**Aboriginal Law Forum**

**Presented by Insight Information**

**Toronto, November 19 - 20, 2007**

# A Modest Proposal in Two Parts*

## PART I

## Mountains of Costly Nonsense –
## The Crisis in Aboriginal Litigation and Some Brave Attempts to Save It

## PART II

## The Role of Elders and Oral History Evidence in the Courts

**Peter W. Hutchins**

**November 2007**

---

* This paper was presented at the Canadian Aboriginal Law 2007 presented by Pacific Business & Law Institute, Ottawa on November 15-16, 2007.

# Table of Contents

**Page**

# PART I - Mountains of Costly Nonsense - The Crisis in Aboriginal Litigation and Some Brave Attempts to Save It

As a young lawyer, John Adams wrote of his satisfaction with his profession:

> Now to what higher object, to what greater character, can any mortal aspire than to be possessed of all this knowledge, well digested and ready at command, to assist the feeble and friendless, to discountenance the haughty and lawless, to procure redress to wrongs, the advancement of right, to assert and maintain liberty and virtue, to discourage and abolish tyranny and vice?
>
> John Adams 1761

Charles Dickens had a bleaker view of the denizens of the Courts.

> "... the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them. ...
>
> This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhaust finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give - who does not

> often give - the warning, "Suffer any wrong that can be done you rather than come here!" "
>
> Charles Dickens - *Bleak House*, Chapter I
> In Chancery

## A. The Mad Mischief and the Costly Nonsense

It was quite evident that on the subject of the Courts as an equitable, efficient place to settle disputes Charles Dickens had some reservations. One hundred and fifty years later, it is obvious to most of us litigating Aboriginal issues and toiling before the Courts of this country that something is still terribly wrong. The Aboriginal litigants themselves look on aghast.

And yet things should be better. It is true that Charles Dickens was employing some poetic licence. But we are well advised to listen to the poets. ... For over twenty years now, at least since *Simon v. The Queen*, the Supreme Court has been insisting that "Aboriginal right claims give rise to unique and inherent eventuary difficulties". The Chief Justice in *Mitchell v. M.N.R.* after asserting these inherent eventuary difficulties continued.

> Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408).[2]

Chief Justice McLachlin continued in *Mitchell* to develop the theme of the necessity of a special approach to the rules of evidence when dealing with oral history. She stated as follows:

---

[2] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 27.

> Thus in *Van der Peet, supra*, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).[3]

One disquieting feature of the Chief Justices otherwise enlightened observations on this matter is her assumption that after all it must be present rules adapted rather than new rules that are the solution:

> Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet, supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw, supra*). [4]

The Chief Justice went on to say as follows:

> The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way.[5]

**Evidence Gathering**

The evidence gathering process in litigation involving Aboriginal and treaty rights is primarily focussed on the re-creation of events which occurred hundreds of years ago,

---

[3] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 27.
[4] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 29.
[5] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 30, emphasis added.

and on the re-creation of societies and cultures as they existed hundreds of years ago. In lengthy trials, weeks, months, and often years, of evidence are devoted solely to determining social activities, practices, relationships and motives of persons who lived in the 17th or 18th centuries.[6] This makes litigation with respect to Aboriginal and treaty rights unique, because there is no other area of the law where history and cultural history so determine the outcome.

> Much of the evidence presented in Aboriginal litigation comes from expert witnesses and testimony from Aboriginal witnesses, elders and community members, regarding oral traditions and the Aboriginal perspective. One of the greatest challenges to both lawyers and judges is the ability to approach and analyse this evidence, in particular these oral traditions, with respect and within context.
>
> The structure of the Canadian court system, with its adversarial focus, is generally completely foreign to the structure and presentation of indigenous oral narratives. On the other hand, indigenous histories, which are frequently circular rather than linear, general rather than specific and often focussed on a moral or spiritual message rather than a simple historical tale, can be very difficult to assess within the confines of the Canadian legal system. In fact, the very orality of these traditions can cause judges to question their validity and whether acceptance of the perspective within these narratives is "cognizable to the Canadian legal and constitutional structure" (*R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 49).[7]

---

[6] For instance, the *Victor Buffalo* case is an example of the scope of evidentiary issues in large Aboriginal cases. Prior to trial, there were 372 days of examinations for discovery, over 100 pre-trial conferences, and some 30 judicial decisions. In the first two phases of the trial, 62 witnesses were heard, including Elders, experts, a former Prime Minister and three former Ministers of DIAND. Some 14,632 documents were filed as exhibits, trial transcripts exceeded 53,000 pages and the two phases of trial lasted for 351 days. See also the judgment at trial in *Delgamuukw v. British Columbia*, (1991) 79 D.L.R. (4th) 185 at 199-200: "This has been a long trial ... A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "Word Spellers" to assist the Official Reporters were required for many witnesses; a further 15 witnesses gave their evidence on Commission; 53 Territorial Affidavits were filed; 30 deponents were cross-examined out of Court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the provinces' 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of Reply Argument were left with me during that stage of the trial."

