FEDERAL COURT

FEDERAL COURT ~ ABORIGINAL LAW BAR LIAISON COMMITTEE

PRACTICE GUIDELINES FOR ABORIGINAL LAW PROCEEDINGS

APRIL 2016

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About the 3rd Edition

This edition includes new guidelines with respect to dispute resolution options and *applications for judicial review*, complementing the previous guidelines on *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.

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, 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 to these Practice Guidelines.

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 ~ Aboriginal Law Bar Liaison Committee* brings together representatives of the Federal Court, the Indigenous Bar Association, the Department of Justice (Canada), and the Canadian Bar Association 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 Committee regularly consults with First Nation Community Elders from across the country. Their input and advice with respect to the Guidelines on Elder Testimony and Oral History evidence found at Part D of the Guidelines was particularly important. Committee minutes may be found on the Federal Court web site at: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Liaison_Committees

Over the course of its meetings, participants have discussed numerous issues relevant to Aboriginal litigation, including: the need for greater dialogue and the problems associated with repeated amendments to pleadings, excessive documentary evidence, minimal or no pre-trial disclosure of oral history evidence, insufficient notice of expert witness qualifications, and the inconsistent approach to recognition of Elders. The Committee has also discussed the suitability of the adversarial process, the adaptation of judicial process to cross-cultural context, delay and cost.

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 *Federal Courts 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 Aboriginal 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 Federal Courts 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 Federal Courts 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

PART III - PRACTICE GUIDELINES

A. DISPUTE RESOLUTION THROUGH DIALOGUE

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

In 2009, the Federal Court hosted a *Symposium on Oral History and the Role of Aboriginal 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 Aboriginal perspective. This led to a judicial education seminar at Kitigan Zibi in late 2013, developed in collaboration with the Elders, on Aboriginal 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 Aboriginal people, the Court is moving to facilitate dispute resolution between parties other than through adjudication, though without preventing parties from pursuing judicial adjudication. Although the Court will encourage parties to reach a settlement or narrow their issues in dispute through agreement, ultimately the parties must decide whether they want to pursue this avenue, understanding that there is also a cost to 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 discover they are later 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 gain a much better understanding of their own legal position as well as that of the other parties, allowing 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, who may, *in appropriate cases*, 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 either by 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 Aboriginal 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 are 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***

Although in some cases a mediated settlement may offer many advantages for all parties as compared to an adjudicated outcome, 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. A lengthy approval process for federal government, Aboriginal, or other parties to obtain a settlement mandate may 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 themselves to adversarial proceedings, 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.

- ***Rules Related to Costs in Legal Proceedings***

"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;
> (*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. 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]

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 Aboriginal 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

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 to the Director of the Aboriginal Law Section of the appropriate Regional Office, or the

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

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 integrate, where possible, into the litigation process the participants, documentary record, and 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 actions, can be facilitated not only by co-operation between the litigants and their counsel but by effective use of the Rules of the Court and case management. To ensure that there is awareness as to some of the Rules applicable and flexibility offered through case management, the following Rules are highlighted which may be of assistance in Aboriginal law matters:

- 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 immediate case management is required, under Rule 3

[5] For example, where negotiations between the parties are on-going.
[6] For more information, see: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing
[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.

- 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, for which the case management judge will normally have a more *active* role, depending on the degree of cooperation between parties; or
  b) to defer proceeding with the case, for which the case management judge will normally take 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 substantial reason to remove a proceeding from the normal timetables set out in the Rules. However, a party that refuses to consent should normally provide the Court with its reasons 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.

- *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, as noted in part II above, 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 June 2015, the Court issued a 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
g) scheduling experts
h) scheduling trial dates

ii. Identification of issues for trial or summary disposition

a) can the trial be split into phases or can evidence and argument be presented by issues rather than in the conventional format - Rule 274, 278
b) if the proceeding is phased, should one judge be seized for all phases?
c) will judgment be rendered after the completion of each phase?
d) how will appeals of a determination in a phase impact the hearing of the remaining phases of the trial?

[8] NOTICE TO THE PARTIES AND THE PROFESSION - CASE MANAGEMENT: INCREASED PROPORTIONALITY IN COMPLEX LITIGATION BEFORE THE FEDERAL COURT– available at http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/NOTICE%20TO%20THE%20PROFESSION%20-%20case%20management%20FINAL%20(ENG).pdf

[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.

e) severance of one or more issue – Rule 107
f) agreed statement of facts
g) consider 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, 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, having regard to the issues in play, and 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

[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)
- 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."

