibility of dialogue leading to resolution or a narrowing of the dispute by agreement.
    - Parties may request a consent 'standstill' order, which would allow them to consider all options for resolving or narrowing of the dispute without the pressure of being subject to normal time-lines for proceeding with adversarial litigation.
- if an Applicant wishes to file a Notice of Application with the Court *to avoid statutory deadlines for bringing an application for judicial review,*[17] but is not ready to advance according to the time-line under the Rules (e.g., filing of affidavits, cross-examination, and preparation of the applicant's and respondent's record), the party may wish to file a 'protective' Notice of Application accompanied by a request for special case management and a 'standstill' order.

See also Part III A - Dispute Resolution Through Dialogue, above.

3. Service and Filing of Documents

Pursuant to Rule 301, to bring an application for judicial review, the Applicant must file three copies of a Notice of Application (using Form 301) with the Registry of the Federal Court, along with the payment of a $50 filing fee (pursuant to Tariff A). The Registry will keep two copies of the Notice for the Court file and then stamp / return one copy of the Notice, which the Applicant must then serve (that is, deliver according to the Rules of service) on all Respondents named in the Application (see Rule 303 to determine who must be named).

> Rule 127. (1) An originating document that has been issued, other than in an appeal from the Federal Court to the Federal Court of Appeal or an *ex parte* application under rule 327, shall be served personally.

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

The Rules regarding *personal* service are found at Rules 127 to 137. Of particular note, Rule 133 provides a special procedure for service on the Crown, the Attorney General, or any other Minister of the Crown:

> Rule 133. (1) Personal service of an originating document on the Crown, the Attorney General of Canada or any other Minister of the Crown is effected by filing the original and two paper copies of it at the Registry.

Although the originating Notice is first filed and then served on other parties, subsequent documents must first be served on the other parties and then filed, along with proof of service, with the Registry. Such documents need not be served *personally*. Rules for *non-personal* service of documents are found at Rules 138 to 148. Rules related to effective timing and proof of service are found at Rules 142 to 146.

Parties may also file documents electronically.[18] Pursuant to Rule 141, parties may consent to electronic service so that documents can be served by email or other electronic service upon one another.

4. Affidavit Evidence: Filing Documents in an Application

An application for judicial review is a legal proceeding to request the Court to review a decision (usually only one decision, per Rule 302) made by a federal office, such as a board, commission or other tribunal. This includes decisions of Band Councils in most circumstances. The Court reviews the decision having regard to the evidence that was before the *original* decision-maker. If there were witnesses who appeared before the original decision-maker, their original evidence *as recorded in a transcript* may also be placed before the Court. However, they are not called to present their evidence again. Thus, judicial review proceedings are usually 'paper-based' proceedings, in that they are a review based on the documentary record of the original decision maker. In special circumstances, such as where elder testimony and oral history may be required, Rule 316 gives the Court discretion to authorize a witness to give oral evidence rather than affidavit evidence:

> **316.** On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application.

An application can also be treated as an action if credibility is an issue or witnesses need to be called, pursuant to *Federal Courts Act* s.18.2(4):

> **18.4** (2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

However, judicial review proceedings do not provide an opportunity for a complete re-hearing with witnesses before the Court (though if the Court decides to overturn the decision of the original decision maker, the matter may be returned for a new hearing).

[18] For more information, see: https://www.fct-cf.gc.ca/en/pages/online-access/e-filing#cont

If a party does not possess all the material that was before the original decision maker, that party may request any missing material pursuant to Rule 317 --the material is then to be provided pursuant to Rule 318:

> 317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.
>
> (2) An applicant may include a request under subsection (1) in its notice of application.
>
> (3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.
>
> 318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit
> (*a*) a certified copy of the requested material to the Registry and to the party making the request; or
> (*b*) where the material cannot be reproduced, the original material to the Registry.

Note: Even if the original decision-maker has provided material to the Registry of the Court under Rule 318, it is not considered to be on the official Court record unless at least one party has specifically included it within that party's record.

It is the parties' responsibility to select, from among the documents before the original decision maker, those materials that each party wishes to place before the Court. These materials, *as well as any others that the party considers relevant to the Application*, must be exchanged between parties by way of affidavit (a *sworn* statement by the party or lawyer), with documents attached as exhibits to an affidavit.

> Rule 306. Within 30 days after issuance of a notice of application, an applicant shall serve its supporting affidavits and documentary exhibits and file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.
>
> Rule 307. Within 30 days after service of the applicant's affidavits, a respondent shall serve its supporting affidavits and documentary exhibits and shall file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.

In judicial review proceedings in Federal Court, unlike most provincial jurisdictions, the respondent is required only to file a notice of appearance, which is bare notice that the party intends to respond to the application. As it does not require a substantive response to the applicant's petition, this can cause challenges for the applicant in deciding what documents are relevant to include in the record it places before the Court.

Once the affidavits and documentary exhibits are exchanged, either party may choose to conduct a cross-examination of the other party's affidavits, often with a stenographer who can prepare a transcript, if required.

> 308. Cross-examination on affidavits must be completed by all parties within 20 days after the filing of the respondent's affidavits or the expiration of the time for doing so, whichever is earlier.

Once the cross-examinations are complete, each party must prepare its record, serve a copy on other parties, and then file three copies with the Registry along with proof of service:

> Rule 309. (1) An applicant shall serve and file the applicant's record within 20 days after the day on which the parties' cross-examinations are completed or within 20 days after the day on which the time for those cross-examinations is expired, whichever day is earlier.
>
> Rule 310. (1) A respondent to an application shall, within 20 days after service of the applicant's record, serve and file the respondent's record.

Each party's record must also include a memorandum of fact and law, which is a written argument summarizing the evidence and the legal principles and arguments the party relies on. Unlike most provincial jurisdictions, applicants in judicial review proceedings in Federal Court (other than citizenship, immigration and refugee proceedings) are not entitled to file a written reply to a respondent's written argument.

Parties may rely on Rule 70(2.1), which exempts parties from having to file a complete paper version of most authorities.[19]

5. Case Management / Mediation

The management and expeditious disposition of court proceedings, which may be particularly complex in Aboriginal law applications for judicial review, can be facilitated by co-operation between the parties and by case management. To ensure that there is awareness as to some of the Rules applicable and the flexibility that is offered through case management, the following Rules are highlighted.

Case Management Procedure

- In order to apply for case management (either immediately upon filing a Notice of Application or at some later date), a letter under Rule 384 should be sent to the Court Registry (with a copy to the other parties). This letter should include a request that it be brought to the attention of the Chief Justice[20] and should address the following issues:
    - the reasons for which case management is sought
    - whether a case management judge is required on an urgent basis, and if so, why
    - a proposal for managing the case (preferably a joint proposal upon agreement of all parties), including an indication as to whether the parties intend:

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[19] Book of authorities

Rule 70 (2.1) In respect of reasons for judgment, the book of authorities shall contain

(a) in the case where the book is filed in paper copy and the reasons are available from an electronic database that is accessible to the public at no charge, the relevant extracts of the reasons — including the head note, if any, and the paragraphs immediately preceding and following the extracts — with a reference to the database clearly marked on the page containing the extract; and

(b) in any other case, the reasons for judgment in full with the relevant extracts clearly marked.

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

(a) to move the proceeding forward expeditiously – this will normally require the case management judge to have a more *active* role, depending on the degree of cooperation between parties; or

(b) to defer proceeding with the case – this will normally result in the case management judge assuming a longer-term *monitoring* role, for example, to permit negotiation or mediation outside the Court [ex., Rule 390]

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

Disagreement: if the parties do not agree, the Court normally will take an active role, according to the circumstances of the case.

- the parties should indicate whether they wish immediately to hold a case management conference with the case management judge, and if so:

  (a) their availability in the following 2 weeks;

  (b) a list of issues they wish to address at this conference.

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

- Rule 380(2) provides that if no requisition for hearing is filed within six months after the notice of application is filed, the parties will be required to advise the Court as to the status of the matter, or the Court may impose case management immediately.

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

- The case management judge deals with all matters that arise prior to the hearing of a specially managed proceeding and has considerable flexibility, to allow litigants and the Court to tailor the proceedings to meet special circumstances when required. This includes the authority pursuant to Rule 385(1) to:

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

  (*b*) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;

  (*c*) fix and conduct any dispute resolution or pre-hearing conferences that he or she considers necessary; and

(*d*) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

Issues to Address under Case Management

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

(a) a scheduling framework for:
- service of affidavits and filing proof of service
- cross-examination on affidavits
- any other procedural issues that parties anticipate will require determination by the Court
- any motion for an interim / interlocutory injunction (parties may wish to consider requesting an expedited hearing on the merits as an alternative to filing a motion for injunction)
    - this normally results in increased litigation costs and additional delay in reaching a more durable resolution of the underlying issues

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

For additional information on dispute resolution options, see Section A – Dispute Resolution Through Dialogue (above).