[7] The Supreme Court of Canada emphasized, quoting *Sparrow*, that it is (at para. 49) "crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake". However, it also

That tension, between the Aboriginal perspective and 'what is cognizable to the Canadian legal and constitutional structure' is at the very heart of the continuing struggle of Aboriginal peoples to have their perspective, as enshrined in their oral narratives, understood and given value within the Canadian legal system.

The Royal Commission on Aboriginal Peoples, after hearing submissions from experts in oral history, commented on the need to evaluate cultural biases in accepting the written word over the spoken word. It stated:

> Oral history, linguistic analysis, documentary records and archaeological sources for the study of Aboriginal history are now regarded as complementary, with one source filling gaps in another source and thereby providing a more complete picture. ...
>
> Oral and documentary sources are often found to complement and confirm each other, giving weight in recent historical work to oral histories. However, when oral accounts are not substantiated by documentary records, they are much more likely to be challenged or dismissed in a culture that relies heavily on the written word. If oral accounts contradict the written record, the latter document is likely to be considered authoritative.
>
> Commissioners are aware that colonists making documentary records and Aboriginal historians transmitting oral accounts often perceived events from very different perspectives and conceived of very different purposes for the records they preserved and passed on. We reject the position that written documents of colonial society are, by definition, more reliable than oral accounts by Aboriginal historians.[8]

---

noted that "that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure". Similar observations were made in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

[8] *Report of the Royal Commission on Aboriginal Peoples*, Volume 1, "Looking Forward, Looking Back" (Ottawa: Communication Canada Group - Edition, 1996), Notes 4 at 40-41.

## B. Some Brave Attempts

In September of 2005 I was asked to address the Judges of the Federal Court at a National Judicial Institute Federal Court Education Seminar in Montebello, Québec. In preparation for the seminar, I polled a number of experts with whom I and my colleagues had worked in Aboriginal litigation. I thought then and still do that it was important to identify the particular nature of Aboriginal litigation, why in fact it is *sui generis* and to follow-up with some particular problems faced by litigants, litigators and experts in Aboriginal cases. The framework proposed to the judges looked somewhat as follows:

Three elements:

- *Sui generis* Nature of Aboriginal Litigation
- Some Problems for Litigators
- Possible Alternative Approaches and What the Court Might Do

**<u>*Sui generis* Nature of Aboriginal Litigation</u>**

- Interdisciplinary issues at stake;
- Cross-cultural and multicultural character of the issues;
- The importance of oral tradition histories;
- The evolving understanding of relevant and appropriate expertise;
- The extreme dependence upon historical analysis;
- The presence of complex linguistic issues;
- The challenges for valuation – historic claims, *sui generis* interest in land, the cultural importance of land, etc.

- A unique legal context with several legal systems applicable in any one case:

    - Aboriginal customary law;
    - Common law;
    - Constitutional law;
    - Civil law;
    - Federal common law;
    - International law;

**Some Problems for Litigators**

- The adversarial and winner take all nature of the process;

- Preparation of evidence to satisfy the Court while avoiding extraneous inquiry and expense;

- Shrinking pool of "willing" experts;

- The presence of "career" Court experts;

- Prohibitive cost of meeting the ever increasing "evidentiary burden" (almost inevitably borne by Aboriginal Plaintiffs);

- Management of documents:

    - Disclosure and production of historical/archival documents: is it a wasteful exercise – duplication of research, no context or analysis;
    - Should the Court consider and what weight should the Court give to documents that:

        . are not identified by experts;
        . are not contextualized by experts;
        . are not analysed by experts;

**Possible Alternative Approaches and What the Court Might Do**

- A code of ethics for experts;

- Rethinking the expert witness categories (e.g. how to classify Aboriginal Elders)

- Court appointed experts acting as "friends of the Court";

- Early identification and disclosure of potential experts;
- Early pre-trial Court involvement in structuring evidence;
- Require Case Management Conferences prior to commissioning expert evidence – to encourage or order:
  - Joint commissioning of evidence;
  - Collaboration of experts;
  - Peer review of Expert Reports;
  - Selection from a predetermined pool of experts;
- Require participation of experts prior to closing pleadings;
- The use of a panel of experts in Court to 'air' the issues;
- Collaboration of Parties' experts prior to preparing Reports;
- Collaboration of Parties' experts after Plaintiffs' Reports are filed;
- Collaboration of Parties' experts after preparation of Reports and filing of Plaintiffs and Defendants Expert Reports;
- Peer review of Expert Reports;
- Possible limited use of experts at the Appellate level;
- Education of the Judiciary in the methodology of diverse disciplines;
- Management of documents:
  - Disclosure and production of historical/archival documents: is it a wasteful exercise – duplication of research, no context or analysis;

    One Affidavit of Document we are working on has approximately 15,000 (?) documents;

  - Should the Court consider and what weight should the Court give to documents that:
    - are not identified by experts;
    - are not contextualized by experts;
    - are not analysed by experts;

I also provide some models and materials.