- the Federal Courts Rules allow for dispensation of the requirement to produce relevant documents, and so a party can seek an exemption from the obligation to produce documents, either generally or by category of document, for example[11]
- it is recommended that the trial judge, if already assigned, should be consulted with respect to the discussion regarding disclosure and any direction / order of the Court regarding the scope of disclosure
- time-line for disclosure of evidence, including the possibility of sequenced disclosure to allow for staged research, having regard to the complexity of the issues and agreed scope of disclosure and the consequent time required for full review 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

- protocol for electronic exchange of discoverable documents between the parties[12]
- parties are encouraged to file documents electronically[13]
- 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.

vii. Experts

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

Additional Notes - Many experts called to testify in Aboriginal cases teach at universities. As such, they may require a fixed date to testify in order to accommodate their teaching schedule. (See also Trial Management – Trial Schedule

[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: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing

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 with regard to use 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, trial management conferences should be scheduled to allow the trial judge to address those issues that can be resolved in advance of the trial, including:

(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 the *Notice to the Profession (Common List of Authorities)*, which exempts parties from having to file a complete paper version of those cases on the Aboriginal Law List, [14] which are deemed to be in the party's book of authorities; however, if a party intends to refer to one of these authorities, the passage upon which they will rely should be included.

(b) trial venue

- consider having parts of the trial in the Aboriginal community
- assess the advantages / disadvantages arising from the choice of venue, including:
  - the effect that the venue may have on the ability/ease of witnesses to testify in open court, and in particular where Elders are being called to testify
  - whether some issues / testimony might be more appropriate in a specific venue

[14] A possible Rules amendment is under consideration in 2016-2017 to extend the scope of the Common List of Authorities so that it would apply to all jurisprudence that is available in a public, electronic database without charge.

- whether the hearing could proceed in different locations, both on in aboriginal communities and in an urban location
- 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:
  - reservation of facilities on a reserve
  - 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 / weekly schedule
- long-term scheduling, including the scheduling of breaks in the trial
- scheduling of experts - many experts are academics who teach at universities, and they may require a fixed date to testify in order to accommodate their teaching schedule (limitations on availability should be communicated to Court at the pre-trial conference) [see also Case Management – Scheduling of Experts, 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, or 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 given the varying languages and dialects of Canadian Aboriginal peoples
- 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
- for a long trial, it might involve an 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 giving evidence. For example, between the completion of cross-examination and the commencement of re-examination, the lawyer who is going to re-examine the witness is not to have any discussion respecting evidence that will be dealt with on re-examination without leave of the court. Discussions between a witness and counsel who produced the witness also should not occur during breaks in cross-examination.

(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 directly 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
    - can these determinations be made right away, or if not, can a schedule be established for raising the issues
- 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 many 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) (i.e. that all objections to the documents based on hearsay are removed)
- preparation of a common book of documents that contains all documents that are 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

The following recommendations are proposed for management of the trial in progress:

(a) integrity of Court proceedings
- it is ultimately the Court's responsibility to ensure that appropriate standards of conduct are maintained throughout the proceedings
- in particular, during cross-examination, counsel are expected to treat all witnesses with respect, and 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) at the beginning of the trial, and possibly again during final submissions, the trial judge should advise parties of limitations, if any, on the scope of evidence on which the trial judge intends to rely for rendering judgment

(d) opening submissions – it is recommended to receive comprehensive opening submissions from all parties as the trial starts rather than hear the respondent's position many months later, though allowing a summary "refresher" opening when the respondent begins

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

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 First Nations 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

[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*.

> first communicated by the federal board, commission or other tribunal to the office of the Deputy 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 the parties 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 where it may be more appropriate for evidence to be presented before a reviewing Court in person, such as where elder testimony and oral history are 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

[18] For more information, see: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing

decision of the original decision maker, then the matter may be returned for a new hearing).

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, and 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 (that is, to ask questions of the person who made the sworn statements in each affidavit), 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 the *Notice to the Profession (Common List of Authorities),* which exempts parties from having to file a complete paper version of those cases on the Aboriginal Law List,[19] which are deemed to be in the party's book of authorities; however, if a party intends to refer to one of these authorities, the passage upon which they will rely should be included.