(c) document management
- protocol for electronic exchange of affidavits between the parties
- a party may consent to electronic service of documents by serving a Notice of Consent in Form 141A (see Rule 141)
- use of document management technology during the hearing
    - format / coding / numbering / etc.
    - possible directions from the Court – Rule 33

(d) the scheduling of the hearing date, including possible expedition of the hearing depending on the urgency of the matter in dispute (see (a) above re motions for injunction)

(e) the hearing venue

Some judicial review applications, such as governance disputes, may be suitable for a hearing within the Indigenous community. This facilitates access to justice through participation by the wider community in the hearing(s). Among other things, this allows

for a better understanding, and acceptance, of the outcome. Pursuant to the Rules, the Court is not restricted to sittings in established Court locations:

> Rule 28. The Court may sit at any time and at any place.

- consider having parts of the hearing, *including delivery of the judgment and reasons for judgment*, in the Indigenous community
- assess the advantages / disadvantages associated with potential hearing venues, including:
  - the availability of a suitable hearing room or expense of adapting one
  - the facilitation of access by members of the community(ies) affected by the proceeding
  - the availability of suitable accommodation for the judge, Court staff, counsel, and others
  - travel time to the proposed venue
  - any other relevant factors
- the discussion regarding choice of venue should include any special preparation required for hearings not held in existing Court facilities, such as:
  - reservation of facilities in Indigenous communities;
  - advance visits by hearing judge, the judge's law clerk, Registry staff, counsel, and others

(f) the hearing schedule

(g) special ceremonies

As noted under (e) above, some judicial review applications may warrant special arrangements for the hearing venue. Similarly, special ceremony may be considered in such situations, particularly if all parties involved in the proceeding are Indigenous.

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

(h) cultural orientation

- opportunities for cultural orientation in advance of the hearing
- depending on the scope of the orientation, a transcript may be advisable for the record
- for site visit – advance agreement as to what would be discussed
- possible orientation for community by counsel or court representative

(h) integrity of Court proceedings

- it is ultimately the Court's responsibility to ensure that appropriate standards of conduct are maintained throughout the proceedings

The case management judge shall consider whether to defer some of these issues to the application judge. In some proceedings, the Court may assign a judge both to 'case-manage' the proceeding (i.e., conduct meetings with the parties, as needed, to address the issues listed above, and in some cases to decide on procedural disputes) as well as to adjudicate the substantive issue(s) in dispute. However, if the case management judge is involved in mediation / settlement discussions with the parties during the case management phase, that judge normally will not preside at the final hearing on the merits unless all parties consent (see Dispute Resolution Through Dialogue, above, and Rule 391).

6. Hearing

Once the respondent has filed its record, or the time period for doing so has expired, the applicant should file a requisition for hearing:

> **314.** (1) An applicant shall, within 10 days after service of the respondent's record or the expiration of the time for doing so, whichever is earlier, serve and file a requisition, in Form 314, requesting that a date be set for the hearing of the application.

Rule 314(2)(a) to (f) set out the required content of the requisition. Of particular note:

- R314(2)(b) hearing venue – even if the proceeding was not specially managed, a party may request that the hearing be held within the Indigenous community.
    - See Hearing Venue (under Case Management, above) for considerations that apply.
- R314(2)(c) length of hearing – the proposed hearing length should be based on discussions between the parties. In the case of disagreement, or if either party considers that the hearing may be considerably longer or shorter than the time proposed, this should be noted in the requisition.
    - Important: it may not be possible for the Court to accommodate last-minute changes to the schedule if more time is needed.

D. ELDER TESTIMONY & ORAL HISTORY PROTOCOL

As noted earlier, in 2009, the Federal Court hosted a *Symposium on Oral History and the Role of Indigenous Elders*, opening a dialogue with Elders from across Canada along with representatives of the public and private Bar. In turn, these same Elders hosted a historic meeting in 2010 at Turtle Lodge to promote better understanding of the Indigenous perspective. The *Liaison Committee* then continued discussions with these Elders, whose input and advice were instrumental in the development of the following guidelines, which were published initially in 2012 and updated first in 2016 and then 2021.

METHODOLOGY

In updating this Protocol, 10 cases were reviewed where either a formal or informal protocol for oral history testimony was adopted by the parties or ordered by the Court. The cases referenced in footnotes throughout the Protocol are the following:

1. *Les Innus de Uashat Mak Mani-Utenam c Sa Majesté La Reine du Chef du Canada,* SCT-2003-13 : Protocole régissant le témoignage des aînés [*Innus de Uashat Mak Mani-Utenam*]
2. *Peter Watson et al v HMTQ ; Wesley Bear et al v HMTQ,* Court File No T-2153-00 and T-2155-00: Pre-Trial Conference Minutes from December 13, 2017 and TMC Minutes from March 7, 2018 [*Watson-Bear*]
3. *Akisq'nuk First Nation v HMTQ,* SCT-7006-12: Oral History Protocol [*Akisq'nuk*]
4. *Restoule et al v Attorney General of Canada et al,* Court File No: C-3512-14 & C-3512-14A: Order (Procedure for Taking Evidence), Appendix A: Elders' Protocol [*Restoule*]
5. *Kawacatoose et al v HMTQ,* SCT-5001-13: Protocol for Elder Testimony and Oral History [*Kawacatoose*]
6. *Shot Both Sides et al v HMTQ,* 2015 FC 1159: Order [*Shot Both Sides*]
7. *Sechelt Indian Band v Canada (Attorney General) et al,* No A980252: Consent Order [*Sechelt*]
8. *Couchiching First Nation et al v AG Canada et al,* 2014 ONSC 1076: Judgment [*Couchiching*]
9. *Gitxaala Nation* Submission on need for Oral Evidence d. Oct. 6, 2011 A2E7V6
10. *Ignace v British Columbia (Attorney General),* 2019 BCSC 10

Sections outlined in a box (such as this paragraph) list alternatives for addressing the same topic that are drawn from the example protocols or provide specific examples of clauses that may be unique or not generally applicable.

Sections not in a box are elements of the protocols that appeared relatively consistent with the other protocols reviewed.

PREAMBLE

Terms and Scope

In this Protocol, the terms "oral history testimony", "oral history", "Elder testimony" and "oral evidence" are used to refer two types of testimony:

- Oral histories (which may or may not be delivered by an Elder); and/or
- Oral evidence by an Indigenous "Elder" (a term which may or may not be used by the Indigenous group at issue, and can mean different things to different Indigenous groups).

This Protocol is flexible and broad in its application and can be a tool for solutions in a range of situations. Counsel may wish to discuss more precisely when this Protocol is to apply, and whether refinements may be appropriate. The following contexts, without being restrictive, may be particularly appropriate:

1. When a party wants to introduce oral evidence of something that, in their laws and traditions, is meant to be shared orally – Indigenous stories or teachings, the "history" of an Indigenous group, explanation of Indigenous laws, etc.
2. When an Indigenous person (whether or not an Elder) testifies and the application of this Protocol appears appropriate – this will depend on the scope of the Protocol, but there are several aspects which seem appropriate to adopt outside the more narrow scope of oral histories.

Purpose

The purpose of this Protocol is to balance the appropriate reception of Elder testimony and oral history evidence with the practical needs of the justice system in a manner that promotes fairness and truth-seeking in civil litigation. The overarching theme of this Protocol is that in addition to providing useful evidence regarding material issues of fact, the Indigenous perspective provided by Elders can assist the Court by providing context for the matter before the Court.

Prior to the development of this Protocol, parties and the Court had to develop protocols from scratch, with guidance from the previous edition of the *Practice Guidelines for Aboriginal Law Proceedings.* This Protocol provides options from previously adopted protocols that may facilitate the presentation of an Indigenous Elder's evidence in keeping with the Court's requirements and in recognition of Indigenous sensibilities. It is

intended to allow for consistency between protocols where desirable as well as demonstrate the variety of ways protocols can be adapted to the diversity of Indigenous communities and their treatment of oral history.

Given that the reception of oral history takes place in a case-specific context, this Protocol is not meant to be prescriptive. Instead, it has been designed to present options for consideration and adaptation by the parties and the Court in the particular circumstances of each case.