In making my suggestions to the Judges, I, of course, realize that the Rules of the Federal Court provide for pre-trial settlement discussions and conferences. (Rules 257-267) What I was suggesting is that lawyers being who they are and the adversarial process being what it is, the Court should perhaps have more specific rules or should consider incorporating more specificity into its practice. And, of course, central to this presentation was the role of the expert witness and how she or he might simplify rather than complicate the entire process.

Just to give some idea of costs of expert evidence in these trials, on the basis of the survey of the services of expert witnesses in proceedings in which our firm has been involved, the services of an expert inclusive of preparing a report and appearing at trial runs between $50,000.00 and $100,000.00. Experts required to perform more time consuming tasks such as archival research or interview work in communities run well over $100,000.00. These are people with not unreasonable per diem rates. It's just that the task is enormous, including producing extensive documentation, rebutting experts on the other side and often spending up to 3-4 weeks on the witness stand.

- **A code of ethics for experts**

I provided the Code of Practice for Experts as part of the material from the British Civil Procedure Rules. The Code is short and essentially includes what I believe we all understand to be the duties of experts. The question is whether it is worthwhile actually having a Code for Experts. My thoughts on this are that it might be useful in providing some independent guidance to experts and some distance from the parties instructing them.

- **Rethinking the expert witness categories (e.g. how to classify Aboriginal Elders)**

I believe that it is useful to give some thought to who should be considered an expert witness. One obvious example are Aboriginal Elders who are considered experts by their community and who are in the position to provide the Court with opinion evidence on oral traditions and their culture generally. This is important opinion evidence on the Aboriginal perspective.

An interesting example of a creative approach to who is appropriate as an expert witness was the judgment of Justice Teitelbaum within the *Victor Buffalo* proceedings on the matter of the admissibility of an Expert Report prepared by Prof. Douglas Sanders, a legal historian. Objections were raised that lawyers should not testify. However, Justice Teitelbaum found a legal historian could put legal events in historical contexts and, in doing so, assist the Court.[9]

Finally, there is the issue of experts with academic qualifications but no direct experience with Aboriginal communities or Aboriginal peoples. To what extent should they be considered "experts" qualified to provide opinion evidence on these communities.

- **Court appointed experts acting as "friends of the Court"**

Part 35 of the British Civil Procedure Rules although they do not appear to provide explicitly for court appointed experts, they do provide the power to direct that evidence be given by a single joint expert (paragraph 35.7) and the Rules also provide interestingly that an expert may request directions directly from the Court to assist them in carrying out his functions as an expert (paragraph 35.14).

[9] *Buffalo v. The Queen,* T-2-22-89, Order of Justice Teitelbaum, January 18, 2001.

The Quebec Code of Civil Procedure provides at article 414 the ability for the Court to designate an expert in order to investigate, verify or determine any fact relating to the case.

Some further issues discussed with the Judges were:

- **Early identification and disclosure of potential experts**
- **Early pre-trial Court involvement in structuring evidence**
- **Require Case Management Conferences prior to commissioning expert evidence – to encourage or order:**
  - **Joint commissioning of evidence;**
  - **Collaboration of experts;**
  - **Peer review of Expert Reports;**
  - **Selection from a predetermined pool of experts;**

- **Early Identification and Disclosure of Potential Experts**

These three following bullets address the matter of timing and in particular what I consider to be the advantage of early identification and disclosure of potential experts and early pre-trial court involvement in structuring evidence.

I suggest that there is a need for case management conferences prior to commissioning expert evidence in order to allow the Court the opportunity to influence the manner in which expert evidence is commissioned and how those commissions are fulfilled, to in effect coordinate the exercise. This could be very helpful in reducing costs and trial time.

The British Rules provide at paragraph 35.7 for joint commissioning of evidence. Where the Court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.

- **Require participation of experts prior to closing pleadings**

I included a suggestion that would require participation of experts prior to closing pleadings. This might seem common sense but is not always the practice. After pleadings are prepared, expert evidence must be commissioned to support the pleadings. As you can imagine, this might have a detrimental effect on the quality of pleadings and ensure a lengthy amendment process. It also risks presenting an expert with a predetermined view of the facts - historical, anthropological, linguistic, cultural or other. This suggestion was endorsed by the experts polled.

- **The use of a panel of experts in Court to 'air' the issues**

This bullet speaks of a use of a panel of experts. This, of course, is what Justice Learned Hand was suggesting over 100 years ago. The experts who I consulted were not unanimously enthusiastic about this approach feeling that it might favour aggressive or opinionated individuals – the good talkers rather that the good thinkers.