5. Case Management / Mediation

The management and expeditious disposition of court proceedings, which may be particularly complex in Aboriginal applications for judicial review, can be facilitated not only by co-operation between the litigants and their counsel but by effective use of the Rules of the Court and 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) with a request that it be brought to the attention of the Chief Justice, requesting that the case be specially managed.[20] The letter should address the following issues:
    - the reasons for which immediate case management is sought, under Rule 3

[19] A possible Rules amendment is under consideration in 2016-2017 to extend the scope of the Common List of Authorities so that it would apply to all jurisprudence that is available in a public, electronic database without charge.

[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.

- 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:
  (a) to move the proceeding forward expeditiously – in which case the case management judge will normally have a more *active* role, depending on the degree of cooperation between parties; or
  (b) to defer proceeding with the case – in which case the case management judge will normally take 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, as noted in part II above, 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, which 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 Aboriginal governance disputes, may be suitable for a hearing within the Aboriginal community. An access to justice issue, this facilitates participation by the wider community in the hearing(s), allowing 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 Aboriginal community
- assess the advantages / disadvantages arising from the choice of venue, 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 Aboriginal 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 Aboriginal.

- 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

(f) 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 Aboriginal 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 AND ORAL HISTORY

As noted earlier, in 2009, the Federal Court hosted a *Symposium on Oral History and the Role of Aboriginal 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 Aboriginal perspective. The *Federal Court ~ Aboriginal Law Bar 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.

1. Preamble

The Canadian legal system relies on the parties to present useful, reliable and fair evidence, in order to allow an impartial judge to decide the facts and the law that resolve their dispute, either through a court proceeding or mediated process.

In the Federal Court, the process is governed by rules of evidence and procedure. The *Federal Courts Rules* are designed to ensure opposing parties have access to information necessary for the preparation of their case and to offer them a forum where they may argue their cases fairly. However they do not specifically address the unique nature of Elder testimony and oral history.

Aboriginal peoples in Canada have unique rights protected by the Constitution. Historical evidence often forms the basis of these rights; however the written historical record from the Aboriginal perspective is scant because the history of Canada's First Nations is mostly recounted orally. Oral history is therefore often an important element in Aboriginal litigation and may be the only means by which Aboriginal litigants can prove and thereby exercise their rights.

Aboriginal Elders are the primary source of evidence about Aboriginal perspectives and Aboriginal oral history. Their testimony about the Aboriginal perspective, touching on indigenous customs, traditions and identities, conveys the context that informs the Court's understanding about indigenous normative values and the significance of events. The Elders' accounts of oral history convey their historical evidence as understood from the Aboriginal perspective.

Elder testimony and oral history is often required to allow the written documentary record and the unwritten Aboriginal perspective together to provide a complete picture. Elder testimony may touch upon historical facts, Aboriginal land occupation, land use, customs, practices, laws, spirituality and identity. Aboriginal ceremony may be part of the process of telling. Such Elder testimony may require interpretation by persons knowledgeable in Aboriginal oral history. Elder testimony can contribute to a better understanding of Aboriginal history from the Aboriginal perspective.

Reconciliation requires the courts to find ways of making its rules of procedure relevant to the Aboriginal perspective without losing sight of the principles of fairness, truth-seeking and justice. This can be accomplished by adopting an approach rooted in respect and dignity. One way to show respect and enable Aboriginal witnesses to be heard is to have regard for Aboriginal ceremony and protocols.

These guidelines seek to balance appropriate reception of Elder testimony and oral history evidence with the practical needs of a justice system in a manner that promotes fairness and truth-seeking in civil litigation. Where the *Rules* do not clearly address matters of Elder testimony or oral history, parties should apply to the Court for a direction or order under the case management or trial management processes.

2. Guiding Principles

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

Principle 2: Rules of procedure should be adapted so that the Aboriginal perspective, along with the academic historical perspective, is given its due weight.

Principle 3: Elders who testify should be treated with respect.

Principle 4: Elder testimony and oral history should be approached with dignity, respect, creativity and sensitivity in a fair process responsive to the norms and practices of the Aboriginal group and the needs of the individual Elder testifying.