This Protocol is intended to help develop case-specific protocols for oral history for any actions and applications commenced in the Federal Court where Indigenous oral evidence is expected.

Counsel should refer to relevant parts of the *Federal Courts Rules* and other sections of these *Practice Guidelines for Aboriginal Law Proceedings* when developing a specific oral history protocol. Where the *Federal Court Rules* do not clearly address matters of Elder testimony or oral history, parties should apply to the Court for a direction or order under the case management or trial management processes.

Objectives

The objectives of a protocol for the reception of oral history in a trial are to:

1. Facilitate the presentation of useful, reliable, and fair evidence that assists a judge to decide the facts and apply the relevant law;
2. Ensure that oral evidence by Indigenous persons or about Indigenous histories, laws and traditions may be presented to and received by the Court in a way that respects Indigenous people and the diversity of Indigenous communities;
3. Adapt the rules of evidence where necessary to receive Indigenous oral evidence while upholding the principles of fairness, truth-seeking and justice to achieve reconciliation; and
4. Clarify what is expected of both parties and their counsel to ensure that Indigenous oral evidence can be fairly and respectfully considered.

Context

Need for Oral Evidence in Litigation

Indigenous peoples in Canada have unique rights protected by the Constitution. Canadian Courts must consider the Indigenous perspective in assessing these rights.[21] Some evidence of these rights is often provided by written historical evidence. However, important aspects of the Indigenous perspective are often absent in the written historical record because most Indigenous peoples recount and record history orally. The written

[21] *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 at 411.

historical record as written by non-Indigenous people may also show disrespect for Indigenous peoples.[22]

Therefore oral history is often an important element in Aboriginal law litigation and may be the only means by which Indigenous litigants can prove and exercise their rights. As the written documentary record and the unwritten Indigenous perspective can be complementary methods of recalling and recounting history, Indigenous oral evidence is often required to provide a more fulsome picture of the past.

Nature of Oral Evidence

Indigenous Elders or other wisdom keepers are the primary source of evidence about Indigenous perspectives and oral history. Elders' accounts of oral history convey historical evidence as understood from the Indigenous perspective.

Elder testimony may touch upon historical facts, Indigenous land occupation and use, customs, practices, laws, spirituality and identity. Their testimony about the Indigenous perspective can convey the context that can assist the Court's understanding about Indigenous normative values and the significance of events.

Indigenous ceremony may be part of the process of telling oral history. Such Elder testimony may require interpretation by persons knowledgeable in Indigenous oral history.

Elder testimony is different from the testimony of an expert witness offering opinion evidence. Elders testify about what they know from their personal perspective, the community's perspective, and their culture's perspective.[23]

Oral Evidence and Indigenous Legal Traditions

There is an important relationship between oral Indigenous evidence and Indigenous legal traditions. As noted by Professor John Borrows:

> Indigenous legal traditions also often rely upon elders or sanctioned wisdom keepers to identify and communicate law.142 In their aggregation, each of these cultural strands are wound together and reinforced by specific practices. These practices include such complex customs as pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing, and the use and importance of place and geographic space to help ensure that certain traditions are accredited within the community.143 Oral tradition does not stand alone, but is given meaning through the context of the larger cultural experiences that surround it.[24]

In keeping with Borrows' insight, counsel should remain open to a spectrum or range of possibilities for Indigenous oral evidence. The open-ended nature of this Protocol is intended to assist in developing responses that address a number of situations ranging

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[22] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 194, [2008] 1 CNLR 112.
[23] Justice L. S. Tony Mandamin, "Aboriginal Elders in Court" (April 20, 2016) at 2.
[24] John Borrows, Indigenous Legal Traditions in Canada, 19 WASH. U. J. L. & POL'Y 167 (2005), at pg 191 https://openscholarship.wustl.edu/law_journal_law_policy/vol19/iss1/13

from oral evidence in support of ceremonies all the way to cross-examination in an appropriate manner.

Challenges of Oral Evidence

The Canadian legal system relies on parties to present reliable evidence, to assist 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.

Indigenous oral evidence provides a challenge to the Canadian legal system; under a traditional approach to the rules of evidence many features of this oral evidence would count against its admissibility and weight.[25] Indigenous oral history may not be merely a recounting of historical facts, but may also be embedded with the current meaning ascribed to past events and have a broader cultural role than just recounting history.[26] In addition, the telling of oral histories often consists of recounting out-of-court statements for the truth of their contents, which conflicts with the general rule against hearsay.[27]

However, the "rules of evidence should facilitate justice, not stand in its way."[28] Oral histories are admissible when they are useful and reasonably reliable, subject to the discretion of the trial judge.[29] Oral histories may be useful in offering evidence of ancestral practices and their significance as well as to provide Indigenous perspectives on historical events. Reliability can be assessed by considering how an Elder came to know and recount oral history and traditions. In this assessment, oral evidence should not be discounted simply because it does not conform to non-Indigenous traditions of recording history.

These Guidelines aim to provide suggestion and general guidance that can be flexibly adapted to the circumstances of each case. Four key challenges may present themselves:

1. Trust - Legal counsel for all parties must work to create an environment of trust within the litigation in order to access well-guarded oral histories. Demonstrating respect, recognition and honesty, throughout the litigation process will assist.
2. Logistics – There may be logistical challenges. Do the witnesses speak English, Can they be contacted in advance? Are there traditional practices to be aware of? All these matters, and others, need to be taken into account.

[25] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 86-87, 153 DLR (4th) 193 [*Delgamuukw*].
[26] *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 37-39; John Borrows, "Listening for a Change: The Courts and Oral Tradition," 39 Osgoode Hall L J 1 (2001) at 5.
[27] *Delgamuukw* at para 86.
[28] *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 30, [2001] 1 SCR 911 [*Mitchell*].
[29] *Mitchell* at paras 30-35.

3. Costs- Witnesses at trial may require one or more translators. There may be other associated costs.
4. Delays –Preliminary steps and motions may be needed and can take time.[30]

Developing a Protocol for Oral Evidence

Reconciliation requires the courts to find ways of making its rules of procedure relevant to Indigenous perspectives 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.

A protocol should recognize the diversity amongst the Indigenous cultures across Canada. Developing a case-specific protocol is a way to achieve the flexibility suitable for the norms and practices of the Indigenous community, the Indigenous Elder involved, the testimony to be heard, and the issues that have been raised in the proceeding.

The more comfortable Indigenous Elders are with the process, the more likely their testimony will be of better quality.[31] In addition to recognizing and respecting the different cultural context involved in giving oral evidence, protocols should also consider any accommodations needed to account for the age and health of Elders who testify.

Expectations of Counsel

Given the importance of ensuring the ability of the Court to consider and weigh oral evidence, counsel are expected to treat Indigenous Elders with respect. This includes:

1. Asking questions of an Elder with an understanding of an Indigenous Elder's position and source of knowledge;
2. Having regard for Indigenous ceremony and protocols to show respect and enable Indigenous witnesses to be heard;
3. Providing the Court and other counsel with enough information to understand the context of the Elders' evidence and to effectively test and assess the evidence; and
4. Remaining mindful that Rule 3 of the *Federal Courts Rules* requires the rules to be interpreted and applied "to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Guiding Principles

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

[30] For a good perspective from counsel for First Nations, see *William v. British Columbia et al*.: Challenges, Successes and Lessons Learned in the Context of Oral History January 22, 2008, By: Gary S. Campo, Woodward & Company.
[31] Justice L. S. Tony Mandamin, "Some Thoughts on Elder Testimony and Oral History" (November 2010) at 4.

Principle 2: Rules of procedure should be adapted so that the Indigenous perspective, along with the academic historical perspective, is fully understood.

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 Indigenous group and the needs of the individual Elder testifying.