- **Collaboration of Parties' experts prior to preparing Reports**
- **Collaboration of Parties' experts after Plaintiffs' Reports are filed**
- **Collaboration of Parties' experts after preparation of Reports and filing of Plaintiffs and Defendants Expert Reports**

The suggestion that I believe is perhaps the most important in all of this is reflected in the preceding three bullets relating to collaboration of experts at various stages in the trial preparation. The experts consulted were unanimous in supporting this approach.

The collaborative approach appears prominently in the British Civil Procedure Rules primarily at paragraph 35.12:

35.12 Discussions between experts

(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to –

(a) identify and discuss the expert issues in the proceedings; and
(b) where possible, reach an agreed opinion on those issues.

(2) The court may specify the issues which the experts must discuss.

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing –

(a) those issues on which they agree; and

(b) those issues on which they disagree and a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

The Code of Guidance for Experts and those instructing them provides the purpose of this exercise as follows:

21.3 The purpose of all discussions between Experts, and the Experts' duty, is, wherever possible, to:

1) Narrow the issue in the case;
2) Reach agreement on any Expert issue;
3) Identify the reasons for disagreement on any Expert issue;
4) Identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.

Another example of a call for resolution of issues through meetings of experts is found in the Extract from the *Guidelines for the Rules of Practice for the Environmental Review Tribunal Government of Ontario*. Under Part V – Issue Resolution, the *Guidelines* states:

(a) The Tribunal expects that the witness will attempt to adequately address, well in advance of the Hearing, the concerns raised by other parties, in an effort to resolve issues, shorten the Hearing, and save time and expense.

(b) Witnesses for all parties should explore any other means of resolving areas of dispute among the parties. For example, witnesses are encouraged to meet with each other before the Hearing to attempt to reach agreement on technical and scientific facts and opinions, to clarify differences of opinion and to consider whether it is feasible and advisable to reduce disagreements or uncertainty by doing additional studies or obtaining additional information. Where a site inspection may assist the witness to provide more complete and useful information, the witness should make such an inspection.

The concept also is found in the Quebec Code of Civil Procedure at article 413.1.

- **Peer review of Expert Reports**

Similar to the panel of experts, the idea of the peer review of expert reports was not enthusiastically endorsed by the experts polled. The feeling was that this would simply introduce more confusion and would not help the Court.

- **Possible limited use of experts at the Appellate level**

I included the following bullet on the possible limit of experts at the appellate level simply to provoke some thinking on the matter. Of course, the idea would not be to repeat the trial exercise. That would contradict what I have been saying about cost, complexity and length of time. However, could experts be recalled by the appellate court to explain aspects of the evidence or provide guidance in the documentary record? It is perhaps worth considering.[10]

[10] This could be useful, even necessary, in the case of demonstrative evidence in the form of live "performance. Prof. Arthur Ray reports on a Metis trial where a Metis fiddler played to illustrate who the Metis were.

- **Education of the Judiciary in the methodology of diverse disciplines**

The final bullet, Education of the Judiciary in the methodology of diverse disciplines, is in my view very important and was a concept suggested by many of the experts polled.

It seems that Judges in Aboriginal litigation are being placed in a near impossible situation under present conditions. They need to be better prepared to look inside other cultures, other disciplines. They need to be able to cede at least some of this mediating to others – notably experts!

Prof. Arthur Ray, a geographer and historian who has testified many times in these cases was awarded the 2005 Bora Laskin Fellowship to examine what he calls Canada's biggest unresolved human rights issue – Aboriginal Land Claims. In the announcement of Prof. Ray's fellowship, Prof. Ray points out how complex Aboriginal litigation is making unrealistic demands on Trial Judges who must develop a PhD level of knowledge on the subject almost overnight and sort through many different points of view to make decisions about new historical facts.

Social Sciences and Humanities Research Council of Canada President Marc Renaud is quoted as saying:

> These decisions have real consequences: for the rights of Aboriginal people, for governments who sometimes pay millions of dollars in compensation, and for our understanding of Canadian history. The work of Prof. Ray will help us learn how we can reduce the potential costs of land claim disputes, both in terms of money and human dignity.[11]

We should remember the reaction of Justice Binnie in *Marshall* I in 1999 as he reviewed the criticisms from professional historians for what the historians see as an

[11] Social Sciences and Humanities Research Council of Canada (SSHRC), "Land Claims Too Costly for Some Aboriginal Groups," Press Release, SSHRC website, November 10, 2007: http://www.sshrc.ca/web/whatsnew/press_releases/2005/bora_laskin_e.asp

occasional tendency on the part of Judges to assemble a "cut and paste" version of history. Justice Binnie reacted as follows:

> While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.[12]

What we must do is provide the judicial process with the tools to seek at least within the parameters of a given case, a relatively stable academic consensus.