These guidelines address procedures that may facilitate the presentation of an Aboriginal Elder's evidence in keeping with the Court's requirements and in recognition of Aboriginal sensibilities. They allow, in a case by case process, for an appropriate accommodation of Aboriginal approaches under the *Rules* in cases before the court concerning Elder testimony and oral history. The overarching theme permeating these guidelines is that the Aboriginal perspective provided by Elders can assist the Court by providing context for the matter before the Court.

It should be remembered that there is considerable diversity amongst the Aboriginal cultures across Canada. These guidelines are a means for achieving flexibility suitable for the Aboriginal Elder involved, the testimony to be heard, and the issues that have been raised in the proceeding.

3. Calling an Elder to Testify

The decision of whether an Elder should testify or whether oral history should be placed in evidence is a matter to be decided by the party that desires to introduce such testimony or evidence. This decision is decided by the party in consultation with their legal counsel and the Elder.

Consideration should be given to these guidelines when it is decided Elders are to testify. The parties may consider a case management or trial management conference to settle on a flexible, appropriate procedure for hearing the Elders' testimony.

4. Questions of Admissibility of Elder's Testimony

The admission of an Elder's testimony is a matter for the trial judge to decide on a case by case basis. Elder testimony informs the Court of the Aboriginal perspective and will usually be admissible where an Elder is a person recognized by his or her community as having that status.[21]

5. Preliminaries to Elder Testimony and Oral History

(a) Disclosure

The party calling an Elder to testify should provide information about the Elder and the basis of his or her knowledge about the subject matter of the testimony. Given the differing dynamics 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.

The disclosure should also provide information about the Aboriginal community's practices or protocols for requesting Elder testimony. Elders often refrain from describing themselves as elders and the party calling an Elder may have a community member to introduce the Elder and confirm his or her status as an Elder.

The disclosure should also summarize the proposed evidence, keeping in mind both that Aboriginal respect for Elders may involve not directing an Elder's words and that an Elder unfamiliar with court proceedings may respond on unexpected topics.

Where issues arise between parties over the adequacy of the disclosure, the parties should seek assistance through case management or trial management for a direction or ruling on the disclosure to be provided and its timing. 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.

(b) Consultation

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

[21] *R. v. Van der Peet* (1996), 137 D.L.R. (4th) 289 (S.C.C.) at 318. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1074. Courts can receive evidence of oral history and oral tradition and the ordinary rules of evidence must be applied in a flexible manner to allow for their admission. See also *Mitchell v. M.N.R.*, [2001] S.C.R. 911 para 33 – however, traditional rules of evidence must be applied in Aboriginal rights and title cases, and evidence must meet tests for admissibility. *William et al v. British Columbia et al.*, 2004 BCSC 148 - once admitted, weight is a matter for the trier of fact. This information supplements this section by setting out the some of the authority that grounds this section of the Guidelines.

on their contribution. Such consultation may also seek Elders' recommendations on Aboriginal protocols or on matters touching on Aboriginal sensibilities.

Where both parties are involved in consultation with Elders, the Court may also become involved through the case management or trial management process. Involvement by the Court gives the consultation a demonstrated element of respect and importance for hearing Elders in court.

6. Commission Evidence

A party who intends to tender oral history evidence through Elders who are elderly, infirm, or who may be otherwise unavailable at trial, may seek an order for the out-of-court examination of that Elder before trial. The following should be considered in taking of commission evidence:

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

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 trial. However, the parties may apply to the Court to use the recorded evidence where both parties have had opportunity to participate in the taking of commission evidence and sufficient reason exists for not requiring Elders to testify twice.

7. Protective Measures when Warranted

If the Aboriginal oral history evidence to be tendered at trial contains sensitive 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.

The *Rules* provide for handling of confidential material:

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

The party that seeks to protect the confidentiality of Aboriginal evidence should indicate the reason why in advance of tendering the evidence.

8. Demonstrative Evidence

Elders' evidence may be presented in a demonstrative manner: songs, dances, culturally significant objects or activities on the land.[22]

The parties may apply to the Court for a direction or order in relation to the presentation of demonstrative evidence.

9. Special Hearing for Receiving Elder Testimony

The Court may consider holding a special hearing to receive Elder testimony and oral history. The Elder testimony given in the special hearing may be evidence at trial, subject to admissibility.

This special hearing may be held at any stage in the trial, though it is best at an early stage. An early special hearing may allow the parties to consider their positions, having heard the Aboriginal perspective, and allow the parties to revisit mediation or negotiation for some, if not all, issues.