ADMISSIBILITY

1. The admission of an Elder's testimony is a matter for the Trial Judge or Tribunal to decide on a case by case basis.[32]

2. Elder testimony informs the Court of the Indigenous perspective and will usually be admissible where an Elder is a person recognized by his or her community as having that status.[33]

DISCLOSURE AND PRELIMINARY ISSUES

List of Elders to be Called

3. The party calling an Elder to testify will provide the other party with a list of witnesses it intends to call to give Elder testimony or oral history evidence:

   a. Prior to setting a date for hearing lay witness testimony, the party calling the Elder will also provide the basis of the witness's testimony.[34]

   b. Pursuant to the protocol, the following Elders will testify: [names, addresses, birthdates][35]

4. 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.[36]

5. The disclosure should also provide information about the Indigenous 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.[37]

6. A panel of Elders may be called to testify as a collective where the oral traditions of an Indigenous group are held as a collective. In such cases, the party calling the panel should identify the panel members and the basis for

[32] *Kawatacoose* at 2; *Restoule,* Appendix A at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[33] *Restoule,* Appendix A at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[34] *Akisq'nuk* at 1-2.
[35] *Innus de Uashat Mak Mani-Utenam* at 2. This aspect of disclosure was provided as part of the protocol.
[36] *Restoule,* Appendix A at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[37] *Restoule,* Appendix A, at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31

collective testimony. Restrictions on the testimony, such as who may answer questions posed on cross-examination, may be needed to assist the court.[38] Counsel should remain open to the possibility that other forms of collective customs, such as ceremonies, (see Borrows quote above) may be needed to properly support the history of an Indigenous group.

Introduction of Elders

7. A community member or witness agreed upon by the parties may introduce an Elder, present biographical and genealogical evidence concerning each Elder who will be called, and testify as to the basis on which Elders are recognized by the First Nation.[39]

8. The party calling an Elder may have a community member introduce the Elder and confirm his or her status as an Elder.[40]

Will says

Will say Requirement

9. The party calling an Elder to testify will provide the other party with will say statements.[41]

10. If there has been no previous examination for discovery conducted or disclosure regarding this evidence then the party calling the Elder shall provide the other party with a will say statement.[42]

Content of Will says

11. Will say statements will include summaries of the subject areas to be covered by each witness and their anticipated evidence, including the basis of their knowledge and information about the community's practices or protocols associated with the transmission of oral history.[43]

12. Regarding the summaries of Elders' evidence, the parties will keep in mind that Indigenous respect for Elders may involve not directing an Elder's words and that an Elder unfamiliar with court proceedings may respond on unexpected topics.[44]

13. The content of each Elder's will say statement shall include a detailed description of:

    a. The language that will be used by the Elder;

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[38] *Gitxaala_Nation* Submission_on_need_for_Oral_Evidence_d._Oct._6,_2011_A2E7V6 and *Ignace v. British Columbia (Attorney General)*, 2019 BCSC 10 for an order on oral history evidence from a panel.
[39] *Kawacatoose* at 2; *Shot Both Sides*, Order at para 9.
[40] *Restoule*, Appendix A, at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[41] *Akisq'nuk* at 1-2.
[42] *Shot Both Sides*, Order at paras 7, 9.
[43] *Akisq'nuk* at 1-2; *Restoule*, Appendix A, at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[44] *Restoule*, Appendix A, at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.

b. The personal, family, community and professional background of the Elder sufficient to fully ascertain the witness' status as an Elder in the community and his or her authority to recount the oral history;

c. Any background of the Elder relevant to the testimony that he or she will provide;

d. How and when the Elder came to know the evidence;

e. Who relayed the evidence to the Elder, the relationship of the Elder to that person, that person's general reputation, and whether that person witnessed the event in question or was told of it; and

f. What the Elder will say.[45]

14. The party calling an Elder will provide the other party with a will say statement of any Elder called to provide evidence stating how a First Nation's oral history is preserved, who is entitled to relate it, how this entitlement is assessed, and the community practice with respect to safeguarding its integrity, unless such evidence had been previously disclosed to the other party.[46]

15. Where a witness does not introduce an Elder, the party may address the information listed at paragraph 19 of *Tsilhqot'in Nation v British Columbia*, 2004 BCSC 14, reproduced below, in a preamble to the will say statements:

a. personal information concerning the witness's circumstances and ability to recount what others have told him or her;

b. who it was that told the witness about the event or story;

c. the relationship of the witness to the person from whom he or she learned of the event or story;

d. the general reputation of the person from whom the witness learned of the event or story;

e. whether that person witnessed the event or was simply told of it; and,

f. any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact.[47]

Timing of Will Say Statements

16. Will says statements shall be served and filed according to the following time-frame.

Service of Will Say Statements

[45] *Shot Both Sides*, Order at para 12.
[46] *Shot Both Sides*, Order at para 7.
[47] *Kawacatoose* at 2.

a. prior to setting a date for hearing lay witness testimony.[48]

b. by [date, approximately four months prior to the special hearing].[49]

Filing of Will Say Statements

c. by [date, approximately five months prior to trial].[50]

d. within sixty days of the protocol being finalized, or such greater period as the parties may agree or the Court order.[51]

e. at least ninety days prior to trial. [52]

Timing of Will Say Statements Relative to Document Disclosure

f. Given the differing dynamics and logistical issues that may be associated with having an Elder testify, this disclosure need not necessarily coincide with document disclosure as long as it is timely. [53]

Use of Will Says in Trial

17. Will say statements need to be as clear as possible. The Crown is entitled to fair notice of the case to be met. If there is reliance on hearsay, this should be identified specifically and without ambiguity.[54]

18. The will say statements should contain sufficient detail to allow for challenges to the proposed evidence by the other parties on the basis of relevancy and for effective preparation of cross-examination.[55]

19. The will say statements will not form part of the evidence at trial but the other party will be able to use a will say statement as a prior statement of an Elder witness should the oral evidence offered at trial be materially different than or inconsistent with that set out in the will say statement.[56]

Preliminary Objections

20. If the other party intends to raise a preliminary objection to the admissibility of the evidence set out in the will say statements, the other party will inform the party calling the Elder of this:

a. one month in advance of the hearing.[57]

[48] *Akisq'nuk* at 1-2.
[49] *Kawacatoose* at 1.
[50] *Watson-Bear*, TMC Minutes from March 7, 2018 at para 3.
[51] *Shot Both Sides*, Order at para 11. Whether will say statements would be provided was a contentious issue in this case and was argued at length, with the First Nation opposing Canada's inclusion of will says at part of a proposed protocol. The Court ordered that will say statements be used.
[52] *Kawacatoose* at 2; *Shot Both Sides*, Order at para 9.
[53] *Restoule*, Appendix A, at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[54] *Watson-Bear*, Pre-Trial Conference Minutes from December 13, 2017 at para 28.
[55] *Kawacatoose* at 1; *Shot Both Sides*, Order at para 12.
[56] *Shot Both Sides*, Order at para 13.
[57] *Akisq'nuk* at 2.

b. by a given date, approximately two months before the special hearing to receive Elder testimony and oral history.[58]

c. one month after the will say statements are served and filed.[59]

d. before the Elder testifies and without the Elder present.[60]

21. Issues of a lack of notice are a matter to raise with the trial judge.[61]

22. 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. Without compromising its own role in the judicial process when addressing such issues, the Court will be sensitive to the role of each Elder within the community, and legal counsel for each party are encouraged to be similarly sensitive in this regard.[62]

23. Where a party objects to the admissibility of evidence, it may be appropriate to obtain a ruling on the admissibility of evidence prior to the main evidence being heard.[63]

Documents

24. If either party intends to refer, in direct or cross examination during oral history testimony, to a document that has not otherwise been produced by the parties or relates to a matter not specifically mentioned in the will say statement, the party seeking to refer to the document will advise the other party and produce copies of any such document one month in advance of the hearing.[64]

25. Each party shall disclose to the other all documents, records, maps, drawings, photographs and the like that are intended to be referenced during oral history testimony as soon as they are identified. No later than thirty days prior to trial, the parties shall submit a Joint Book of Documents containing the documents. The admissibility of any document during oral history testimony that has not been identified and produced in accordance with this provision shall be at the discretion of the trial judge.[65]

26. The other party shall have ninety days after the delivery of an Elder's will say statement to identify and disclose to the party calling the Elder the documents it wishes to put to that Elder.[66]

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[58] *Kawacatoose* at 2.
[59] *Watson-Bear*, TMC Minutes from March 7, 2018, at para 3.
[60] *Innus de Uashat Mak Mani-Utenam* at 5.
[61] *Watson-Bear*, Pre-Trial Conference Minutes from December 13, 2017 at para 29.
[62] *Restoule*, Appendix A at 2, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31; *Watson-Bear*, Pre-Trial Conference Minutes from December 13, 2017 at para 29.
[63] *Kawacatoose* at 2.
[64] *Akisq'nuk* at 2.
[65] *Shot Both Sides*, Order at para 6.
[66] *Shot Both Sides*, Order at para 11.