What I am proposing in effect is that the Bench, the Bar and other disciplines swept up in Aboriginal litigation work together to ensure that the judicial process as it applies in Aboriginal litigation become less adversarial and more professorial. Perhaps the dispute handed the judiciary can be resolved at least in part through one or more of the techniques for the mediation of the experts that I have proposed.

Following my presentation at Montebello, I was asked to join the Statutory Rules Committee of the Federal Court and subsequently its Sub-Committee on Expert Evidence. Based on this experience, I firmly believe that the Federal Court, as an institution, and many of its judges are very uneasy with the Rules and precedents being applied to, indeed imposed upon, Aboriginal litigation and are committed to reform. Aboriginal litigation is now on the agenda of the Statutory Rules Committee and certainly has been very much a focus at the Sub-Committee on Expert Evidence. In addition as many of you may know there exists a Federal Court – Indigenous Bar –

[12] *Marshall (No. 1)*, [1999] 3 S.C.R. 456 at para. 37.

Aboriginal Law Bar Liaison Committee that meets twice a year and brings together members of the Aboriginal Bar with members of the Court to discuss specifically Aboriginal litigation. I wish to particularly highlight the work of the Sub-Committee and the Liaison Committee as this is where Aboriginal litigation-specific discussion is taking place.

After study and discussion, the Sub-Committee will be recommending approaches for a more rational presentation of expert evidence before the Court.[13] I have been insisting that this is a particular problem in Aboriginal litigation from the standpoint of length of trial, costs, wear and tear on experts, Court understanding of the evidence and, very particularly, the treatment of Elders evidence which at the moment suffers from rather too much fuzzy direction and too little concrete comprehension and action.

Among the matters that are being considered by the Sub-Committee are rules dealing with the importance of getting experts from each side together well before trial to seek consensus or at least to identify points of agreement and points of disagreement with reasons. In my view, this could result in an enormous saving of trial time, expense and, quite frankly, confusion in our litigation area. Also being considered is a proposed Code of Ethics for Experts, essentially instructing them in their primary duty to the Court, their relationship with counsel and each other, and requirements for written and oral evidence.

Further work is required on other models for expert evidence including Court appointed experts, single experts, panels of experts, shadow experts, to name but a few.

Some matters specific to Aboriginal litigation are being referred first to the Federal Court Liaison Committee. Of course, the Liaison Committee has dealt with the use of experts and the results have been carefully noted by the Sub-Committee. Of particular importance it seems to me now is the matter of how oral traditions and

---

[13] I wish to acknowledge particularly the forward looking, approach and commitment to reform of Justice Anne Mactavish, Chair, Professor Janet Walker, Principal Technical Advisor and all the members and support personnel of the Sub-Committee.

generally evidence put forward by Elders or community representatives is to be characterized and treated. Personally, I believe that we should be seriously considering characterizing Elders evidence as expert evidence, but of a sui generis character, deserving specific rules. More particularly, I believe that evidence on indigenous law should be considered in a manner analogous to foreign law to be proved through an expert practitioner (i.e. an Elder). It should not be assumed that common law or civil law judges have the expertise to pronounce on these other legal systems without taking guidance from experts familiar with the legal system. I have raised this with the Sub-Committee and the Liaison Committee and the concept has met with interest, although the members feel that more discussion is required to allow First Nations representatives and practitioners in the area an opportunity to discuss the issues with members of the Court.

There are other matters under consideration at the Statutory Rules Committee including the use of summary trials and summary judgments that again seem to me to be potentially useful given the length and complexity of Aboriginal litigation. Surely individual issues can be identified, hived -off and put to the Court without a five year trial. This, of course, is already the case in BC, a model being closely examined.

Other matters being examined at the Statutory Rules Committee are: class action proceedings, the powers of prothonotaries, case management proceedings, and issues related to service, filing and certification of documents.

The Expert Evidence Sub-Committee has completed this phase of its work and will report to the Court and the Statutory Rules Committee with its recommendations. Although I am not free to distribute the Report of the Sub-Committee as it is being vetted within the Court, I can describe generally the reforms being suggested.

A number of concerns have been identified with respect to the traditional approach to expert testimony, not just in the Federal Court, but also in numerous other jurisdictions as well. One concern among them relates to the independence of expert

witnesses. The failure of expert witnesses and of some counsel to appreciate the role of the expert witness in the trial process can lead to experts taking on advocacy roles, thereby diminishing the reliability of their testimony, and thus the usefulness of that testimony to the trial judge. Another concern relates to the impact that expert evidence is having on the length of trials, and the commensurate increase in the cost of litigation for the parties.

The Sub-Committee has considered ways in which changes to the rules might address these concerns and others in order to make the process of using expert evidence more efficient and effective.