The special hearing also has the benefit of preserving Elders' evidence that may not be available later, should the trial be delayed or prolonged.[23]

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[24] may be a guide but must be informed by the requirements of the Elders and the Aboriginal community involved. There is not one standard practice among Aboriginal groups for hearing Elders or oral history. The approach adopted should be in keeping with the practices and perspectives of the Aboriginal community concerned.

The parties should address the disclosure of Elder testimony, the location of the court hearing, the use of Aboriginal languages and interpretation, and Aboriginal protocols early in the case management or trial management processes. Discussions about hearing Elder evidence, admissibility and weight of that evidence should be conducted beforehand rather than when an Elder is on the witness stand. Other than immediate issues, such as an objection because of privilege, challenges to admissibility may be deferred on a without prejudice basis to completion of the Elder's testimony while questions of the weight may be left for later argument.

10. Elder Testimony

The procedures adopted for hearing Elder testimony should be chosen to achieve the best environment to receive that testimony. These may include use of the Elder's native language, observance of cultural protocols, choice of a suitable venue, mode of

[22] For example, see *Montana et. al v. HMTQ*, FC No. T-617-85, included in Annex (case study #1).
[23] See also Rule 271(1),(2) in the *Federal Courts Rules* on Taking of Trial Evidence Out of Court.
[24] William et al. v. British Columbia et al., 2004 BCSC 148

testimony, viewing of sites and admission of demonstrative evidence. These subjects should be addressed beforehand in the case management or trial management processes.

(a) Language and Interpretation

The Aboriginal perspective derives much from the Aboriginal language. Interpretation that is both accurate and effective is essential. The party calling the Elder to testify should address the need for interpretation and propose the manner in which the interpretation is to be carried out.

- Simultaneous interpretation is likely the most efficient method of entering lengthy Elder testimony in the native tongue. Sequential interpretation may suffice where the Elder narratives are not long.

- Elders may be willing to testify in English or French even if their command of the language is limited. An interpreter should be available to assist if they need to better express themselves in their own language. In such cases, it is best to first interpret the questions put to the Elder, so they have a clear understanding of the question they are asked to answer. Where Elders choose to testify principally in English or French, they may still use individual terms in their native tongue for specific places or ideas. A glossary of Aboriginal terms should be provided to the court reporter.

- Under the rules, the party calling a witness provides for the interpreter. Parties may have their own interpreters to assist counsel whose interpretations are not part of the record. In some cases, the Court may wish to appoint interpreters with apportionment of interpretation costs. The Court may require an orientation for interpreters touching on the approach to interpretation (word for word or sense of), duty to interpret accurately, court procedure, and legal language.

(b) Venue

The Court may consider, at a party's application, holding part or all of the trial in the Aboriginal community. The rationale for going to an Aboriginal community venue should be considered as well as the answers to such questions as:

- What effect will a community or other special venue have on the ability/ease of Elders to testify in the trial. Are some issues or testimony more appropriately heard in a community venue or in a court room?

- What facilities are available? Are they suitable? Do members of the community have ready access to the chosen venue? Does the public?

- What facilities and accommodations are available for the judge, court staff and counsel for the parties? What are the anticipated challenges with respect to travel, accommodation, court equipment and records that may arise in a community venue away from established court locations?

(c) Examination

The direct and cross-examination of Elders in court is a challenging subject, given that Aboriginal respect for Elders manifests in a cultural norm of not interrupting or questioning an Elder. In addition, Elders may, in telling teaching stories or describing sacred objects or events, invoke Aboriginal spirituality such that their account may be more in the nature of prayer as opposed to telling of personal experience or witnessed events. That is not to say that questions may not be asked of Elders after they have been heard since they are generally disposed to share knowledge and explain to listeners.

Elders have frequently said their experience in court has not been favourable. The formalities of the court and the adversarial aspect of litigation do not accord with Aboriginal approach to sharing knowledge and stories.

The process of receiving Elder testimony in court may be better managed by approaching the process respectfully in keeping with Aboriginal sensibilities, while observing the requirements of the adjudication process.

Addressing the Elder

- The trial Judge can set the tone of the proceeding by expressing respect and appreciation to the Elder for coming to share their knowledge with the Court. The judge has the opportunity to explain the process, providing the Elder with information and orientation about the Court's fact finding process.