Consultation

27. The party calling Elders or both parties, where appropriate, should consult with the Elders beforehand to give them an understanding of what generally is expected of them in court and what may be asked of them in court and enable them an opportunity to reflect on their contribution. Such consultation may also seek Elders' recommendations on Indigenous protocols or on matters touching on Indigenous 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.[67]

    [For example, in *Restoule,* the protocol stated that "The Elders welcome an opportunity to consult with counsel for all parties and the court in a case management process in advance of the date scheduled for hearing the Elder testimony."[68]]

Confidentiality

28. If the Indigenous oral history evidence to be tendered at trial contains sensitive or confidential 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. [69]

29. The *Federal Courts Rules* provide for handling of confidential material. [70]

30. The party that seeks to protect the confidentiality of Indigenous evidence should indicate the reason(s) why in advance of tendering the evidence.[71]

HEARING SET-UP AND LOGISTICS

Language and Interpretation

31. The hearing is to be held primarily in English or French. An interpreter will be available for any Elders who may need to express themselves in an Indigenous language.[72]

32. If needed, the Court shall provide equipment for simultaneous interpretation. [73]

33. If a witness is being examined in a language other than English or French, interpretation should be provided by a person with experience as a legal interpreter, or at least by a person with experience as an interpreter.[74]

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[67] *Restoule,* Appendix A, at 2-3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[68] *Restoule,* Appendix A, at 3.
[69] *Restoule,* Appendix A, at 3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[70] *Restoule,* Appendix A, at 3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[71] *Restoule,* Appendix A, at 3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 31.
[72] *Watson-Bear,* Draft Minutes of the Pre-trial conference held on December 13, 2017 at para 37; *Restoule,* Appendix A at page 5; *Sechelt* at para 3.
[73] *Shot Both Sides,* Order at para 14.
[74] *Sechelt,* Schedule A at page 1.

Choice of the Interpreter or Translator

34. The choice of interpreter will be agreed upon by the parties.[75]

35. The party calling the Elder will provide the other party with the identity of the interpreter they have selected by [date, approximately 4 months before trial].[76]

36. The party calling the Elder will provide the other party with a list of proposed translators prior to setting a date for hearing lay witness testimony. The other party will respond to the proposed translators and the parties will make a joint submission on translators to the Court.[77]

37. If necessary, a word speller shall be agreed upon by the parties. "If the parties cannot agree on an interpreter or word speller at least ninety (90) days prior to the commencement of [the hearing], then one will be appointed by the Court (following receipt of submissions from the parties)." [78]

38. "The interpreter and word speller shall be impartial and independent to the satisfaction of the parties and the Court and need not be the same person."[79]

39. The interpreter and the speller must take a solemn affirmation or oath to perform their duties "truly and faithfully, and without partiality to any party in this proceeding, and to the best of your ability"[80].

Venue

40. Elder evidence will be received:

a. Within the community;[81]

b. Within the community, if possible;[82]

c. Within the community, for a portion of the hearing;[83]

d. Within the community, for a maximum for 20 days;[84]

e. Within or near the community.[85]

[75] *Innus de Uashat Mak Mani-Utenam* at 5;[6] at para 14 of the Order.
[76] *Kawacatoose* at 1.
[77] *Akisq'nuk* at 1-2.
[78] *Shot Both Sides* at para 14 of the Order.
[79] *Shot Both Sides* at para 14 of the Order.
[80] [7] at 3 of Schedule A.
[81] *Innus de Uashat Mak Mani-Utenam* at 2; [5] at page 2; [6] at para 2 of the Order; [4] at page 5 of Annexe A.
[82] [3] at para 5(a).
[83] [2]: Parties agreed to hold trial off reserve; however, at a pre-trial conference, Mr. Justice Lafrenière encouraged some portions of the trial to be held in the community. "Counsel are to review this with their clients and are expected to advise the court as to their clients' wishes and as to the availability of a suitable space shortly. Any venue will need to be suitable for the purpose." (Draft Minutes of the Pre-trial conference held on December 13, 2017, at para 36) At the trial management conference, it was established that the first of four weeks of trial would take place on reserve to cover the evidence of elders. (Minutes of Trial Management Conference held on March 7, 2018, at para 1(b)).
[84] *Shot Both Sides* at para 2 of the Order.

41. The Court, the parties, and their counsel will visit of the proposed venue in the community to confirm that adequate facilities are available to hear and record this evidence.[86]

Site visit

42. The Court and both parties agree to a site visit to the places at or near the land that the community expects to be the subject of the Elder evidence. [87]

43. The site visit will not yield evidence forming the basis of any inferences to be drawn by the trial judge but will be restricted to providing the trial judge and counsel with a better understanding of the evidence to be given by the Elders. [88]

44. If such a site visit is to occur, the Indigenous community is to inform the Court and Canada at least 6 weeks prior to the commencement of the trial; otherwise, no site visit will be undertaken. Any site visit is to be arranged by the Indigenous community, at its expense, and shall include all counsel, their advisors, the trial judge, and court staff, and it shall take place early during the first phase of trial."[89]

Audio-visual Recording and Archiving

45. 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.[90]

46. A party may wish to have its oral history recorded for posterity including recording by audio or visual media. The taking of such recordings should be done in accordance with the Federal Court Media Guidelines, and any other applicable orders or directions on recording in Court. [91]

47. The person or persons recording the Elder testimony shall be agreed to by the parties or, failing agreement, appointed by the Court.[92]

48. The video shall give a direct frontal close-up of the witness' face.[93]

49. The recordings are the property of the Court and a certified true copy of the video and audio recording of Phase I proceedings shall be marked as a trial exhibit.[94]

50. If a recording is made, it may be shared with the other parties, but not for use in the court proceeding unless specified by the Court.

51. A party may seek permission from the Court to webcast and archive the proceedings.[95]

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[85] *Sechelt* at page 1 of Consent Order.
[86] *Shot Both Sides,* Reasons at para 4.
[87] *Shot Both Sides* at para 8 of Decision on the Order.
[88] *Shot Both Sides* at para 8 of Decision on the Order.
[89] *Shot Both Sides* at para 8 of Decision on the Order.
[90] *Restoule,* Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36.
[91] *Restoule,* Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36; *Shot Both Sides* at para 23 of Order.
[92] *Shot Both Sides* at para 23 of Order.
[93] *Shot Both Sides* at para 23 of Order.
[94] *Shot Both Sides* at para 23 of Order.

Ceremony, court set-up and decorum

Ceremony

52. Prior to setting a date for hearing lay witness testimony, the party calling Elder testimony will advise the Court and other party of any ceremony or Indigenous custom, significant to the traditions of the Indigenous group or community, which should precede or follow the lay witness testimony.[96]

    a. For example, one protocol includes requests made by Elders for the use of smudging[97], an eagle staff[98], and a sacred fire[99]. The Court will then exercise its discretion to determine whether and how such ceremony can be incorporated into the proceeding, or on the margins of the proceeding.

53. Elders giving testimony will swear or affirm the truth of their testimony. Where an Elder chooses to take the oath or affirm by Indigenous practice, this is no different than a witness taking an oath on a holy book.[100] Examples of these Indigenous practices include swearing or affirming while holding an Eagle Feather[101] or by pipe ceremony.[102]

Court set-up

54. The seating in the Courtroom may be, after consultation with the parties, assembled :

a.	In a circle;[103]
b.	In a circle or in a semi-circle fashion for certain hearings, if possible; or[104]
c.	In any other fashion which reflects the Indigenous traditions and laws of the group or groups involved in the action.

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[95] *Restoule v. Canada (Attorney General),* 2018 ONSC 114.
[96] *Akisq'nuk* at 1-2.
[97] *Restoule* at page 4 of Appendix A: "The Elders have also asked that a Smudging ceremony be conducted before the start of the hearings in Thunder Bay, and at the hearings dealing with Anishinaabe and Elder evidence, at Minotoulin and Garden River."
[98] *Restoule* at page 4 of Appendix A: ""The Elders would like an Eagle Staff during the proceedings, especially Manitoulin and at Garden River."
[99] *Restoule* at page 4 of Appendix A: "The Elders would like a Sacred Fire during the proceedings, especially at Manitoulin and at Garden River."
[100] *Practice Guidelines for Aboriginal Law Proceedings* at 37.
[101] *Restoule*, Appendix A at 4.
[102] *Kawacatoose* - no mention in protocol, but referenced in final decision (*Kawacatoose First Nation et. al. and Star Blanket First Nation and Little Black Bear First Nation and Standing Buffalo Dakota First Nation and Peepeekisis First Nation v. Her Majesty the Queen in Right of Canada*, 2016 SCTC 1 at para 25).
[103] *Shot Both Sides* at page 18 of Decision ("Appendix 'A': Diagram of Courtroom Configuration); *Restoule* at page 4 of Appendix A.
[104] *Restoule* at page 4 of Appendix A.