The Sub-Committee has recognized that one topic deserves mention: that is, the potential need for special provision to be made in relation to the adducing of expert evidence in Aboriginal litigation. This is because of the unique nature of Aboriginal litigation, and the type of ethno-historical evidence that is required in Aboriginal and treaty rights cases. Some of the concerns that have been raised by the Aboriginal Bar may be addressed through the various topics previously identified for discussion (i.e. experts, summary trials, document disclosure). Other concerns, however, such as the treatment of Elders and oral history, are unique to this area of the law. Since these issues are beyond the mandate and expertise of the Sub-Committee, the Sub-Committee will recommend that, in conjunction with the Aboriginal Liaison Committee, the Rules Committee consider whether further rules for Aboriginal litigation should be developed.

**Issues and Recommendations**

### Issue 1—*Recognition of the Duty of the Expert Witness*

Although there seems to be little doubt, in principle, that the role of the expert witness is to assist the court in providing an independent, unbiased opinion, in practice, the expert is retained and instructed by counsel for a party, and this may affect the expert

witness's appreciation of this role. One way in which jurisdictions such as the United Kingdom and Australia have sought to ensure that the expert understands this role is to require that counsel provide the expert with a clear statement of their role in the form of a Code of Conduct, and to further require that the expert agree to be bound by it.

The Sub-Committee will likely recommend that Rules be amended to include such a requirement, and that a Code of Conduct be included as a Schedule to the Rules. The Sub-Committee reviewed the Codes of Conduct from other jurisdictions, and developed a Code of Conduct that it felt would be suitable for expert witnesses providing reports for use in proceedings in the Federal Court.

### Issue 2—*Streamlining the Process of Qualifying Expert Witnesses*

To assist in streamlining the qualification process, and to identify situations where there are disputes as to whether a witness is qualified to testify as an expert in a particular area, the Sub-committee recommends that the Rules also require that the expert witness's proposed area of expertise be identified at the time that the witness's report is delivered, and that the Rules stipulate that a copy of the expert's curriculum vitae is to be delivered with the report.

In addition, the qualification of experts may be streamlined further by requiring the parties to make any objections they might have to the experts proposed by opposing parties earlier in the process. This may be achieved by requiring the parties other than the requisitioning party to include any objections it may have to the requisitioning party's proposed experts in the pre-trial conference memoranda, and by requiring the requisitioning party to make any objections it may have to the responding party's proposed experts at the pre-trial conference.

### Issue 3—*Contents of the Expert's Report*

Another identified concern related to the expert's role is the apparent uncertainty of some experts, and counsel alike, as to the information that must be supplied by an expert in providing a report, in order to ensure that the testimony will be of assistance to the Court. For example, some expert reports are tendered without the expert's qualifications or without any identification of the expert proposed area of expertise. In the case of a report tendered in this way, it is not possible to determine whether the expert is qualified to provide an opinion.

In the jurisdictions in which Expert Witness Codes of Conduct have been introduced, these Codes of Conduct have contained a list of the contents of the Expert's Report to ensure that the expert is aware of what must be submitted in providing a report. The Sub-Committee has reviewed the lists used in these other jurisdictions and developed a list suitable for expert witnesses providing reports for use in proceedings in the Federal Court.

### Issue 4—*Requiring Expert Witnesses to Confer with One Another in Advance of Trial*

In *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996), Lord Woolf advocated introducing the requirement that expert witnesses meet in advance of trial, in order to narrow the issues for trial, and to encourage settlement. Following such a meeting, the experts may provide a written statement identifying the areas of agreement and disagreement for use at the trial, thereby shortening the length of the trial.

The concern has been raised that expert conferencing may cause additional expense and delay, and may be resisted by lawyers: see, for example, Michell and Mandhane, *The Uncertain Duty of the Expert Witness*, (2005) 42 Alta. L. Rev. 635, at

para. 78. As a result, the Sub-Committee was of the view that this process should be subject to the discretion of the Court. Nevertheless, the BC Justice Review Task Force's Proposed New Rules of Civil Procedure for the Supreme Court of British Columbia presumes the use of Expert Conferencing and includes the presumptive requirement that experts meet without counsel present as well as the presumptive requirement that these conferences be treated as privileged. The following is an excerpt from the new rules proposed for British Columbia:

> *Rule 8-3 – Appointment of Own Experts*
>
> *(3) Experts to confer—Unless the court otherwise orders, if 2 or more reports are delivered under subrule (2) in relation to the same issue, the experts who prepared those reports must confer and must, at least 35 days before the date scheduled for trial, produce and sign a statement setting out the points of difference between or among them.*
>
> *(4) Lawyers not to attend—Unless the court otherwise orders, the experts must confer and produce their statement under subrule (3) without participation of the parties or their lawyers.*
>
> ....
>
> *(7) Privilege— Except for the statement referred to in subrule (3), evidence of anything done or said or of any admission made at the conference referred to in that subrule is not admissible at a trial of the action unless the experts and all parties to the action agree.*

Whether the absence of counsel will foster the independent exercise of judgment by an expert is not entirely clear. This possibility needs to be weighed against the potential for the relative force of the experts' personalities to skew the outcome in a face-to-face meeting. Over time, this could in turn lead to a change in the approach taken to selecting experts. It remains to be resolved, therefore, whether specific provisions for experts' conferences held in the absence of counsel are necessary or whether it is sufficient simply to admonish experts in the Code of Conduct to maintain their independence when conferring with one another as directed by the Court.