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

Examination in Chief

- Generally, counsel should address issues that may arise with an Elder's testimony in case management or trial management conference, advising the Court whether they have an agreed approach worked out amongst themselves or in the case management process. Alternatively, such issues can be addressed later in a trial management conference before the Elder is to testify.

- Special procedures may be adopted to govern Elder testimony and oral history evidence at trial, including:

    - Decorum and respect to be afforded an Elder in keeping with Aboriginal sensibilities for respecting Elders;
    - Whether examining counsel will need to direct the Elder's attention to testimony the party wishes to elicit;
    - How objections may be raised without disrupting the flow of an Elder's testimony;
    - Procedures for challenging the admissibility and weight of an Elder's testimony;
    - Being mindful of the Elder's age and physical health and the need for health breaks in the Elder's testimony so as not to tax the Elder's limitations in prolonged questioning.

Cross Examination

- All witnesses are entitled to respect. Questions put to Elders should be courteous in keeping with the respect afforded the Elder by his or her community.

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

- The Court should intervene where questions stray from the bounds of examination or cross examination, or where the Elder may have difficulty understanding the questions.

- 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.

Re-examination

- The usual practices regarding communications with witnesses giving evidence apply including during breaks in testimony and between the completion of cross-examination and the commencement of re-examination. This process should be explained to the Elder beforehand by counsel.

- The Court may grant leave for the discussion of certain subjects with a witness where it is necessary and where it is in the interest of advancing the trial process.

11. Alternative Modes of Testimony

An Elder may wish to testify in the presence of other Elders or in the presence of the community in accordance with their custom for truth telling. Elders may also prefer to testify as a panel or have someone accompany them while they testify.

Elders may also wish to testify in a traditional manner for which oral histories are transmitted or in a specific forum or setting such as on the land or in a circle setting.

12. Audio/Visual Recording of Testimony

The party calling an Elder must be mindful that the Court is a court of record. The Elder should be made aware that the testimony is recorded.

A party may wish to have its oral history recorded for posterity including recording by audio or video media. The taking of such recordings may be done in accordance with Federal Court Media Guidelines on recording in court.[25] If a recording is made, it may be shared with the other party or parties but not for use in the court proceeding unless specified by the court.

[25] See Federal Court web site at www.fct-cf.gc.ca

13. Ceremony

Aboriginal communities may choose to begin important meetings with a ceremony or a prayer. In keeping with Aboriginal practice, participation is voluntary.

Some such ceremonies or spiritual prayers are not to be recorded. On the other hand, Federal Court proceedings are a matter of record. These differing protocols may be reconciled by conducting the ceremony or prayer before Court is opened by the Court registry officer. Closing prayers may be done after Court is closed. The exception is when an Aboriginal witness chooses to take the oath by Aboriginal practice, such as on an eagle feather or with a smudge, during Court. This is no different than a witness taking the oath on a holy book.

14. Expert Evidence

The Federal Courts Rules for expert witnesses typically are not considered suitable for Elders' testimony and oral history. Aboriginal Elders differ significantly from non-Aboriginal academic experts in that Aboriginal Elders' knowledge comes directly from their own culture's traditions and teachings, and needs to be acknowledged accordingly.

Expert witness rules would apply to evidence on the topic of oral history by academic experts.

In those instances where an Elder has both traditional learning and an academic education, the guidelines and expert witness rules are to be adapted as necessary to meet the requirements of receiving the Elder's testimony and oral history evidence.

ANNEX – 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, 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 have 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 present
  - No judge is present.
  - Common costs are divided equally amongst the parties.
  - Rules of evidence and courtroom procedure apply.
  - Order specifies 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 is 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 have 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 have also been a few specific objections to specific questions during the course of the elder's testimony, but efforts have been made to avoid this.
3) Objections recorded by court reporter.
4) Objections may be decided by the Court. This is provided for by the current BC Rule 38(12) and the Consent Order. Note also that the current 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 begins with a prayer which is sung.

Other considerations: Because these elders are elderly, allowances have to be made in terms of flexibility 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 had 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 has been adopted and used in respect to all the plaintiffs' lay witnesses. Most, if not all, the plaintiffs' lay witnesses have testified in a *voir dire*. In every case, except for the one presently the subject of this mid-trial ruling, the defendants have 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)