Decorum

55. The Court, where appropriate, may adjust court attire requirements to receive Indigenous oral testimony:

a.	Counsel and Court officials shall not wear formal court attire but shall be dressed in business casual. The trial judge shall be robed. Security staff shall wear clothing that properly identifies them.[105]
b.	The Elders do not have a problem with counsel wearing gowns.[106]

Demonstrative Evidence

56. 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.[107]

57. The demonstrative evidence to be used may be specified in the protocol. [For example, in *Restoule*, the protocol stated "Elders may have their Sacred Pipes and Drums. The Chiefs who will be giving evidence have also indicated that they will be wearing their ceremonial Headdresses."[108]]

Commission Evidence

58. 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:

    a. identification of elderly or infirm witnesses from whom commission evidence may be required;

    b. the language in which the examination will be conducted and necessary interpretation;

    c. the procedure for recording testimony, whether by Court reporter, audio or video;

    d. the procedure for raising objections without disruptive interruption (such as uninterrupted hearing of the Elder's evidence before raising objections); and

    e. the location of the commission evidence and length of sessions.[109]

59. Such evidence is usually taken de *bene esse*, and the general rule is that the commission evidence will be disregarded if the witness is available at the time of

[105] *Shot Both Sides* at para 2 of Order.
[106] *Restoule* at page 5 of Appendix A.
[107] *Restoule*, Appendix A, at 3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 33.
[108] *Restoule*, Appendix A, at 3.
[109] *Restoule*, Appendix A at 3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 32.

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.[110]

For example, in *Sechelt,* where evidence from an Elder was taken by deposition:

60. The evidence of the witness, [name], will be taken by deposition on dates and times and at locations to be agreed upon by counsel. Rules of evidence and courtroom procedure shall apply to the commission evidence. Commission evidence may be used in negotiations.[111]

61. The commission evidence shall be: recorded by the official court reporter, recorded on digital technology by a videographer, and, if necessary, taken with the assistance of an interpreter and speller.[112]

62. The witness will be subject to direct examination, cross-examination, and re-examination.[113]

63. Objections made during deposition are recorded by the official court reporters. The validity of objections will be decided by the Court by application by any party, pursuant to Rule 7-8(15) of the BC Supreme Court Rules.[114]

Special Hearing for Elder Testimony

64. The Court may consider holding a special hearing to receive Elder testimony and oral history. The Elder testimony given in the special hearing may be evidence at trial, subject to admissibility. This special hearing may be held at any stage in the trial, though it is best at an early stage. An early special hearing may allow the parties to consider their positions, having heard the Indigenous perspective. It may also 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.[115]

65. 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 may be a guide but must be informed by the requirements of the Elders and the Indigenous community involved. There is not one standard practice among Indigenous groups for hearing Elders or oral

[110] *Restoule*, Appendix A, at 3, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 32.
[111] *Sechelt* at paras 1-3, 7.
[112] *Sechelt* at para 6.
[113] *Sechelt*, Schedule A at para 2.
[114] *Sechelt* at para 9.
[115] *Restoule*, Appendix A at 4, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 33.

history. The approach adopted should be in keeping with the practices and perspectives of the Indigenous community concerned.[116]

66. The parties should address the disclosure of Elder testimony, the location of the court hearing, the use of Indigenous languages and interpretation, and Indigenous 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.[117]

For example, in *Kawacatoose*, where a special hearing was held, the protocol stated:

67. The parties agree to hold a special hearing to receive Elder testimony and oral history, based on the need to preserve Elders' evidence that may not be available later and the benefit of allowing the parties to consider their positions, having heard the First Nation perspective. [118]

68. The evidence heard at the special hearing may be evidence at the claim validity hearing, subject to admissibility. [119]

69. If an Elder gives more extensive evidence during examination in chief at the special hearing than stated in his or her will say, the other party can raise the issue of admissibility after the special hearing.[120]

ELDER TESTIMONY DURING TRIAL

70. All Elders called as witnesses will be subject to direct examination, cross-examination and re-examination.[121]

71. All examinations of Elders, including direct examination and cross-examination, will be conducted respectfully and will be subject to the *Federal Courts Act*, RSC 1985, c F-7, the *Federal Courts Rules*, and any other legislation applicable to trial procedure in the Federal Court.[122]

72. The parties agree to a flexible application of the rules of evidence in a manner commensurate with the inherent difficulties posed by Indigenous claims, subject to the Court's direction.[123]

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[116] *Restoule*, Appendix A at 4, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 33.
[117] *Restoule*, Appendix A at 4, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 33.
[118] *Kawacatoose* at 1.
[119] *Kawacatoose* at 2.
[120] *Kawacatoose* at 2.
[121] *Innus de Uashat Mak Mani-Utenam* at 4; *Sechelt*, Schedule A at para 2.
[122] *Shot Both Sides*, Order at para 10.
[123] *Akisq'nuk* at 4.

73. ***Different approach:*** The parties agreed to an informal examination format in a Specific Claims Tribunal proceeding where direct examination, cross-examination and the tribunal's questions would be raised immediately, instead of having a separate time for cross-examination and the tribunal's questions. This was meant to help the Elder recall their testimony:

The parties propose an informal examination during which the claimant will address, as much as possible, specific subjects. The Respondent and the Tribunal will have the opportunity to ask questions on this same topic immediately, rather than cross-examination and questions from the Tribunal at the end of the examination-in-chief. This approach is designed to make it easier for the witness to recall their main testimony when the Respondent or the Tribunal asks questions.[124]

Role of the Trial Judge

74. 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.[125]

75. The trial Judge must be mindful to avoid statements which may be taken to be to the detriment of one party or the other.[126]

76. The trial Judge should intervene where questions stray from the bounds of examination or cross examination, or where the Elder may have difficulty understanding the questions.[127]

Role of Counsel

77. Counsel will do their best to facilitate the Elders' testimonies, to ensure that the testimonies are an enriching and rewarding experience, and to ensure that the examination, cross-examination and re-examination of the Elders are conducted in the upmost respect of the Indigenous community's values.[128]

78. Counsel will ask questions of a witness in a straight forward manner, using plain language.[129]

79. Counsel will be mindful of the witness' age and physical health and allow for breaks as needed.[130]

80. The parties may provide a flexible timeline for each witness, according to the person's preferences, health and fatigue.[131]

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[124] *Innus de Uashat Mak Mani-Utenam* at 4.
[125] *Restoule*, Appendix A at 6, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 35.
[126] *Restoule*, Appendix A at 6, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 35.
[127] *Restoule*, Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36.
[128] *Innus de Uashat Mak Mani-Utenam* at 2.
[129] *Akisq'nuk* at 5 (b) of p. 2.
[130] *Akisq'nuk* at 5(d) of p. 2.
[131] *Innus de Uashat Mak Mani-Utenam* at 3.

81. It is acknowledged that respect for elderly witnesses might involve not directing the witness' words and that an elderly witness unfamiliar with court proceedings might testify on unexpected topics.[132]

82. The parties agree to minimize disruptions to the flow of a witness' testimony.[133]

83. Counsel shall remain seated when examining or cross-examining an Elder. They shall stand only when addressing the Court.[134]

Exclusion of Witnesses

84. Witnesses cannot communicate with each other during the examinations. Each Elder will be excluded from the room when the other is being examined, unless otherwise agreed. [135]

85. No motion to exclude from the hearing an Elder who will be called as a witness at Phase I shall be made or entertained until after the evidence respecting the oral history traditions of the tribe has been concluded.[136]

Direct Examination

86. Counsel may be seated next to the Elder during examination in chief, especially where Elders are hearing-impaired.[137]

87. Counsel may lead a witness in relation to non-controversial areas of direct examination.[138]

88. If the evidence given on direct examination differs in some material manner from that provided in a witness' will say statement, then that difference may have to be addressed by the witness, or by counsel in submissions.[139]

