



FEDERAL COURT

**FEDERAL COURT ~ ABORIGINAL LAW BAR
LIAISON COMMITTEE**

**ABORIGINAL LITIGATION
PRACTICE GUIDELINES
NOVEMBER 5, 2009**

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PART I - PREAMBLE

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. 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, *Liaison Committee* participants have discussed numerous issues relevant to aboriginal litigation:

- lack of dialogue
- repeated amendments to claim / defence
- excessive documentary evidence
- minimal or no pre-trial disclosure of oral history evidence
- insufficient notice of expert witness qualifications
- inconsistent approach to recognition of Elders
- adversarial process
- adaptation of judicial process to cross-cultural context
- delay & cost

Although this first edition of the guidelines is focussed on *actions*, many recommendations may be equally relevant to *applications*. Parties and their legal counsel are encouraged to draw from the recommendations where they are found to be helpful. The guidelines shall be updated with the benefit of further deliberations by the committee and additional experience as a litigation reference tool. Upon completion of this first edition, the committee continues its work with a focus on litigation practice issues involving oral testimony and the role of Elders, expert evidence, trial management, and applications for judicial review.

Feedback & Compilation of Litigation Best Practices

Comments, suggestions and experience with these Practice Guidelines are welcome and may be sent either to the member organizations or else to the Secretary of the Committee:

Executive Officer, Federal Court
media-fct@fct-cf.gc.ca
(613) 947-3177

The *Liaison Committee* aims to capture best practices for all stages of litigation 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 either for inclusion in a future annex to this Practice Guidelines or else as a stand-alone on-line resource.

PART II - FLEXIBLE PROCEDURES

As a superior court of record established under section 101 of the *Constitution Act, 1982*, 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 reach 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.

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.

PART III - PRACTICE RECOMMENDATIONS

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 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*¹ 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 electronically²

3. Case Management

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 may be of assistance in aboriginal law matters.

Case Management Procedure

- 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.³ The letter should address the following issues:

¹ For example, where negotiations between the parties are on-going.

² For more information, see: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing

- the reasons for which immediate case management is required, under Rule 3
 - 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.
- 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, including 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;

³ 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.

- (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.

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) scheduling framework for:
 - amendment to pleadings and filing of a defence
 - pre-trial discovery
 - any other procedural issues that parties anticipate will require determination by the Court
- (b) identification of issues for trial(s) or summary disposition
 - Consider whether:
 - (i) one or more issues may be resolved by summary disposition;⁴
 - (ii) the trial should be split into phases (i.e. presenting evidence and argument by issue rather than presenting the case in the conventional format); or
 - (iii) formal severance of one or more issues in the action is appropriate – Rule 107
 - If the case is heard in phases and where the nature of the facts and issues permits, consider:
 - (i) whether the judge sitting on Phase 1 is seized of any subsequent phases, particularly where there is a delay contemplated between phases;
 - (ii) whether judgment will be rendered after each phase or following the entire trial; and
 - (iii) if the former, whether judgment on each phase may be appealed and whether the remainder of the action may be stayed pending the outcome.
 - 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.
- (c) possible use of dispute resolution services available under the Rules, including:
 - 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)
 - mini-trial – Rule 387(c)
 - stay of proceedings pending alternate means of dispute resolution – Rule 390
 - review of a request, if any, by a party for assignment of a judge or prothonotary with specific mediation and / or cross-cultural experience
- (d) pre-trial discovery - discovery of documents
 - possible agreement by counsel to limit the scope of document disclosure (from that established by the *Peruvian Guano* test),⁵ or to seek a Court order to this effect, having

⁴ See Rule 213.

⁵ 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

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

- 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 example⁶
- 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

(e) pre-trial discovery - examinations for discovery and interrogatories

- time-line for examinations
- consent of the parties or leave of the Court is required to permit discovery to be conducted both by written interrogatories and oral examination⁷

(f) document management

- protocol for electronic exchange of discoverable documents between the parties⁸
- parties are encouraged to file documents electronically⁹

(g) scheduling experts

- 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 below)
- Limitations on availability should be communicated to Court at the pre-trial conference.

(h) scheduling of trial date

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:

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.”

⁶ See Rule 230.

⁷ See Rule 234(1).

⁸ 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](#).

⁹ For more information, see: http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/E-Filing

- (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 A)
 - abbreviated style of cause
 - short description of motion / document

- (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
 - whether the hearing could proceed in different locations, both on the land and in the city
 - 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, though noting 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 taking a view – 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. In particular, 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.
- (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 should 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

ANNEX A – 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 <u>The Crown (Defendant)</u>
This Document Filed By <u>The Crown (Defendant)</u>

FEDERAL COURT

BETWEEN:

(NAME OF PLAINTIFFS)

Plaintiffs

- and -

(NAME OF DEFENDANT)

Defendant

WRITTEN REPRESENTATIONS OF (NAME OF PARTY)