Accordingly, the Sub-Committee will likely recommend that the possibility of expert conferencing be included among the subjects that parties are required to address at Case Management, Pre-Trial and Trial Management conferences.

The Sub-Committee will likely further recommend that orders that expert witnesses meet in advance of trial be added to the directions that the Court may make in respect of expert evidence, including, where appropriate, that the experts confer without counsel present, that the experts confer in the presence of a prothonotary or another judge, and that the communications be treated as privileged. In addition, the need for experts to maintain their independence in the course of expert conferencing should be recognized explicitly in the Code of Conduct.

Of course, to the extent that expert conferencing becomes a familiar part of the results of Case Management, Pre-Trial and Trial Management conferences, it is to be hoped that the parties themselves will anticipate this eventuality, and initiate the process voluntarily well in advance of the Pre-Trial conference.

### Issue 5—*Assessors, Court Appointed Experts and Single Joint Experts*

The United Kingdom, Australia and British Columbia have all implemented changes to their rules dealing with court-appointed single joint experts. The aim of these changes is to reduce the costs associated with the calling of multiple experts, as well as to address the issue of lack of objectivity on the part of expert witnesses. Most of these changes are relatively recent, and thus little in the way of a 'track record' has been established to see how the rules have been working. Moreover, it should be noted that these rules have been the subject of some controversy as they fit awkwardly into a system of party prosecution in which the parties have the main responsibility for defining the issues and establishing the record.

Rule 52 of the current Federal Courts Rules provides that the Court may appoint an assessor to assist the Court in understanding technical evidence or to provide a written opinion in a proceeding. This Rule has not been used frequently, but it would appear to serve a similar function to rules providing for court appointed experts. Assessors and court appointed experts assist the Court directly, and not primarily as guided by counsel in counsels' prosecution of the case or defence. Although assessors do not testify at the trial, where an assessor's view of the evidence could influence the outcome of the trial, it is likely that that view would be put to counsel for comment.

Given the similarity between assessors and court appointed experts, the Sub-Committee will likely not propose to introduce new provisions for court appointed experts. Instead, the Sub-Committee may well recommend that, where appropriate, greater use should be made of Rule 52 in the appointment of Assessors.

In contrast with the court-appointed expert is the expert that the parties select and retain jointly. The Sub-Committee felt that this option for the parties may be desirable and that it would be helpful to make it explicit in the Rules. Accordingly, the Sub-Committee will likely recommend that Rule 52 be amended to distinguish between Assessors in Rule 52, and Experts, including single joint experts, in Rule 52.1.

### Issue 6—*Application of the Rules Governing Expert Witnesses to both Actions and Applications*

Expert witnesses regularly provide evidence to the Federal Court in both actions and applications. As a result of the structure of the Federal Court Rules, a number of the rules governing expert witnesses are found in Part 4, which provides for procedure in Actions. It is felt that where appropriate, these Rules should also apply to the procedure for expert witnesses in Applications.

## RETHINKING THE CONCEPT OF EXPERT WITNESSES

### A. Admissibility of Expert Evidence

Undoubtedly one of the most important pieces of work in progress is the issue of the treatment of Aboriginal Elders evidence before the Courts and no less important the treatment of the Elders themselves. As stated above, I and other members of the Aboriginal Bar have been pressing for a consideration of Elders as *sui generis* experts in many cases pronouncing upon and indigenous law foreign to Canada's common law and civil law traditions. I am not forgetting, of course, the discussion in many decisions of the Supreme Court of Canada on the doctrine of continuity and the survival of indigenous law and indigenous legal orders.

The traditional rule excluding opinion evidence was described by Major J. in *R. v. D.(D.)*:

> A basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved.[14]

The Courts have recognized an exception to the general rule excluding witnesses from testifying as to their opinions by allowing expert witnesses to give opinion evidence.

The test for whether the testimony of an expert witness is admissible is set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. The four criteria for the admission of expert evidence are: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert.

---

[14] *R. v. D.(D.)*, [2000] 2 S.C.R. 275 at para. 49.

It is relatively rare for judges presiding over cases involving Aboriginal or treaty rights to rule against the admission of expert evidence. Usually weaknesses in the expert evidence will be determined by the weight accorded to it. Of the four *Mohan* criteria, 'necessity in assisting the trier of fact' appears to be the criterion under which expert evidence in Aboriginal litigation has been ruled inadmissible by the Courts.