89. It is expected that the Court will wish to know certain information from every witness giving oral history evidence:

    a. Information on the First Nation's tradition on how oral histories are passed down from generation to generation;

    b. Some information concerning the witness's ability to recount what others have told them;

    c. Who it was that told the witness about the event, story, cultural tradition, cultural practice or genealogy and how that person may have learned of the oral history;

    d. The relationship of the witness to the person from whom they learned

[132] *Akisq'nuk* at 6(b) of p. 3; 5 at p. 2 under Admissibility and Weight.
[133] *Akisq'nuk* at 5(e) of p. 2; 5 at p. 2 under Oral History Evidence Hearing.
[134] *Shot Both Sides,* Order at para 2.
[135] *Innus de Uashat Mak Mani-Utenam* at 4.
[136] *Shot Both Sides,* Order at para 8.
[137] *Restoule,* Appendix A at 6.
[138] *Akisq'nuk* at 5(c) of p. 2.
[139] *Shot Both Sides,* Reasons at para 13.

of the event, story, cultural tradition, cultural practice or genealogy;

e. Some general information concerning the person from whom the witness learned of the event, story, cultural tradition, cultural practice or genealogy;

f. Whether that person witnessed the event, cultural tradition or cultural practice or was simply told of it; and

g. Any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact, and what weight can be placed on this evidence, in making critical findings of fact.[140]

Cross-examination

90. The respondent may cross-examine witnesses on any evidence they provide.[141]

91. Cross-examination must be conducted respectfully and questions should be courteous in keeping with the respect afforded to the Elder by his or her community.[142]

92. Counsel should take into account the cultural approach of the Elders in making best efforts to ensure that the Elder understands the questions asked.[143]

93. The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination should be explored in appropriate cases. This exploration should be done on consent of the parties or on direction of the Case Management Judge.[144]

94. The Elder may discuss with counsel and Judge as to the manner of conducting appropriate cross-examinations.[145]

Re-examination

95. 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.[146]

[140] *Akisq'nuk* at 5(h) of p. 3.
[141] *Akisq'nuk* at para 5(g) of p. 3.
[142] *Restoule*, Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36; *Shot Both Sides*, Reasons at para 13.
[143] *Restoule*, Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36.
[144] *Restoule*, Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36.
[145] *Restoule*, Appendix A at 7.
[146] *Restoule*, Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36.

96. 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.[147]

Objections

97. Special procedures may be adopted to govern how objections may be raised without disrupting the flow of an Elder's testimony.[148]

98. Counsel for the defendants may choose to delay or defer objections so as not to unnecessarily interrupt the evidence of an Elder, and doing so will be without prejudice to the objection, which the Court can deal with at an appropriate time.[149]

99. An Elder shall not be interrupted while he or she is speaking, except if an immediate objection related to privilege is required or if there are serious interpretation issues.[150]

100. A party may object to a question posed by counsel before the Elder begins his or her testimony in answer, if in its opinion the objection is so serious that it must be raised immediately. [151]

101. A party may raise an objection after the conclusion of the testimony given by one Elder and before the testimony of the next Elder or during breaks in an Elder's testimony.[152]

102. Any objections during examination in chief, cross examination or re-examination will not be made at the hearing but will follow at a case management conference if necessary or a hearing convened by the Tribunal for that purpose.[153]

103. The parties agree to reserve objections and submissions on admissibility, if any, until after the parties have received and reviewed the transcripts of the witnesses' testimony. Once the party has reviewed the transcripts it will put any objections to the admissibility of the evidence in writing. The parties will agree to a mutually convenient date to present argument to the Court on the admissibility of any evidence where the party maintains an objection to that evidence.[154]

104. The parties all agreed that the evidence of one of the Elders would go on the record and the defendants would reserve the right to argue against its admissibility in closing submissions.[155]

[147] *Restoule*, Appendix A at 7, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 36.
[148] *Restoule*, Appendix A at 6, incorporating the *Practice Guidelines for Aboriginal Law Proceedings* at 35.
[149] *Innus de Uashat Mak Mani-Utenam* at 5; *Restoule*, Appendix A at 7; *Shot Both Sides*, Order at paras 16-17.
[150] *Shot Both Sides*, Order at para 15.
[151] *Shot Both Sides*, Order at para 17.
[152] *Shot Both Sides*, Order at para 18.
[153] *Kawacatoose* at 2.
[154] *Akisq'nuk* at para 5(f) of p. 3.
[155] *Couchiching* at para 59.

Annex A - Checklist of Matters to Consider When Preparing an Indigenous Law Case

This checklist provides a broad overview of relevant matters that parties and counsel should be considering when preparing for litigation involving Indigenous parties and/or Indigenous laws and legal orders.

It is therefore a user-friendly tool, which serves as a starting point when it comes to dealing with such matters. Although some points are specific to certain steps of the judicial process, this checklist can be referred to throughout the dispute resolution process as a whole, and is not limited to trials.

As is the case with the Federal Court's Practice Guidelines for Aboriginal Law Proceedings, this checklist is not prescriptive and is not meant to be read in a limiting manner, but should rather find flexible and broad application.

Checklist of Matters to Consider When Preparing an Indigenous Law Case		**REMARK**
1	**Review and research the relevant community**	
	- Obtain cultural information	
	- What language is preferred / understood by your client?	
	o Is there a need for an interpreter?	
	- Are there existing Indigenous legal traditions? If so have they been studied or documented? Are there any sources you can consult?	
	- Are there any relevant treaties?	
	- Are there any self-government agreements?	
	- Are there any land claim agreements?	
	- Are there any existing or ongoing legal claims?	
	**Lawyers who are unfamiliar with working with Indigenous Peoples and wish to obtain further information can consult: • *Guide for Lawyers Working with Indigenous Peoples*, by The Advocates' Society, The Indigenous Bar Association and The Law Society of Ontario • *Truth and Reconciliation Toolkit*, by the Canadian Bar Association	
2	**Identify the existing governance structures**	
	- Does the Indigenous group have its own Constitution?	

	- Has the Indigenous group adopted an election code (or similar legislation)?	
	- Is the Indigenous group scheduled to the *First Nations Elections Act*, S.C. 2014, c 5?	
	- Has the Indigenous group enacted a membership code?	
	- Has the Indigenous group established laws and procedures respecting land management pursuant to: o a treaty, self-government agreement, or land claims agreement o RLEMP (Reserve Lands and Environmental Management Program) o RLAP (Regional Land Administration Program) o a Land Code under the *First Nations Land Management Act*, S.C. 1999, c. 24 (and if so, whether it has enacted laws and procedures under the Land Code)	
	- Has the Indigenous group enacted a law respecting matrimonial real property, or whether it is subject to the *Family Homes on Reserves and Matrimonial Interests or Rights* Act, S.C. 2013, c. 20?	
	- Has the Indigenous group enacted a law pursuant to *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24?	
	- Has the Indigenous group enacted a governance code?	
	- Has the Indigenous group established rules respecting conflicts of interest?	
	- Is the Indigenous group scheduled to the *First Nations Fiscal Management Act*, S.C. 2005, c. 9, and if so has it enacted o a Financial Administration Law o property taxation and assessment laws o a property transfer tax law o other related laws (e.g. local service tax law, business activity tax law, development cost charges law)	
	- Has the Indigenous group enacted financial administration or property tax bylaws under s. 83 of the *Indian Act*?	
	- Has the Indigenous group enacted bylaws under s. 81 of the *Indian Act*?	
	**The First Nations Gazette can be a good starting point to search for law, by-laws and codes	
	- Has the Indigenous group established practices respecting custom adoption?	

	- Does the Indigenous group have its own dispute resolution practices?	
	- Does the indigenous group have unwritten customs/ indigenous legal principles?	
	o Who can testify to these customs/principles?	
	o Is there evidence of the "broad consensus" of the community (see, e.g., *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287)?	
3	**Identify the relevant evidence**	
	- Is there any relevant oral evidence?	
	o Is there demonstrative evidence regarding legal traditions (songs, stories, maps, wampum belts, other cultural artifacts)	
	o Is there elder evidence?	
	o Stories that convey legal principles? Have these stories been reduced to writing? Who can testify about them?	
	- Have the legal traditions of this indigenous group been studied or documented?	
	- Is there a land use plan?	
4	**Logistics of the evidence**	
	- Who are the witnesses	
	o Are there any specific measures that need to be taken for the swearing of the witnesses (smudging, feather, cultural objects, etc.)?	
	o Are there any elders?	
	o Is there a language barrier?	
	o Is there a need for a translator?	
	- What are the affidavits needed	
	- Is there a need for an examination?	
	o Where should this examination take place? ▪ Lawyer's office? ▪ In the community ▪ Any other meaningful place for the individual/community?	
	- Are there any restrictions on the evidence regarding legal traditions?	
	o Is a confidentiality order needed?	
5	**Logistics of the hearing**	

	- Where will hearing taking place?	
	o Should the hearing take place in the community	
	- Is there a need for witnesses, parties or the Court to travel?	
	- If the hearing is taking place virtually, is there a need make the hearing accessible in the community (live broadcast in a community center, live broadcast on the community's website)	

ANNEX B – COMPILATION OF PRACTICE EXAMPLES

The Liaison Committee aims to compile examples of helpful practices for all stages of legal disputes in this area. Parties are invited to submit noteworthy examples of orders, agreements, schedules, protocols, etc. that have been found to be helpful in the context of specific cases, which can then be considered for inclusion in this annex.

Examples may be submitted to: Legal Counsel, Federal Court, media-fct@fct-cf.gc.ca, (613) 947-3177. They may also be submitted via representatives on the Liaison Committee from the Canadian Bar Association, Indigenous Bar Association, Advocates Society, or Department of Justice.

Case Study #1 - Oral History Witness

***Action*:** Montana et. al v. HMTQ, FC No. T-617-85, et. al.
***Witness*:** Ms. Amelia Potts
***Called by*:** Samson Band
Disclosure of Oral History evidence of this witness in advance of trial? Yes
Type and timing of Disclosure:
1) Statement of Oral History to be relied upon, provided about 9 months before start of trial;
2) Transcript of narrative related by witness previously, provided about 2 months before start of trial (about 3 months before start of witness's evidence).

Language other than English or French? Yes
Interpretation/translation:
Traditional process. Interpreter provided by the party calling the witness, performed simultaneous translation (Cree to English). Transcript of evidence as translated also prepared and marked as a trial exhibit.
***Objections*:** Yes
***Method of objecting*:**
General objection before witness gave evidence and after witness gave evidence, to avoid interruption.
***Cross-examination*:** Yes
***Method of cross-examination*:**
Traditional process. Direct questions by opposing counsel, including leading questions.
Other ceremonies or protocol?
1) Offering of gift made to witness by counsel leading her prior to witness giving evidence.
2) Another person gave evidence as an "Introducer" to describe witness's general reputation as an elder in her community. Treated as an ordinary witness and cross-examined.

[See also *Montana v. Canada*, 2006 FC 261 (Justice Hansen) at paras 55 – 59; decision affirmed by FCA at *Montana v. Canada*, 2007 FCA 218.]

Case Study # 2 – Oral History

Action: *Haida Nation v. BC & Canada,* BCSC No. L020662

Status: Depositions being taken of elders (i.e. out-of-court evidence before trial); trial date not fixed yet.

Disclosure of oral history evidence in advance of trial? Yes

Type and timing of disclosure:

Plaintiffs provided will-say statements ranging from 5 to 54 pages to the Crown at least 60 days before the commencement of the examination of the elder.

Deposition evidence taken? Yes

Process for taking deposition evidence:

Consent orders obtained for the taking of deposition evidence of individual elders which set out the procedure (sample Consent Order to be provided):

- Deposition evidence is being taken in the Plaintiffs' communities.
- Court reporter, videographer, and word speller were present
  - No judge was present.
  - Common costs were divided equally amongst the parties.
  - Rules of evidence and courtroom procedure applied.
  - Order specified the use that can be made of the deposition evidence.

Language other than English or French used during taking of deposition evidence?

Generally, the Haida language was only used for isolated words. However, one witness recounted a few legends in the Haida language which were entered into the transcript verbatim.

Interpretation/Translation: Not required to date, but Plaintiffs prepared a glossary of terms used by the elders (not agreed to by all parties)

Objections made during taking of deposition evidence? Yes

Process for making objections:

1) General objection made either at the beginning of the elder's testimony or at an appropriate time that does not interfere with the flow of the direct examination.
2) There were also a few specific objections to specific questions during the course of the elder's testimony, but efforts were made to avoid this.
3) Objections recorded by court reporter.
4) Objections decided by the Court. This was provided for by the current BC Rule 38(12) and the Consent Order. Note also that BC Rule 40(31) allows a party to object to the admissibility of any question and answer in a transcript, videotape or film given in evidence, although no objection was taken at the examination.

Cross-examination: Yes

Method of cross-examination: Traditional process. Direct questions by opposing counsel.

Other ceremonies or protocols? During the taking of each deposition, every day began with a prayer which is sung.

Other considerations: Because these elders are elderly, allowances were made in terms of start and finish times, length of breaks, etc. Because of their medications and health conditions, some elders are better able to testify in the morning, others in the afternoon.

Case Study # 3 – Oral History

Action: *The Ahousaht v. Canada and BC*, BCSC Action No. S033335, Vancouver Registry
Status: Trial decision is currently under appeal.
Disclosure of oral history evidence in advance of trial? Yes
Type and timing of disclosure:

1) Document production by the Plaintiffs included some audio tapes which contained oral history evidence;
2) Interrogatories delivered by the Crown which sought oral histories. Plaintiffs objected to the interrogatories on the basis that they asked for information regarding oral histories founded on events that took place, or information from a time, before living memory and therefore beyond the scope of interrogatories;
3) Examinations for discovery of the Plaintiffs included questions about the First Nation's oral histories;
4) Plaintiffs provided will-say statements which included references to oral history evidence. Parties agreed to exchange will say statements of lay witnesses 30 days prior to the testimony of the witness, subject to the exigencies of the trial regarding such matters as scheduling.

Deposition evidence taken? No.
Trial Venue: 2 days of trial took place in the Plaintiffs' community. The rest of the trial was held in a courtroom in Vancouver.
Language other than English or French? No.
Interpretation/Translation: Not required, but the Plaintiffs prepared a glossary of terms used by their witnesses.
Objections? Yes
Process for making objections:
The trial judge issued directions at a case management conference, with the consent of all parties, which established a procedure for oral history objections at trial. The Direction is described as follows in paragraphs 2-3 of a mid-trial ruling [*Ahousaht v. Canada*, 2008 BCSC 769]:

> "[2] At a case management conference conducted on February 20, 2007, I directed, with the consent of all parties, a procedure to be followed for the hearing of oral history evidence. Insofar as the plaintiffs have (with the consent of all parties) delivered will-say statements for each lay witness, the defendants have thereby received advance notice that a witness's testimony was anticipated to be based, at least in part, on oral history. The direction I gave as to oral history objections was as follows:
>
> (a) the defendants should state their general objection to the reception of oral history of a particular witness where it was anticipated the witness would testify as to oral history. If appropriate the court would then declare a *voir dire* for all of that witness's testimony;
> (b) within two days of the testimony the defendant(s) would advise whether they wished to maintain their objection to the admissibility of the oral history and, if so, to which portions of the testimony;
> (c) submissions would then be made to the court regarding the admissibility of the oral history at issue as soon as possible after the testimony of the witness, within the trial schedule;
> (d) the court's ruling with respect to oral history would determine if all or parts of the evidence heard on the *voir dire* was admissible and those portions ruled admissible would become evidence at the trial;

(e) if oral history was deemed inadmissible the plaintiffs would retain the right to recall a witness in order to address the subject matter of the evidence that was excluded and the defendants retained the right to cross-examine on this new testimony.

[3] That procedure was adopted and used for all the plaintiffs' lay witnesses. Most, if not all, the plaintiffs' lay witnesses testified in a *voir dire*. In every case, except for the one presently the subject of this mid-trial ruling, the defendants waived any objection to the admissibility of the oral history."

Cross-examination: Yes
Method of cross-examination: Traditional process. Direct questions by opposing counsel.
Other ceremonies or protocols?

1) Courtroom rules drafted by the Plaintiffs' counsel were posted in the community venue where the 2-day trial session occurred.
2) Gift presented by the Plaintiffs to the trial judge during the 2-day session of trial in the Plaintiffs' community.

Extent of Oral History Received at Trial:

Although a procedure was established during case management for the making of oral history objections at trial, the trial judge noted in her final judgment that very little oral history was actually received at trial. She stated at paragraph 81 that: "Unlike many aboriginal rights and title trials, I heard virtually no oral history evidence".

Sample Cover Sheet

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

Motion Number ____(sequential number for motion)_____

This Motion for ____(short description of motion)_____
_____

This Motion Brought By (Plaintiff / Defendant)_____

This Document Filed By (Plaintiff / Defendant)_____

FEDERAL COURT

BETWEEN:

(NAME OF PLAINTIFF)

Plaintiff

- and -

(NAME OF DEFENDANT)

Defendant

WRITTEN REPRESENTATIONS OF (NAME OF PARTY)