In *Mohan*, the Court concluded that to meet the test of necessity (at p. 23): "what is required is that the opinion be necessary in the sense that it provide information 'which is likely to be outside the experience and knowledge of a judge or jury,'" as quoted by Dickson J. in *R. v. Abbey*". Why would this not apply to Aboriginal evidence?

## B. Are Aboriginal Witnesses Experts?

There has been little case-law on the issue of the qualities sought by the Courts in Elders and other community witnesses who testify on oral tradition. This is an area where one culture, that exemplified by the Court, is judging the culture of another, that of the First Nation. It is logical to presume that the authoritativeness of an Elder who testifies on oral tradition must be determined on the basis of the culture of that Elder.

It is clearly preferable that Aboriginal witnesses who testify on oral traditions and histories be able to demonstrate to a court that they have authority to testify, either because they were raised within the traditions, or because they are recognized as holders of traditional knowledge within the community.

We submit that it is high time for our legal system to reconsider the characterization of expert evidence and who may tender such evidence. While the Supreme Court continues to direct that the Aboriginal perspective is important and must be considered by the Courts, the people most equipped to provide that perspective and to instruct the Courts are still labeled "lay witnesses" while scholars often from another culture are considered the "experts".

Justice Sopinka in his work on evidence provides us with some hope. He writes:

> Dickson J., as he then was, in *R. v. Graat* all but did away with the illogical distinction between so-called fact and opinion, where the witness's testimony is founded on personal knowledge.
>
> He pointed out the numerous exceptions to the opinion rule that had developed and concluded: 'Except for the sake of convenience, there is little, if any, virtue in any distinction resting on the tenuous and frequently false antithesis between fact and opinion. The line between fact and opinion is not clear.'
>
> Courts now have greater freedom to receive lay witnesses's opinions if:
>
> (1) the witness has personal knowledge;
> (2) the witness is in a better position than the trier of fact to form the opinion;
> (3) the witness has the necessary experiential capacity to make the conclusion; and
> (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately, and with reasonable facility describe the facts she or he is testifying about.
>
> But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops."[15]

Perhaps two judgments dealing with the issue and decided twenty years apart also indicate some progress.

An example of a case in which the judge questioned the authority of a member of a First Nations community to give oral tradition evidence is the trial decision in *A.G. Ontario v. Bear Island* (1984) 15 D.L.R. (4th) 321, a case that pre-dates *Delgamuukw* by a number of years. The judge questioned whether the community member who had testified as to the oral traditions and history of the Teme-Augma Anishnabe was the best source for the traditions. The reasons in the trial judgment in *Bear Island*, as they relate to oral history, are inconsistent with the reasons in *Delgamuukw* and have, therefore, been

[15] Sopinka, *Law of Evidence in Canada*, at p. 607

superseded. However, it is clear that the judge in that case was uncomfortable with the fact that oral history was given principally by only one witness from the community (who had learned the oral history as an adult) even though the persons from whom the witness had learned that history would have been able to testify.

In a more recent case before the British Columbia Supreme Court, *Tsilhqot'in Nation v. British Columbia*, 2004 B.C.S.C. 1022, both defendants Canada and B.C. had objected to the admissibility of various oral history evidence tendered by the plaintiffs. In particular, objections were raised regarding the evidence of Chief Roger William, in part based on the fact that he was not recognized as an elder and had not consistently led a traditional life. Vickers J. ruled that Chief William's oral history evidence was admissible, pointing to the fact (at para. 23) that "the people who had taught him the legends, stories and traditional living were respected people in the community" and that "he was an elected councillor and has been re-elected four times as Chief of the Xeni Gwet'in. He is a well respected person in his community."

Also encouraging are Chief Justice Lamer's rejection in *Delgamuukw* of the trial judge's findings on the matter of oral histories (they did not accurately convey historical truth, knowledge of them were confined to the communities whose histories they were and they were insufficiently detailed (para. 98)) and Chief Justice McLachlin's endorsement in *Mitchell v. M.N.R.* of Chief Mitchell's testimony (it was "especially useful because he was trained from an early age in the history of his community" (para. 35)) and the trial judge's assessment of Chief Mitchell's testimony as credible (he "did not err in doing so and we may do the same" (para. 35)).

There have been many voices in the courtroom promoting this approach and those voices are beginning to be heard and understood. It is counsel's important responsibility to ensure that Aboriginal voices continue to be heard, that Courts be instructed in what they are hearing in those voices and that there be available to the Court representatives of the academy capable and ready to explain the true nature of their respective disciplines and the connections between those disciplines.

The Supreme Court has repeatedly affirmed that Aboriginal cases cannot be decided in a factual vacuum and have denied claims on the basis of insufficient evidence to meet its tests. With respect, the rethinking of those tests is an urgent affair which can be assisted and accelerated by appropriate evidence being put in at trial and by sensitive treatment of that evidence by trial judges. That wisdom will surely find its way to the top.