THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

August 22, 2008

François Giroux
Secretary of the Rules Committee
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Mr. Giroux:

Re: Discussion Paper – Expert Witnesses

I am pleased to write you on behalf of the Federal Bench and Bar Liaison Committee with respect to the Federal Court of Appeal and Federal Court's Rules Committee discussion paper on expert witnesses.

The Federal Bench and Bar Liaison Committee has played a coordinating role in distributing the consultation paper to interested National Sections representing various areas of law and organizing the responses. Some of the National Sections with a presence in the Federal Court expressed interest in the consultation but as they did not often utilize experts (for example, the Citizenship and Immigration Law Section), they were content to have the Canadian Bar Association's response confined to those Sections more directly interested.

Accordingly, the CBA's Aboriginal Law and Intellectual Property Sections wished to communicate their feedback to the Rules Committee. The submission of the Aboriginal Law Section is enclosed. The Intellectual Property Section has reviewed the submission of the Intellectual Property Institute of Canada (IPIC), and endorses the submission as reflecting the views of the Intellectual Property bar. A copy is attached for your ease of reference. You will note variations between the IPIC submission and that of the Aboriginal Law Section. In our view, these are differences in nuance, reflecting the unique practice issues relating to these two areas of law in the Federal Courts.

We trust that our feedback will be helpful to the Rules Committee, and we thank you for the opportunity to contribute to its work.

Yours truly,

(Original signed by Kerri A. Froc for Simon Barker)

Simon Barker
Chair, Federal Bench and Bar Liaison Committee

500–865 Carling, Ottawa, Ontario, Canada K1S 5S8
tel/tél. : 613.237.2925 toll free/sans frais : 1.800.267.8860 fax/téléc. : 613.237.0185 info@cba.org www.cba.org

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Expert Witnesses in the Federal Court

NATIONAL ABORIGINAL LAW SECTION
CANADIAN BAR ASSOCIATION

August 2008

500-865 Carling, Ottawa, Ontario, Canada K1S 5S8
tel/tél. : 613.237.2925 toll free/sans frais : 1.800.267.8860 fax/téléc. : 613.237.0185 info@cba.org www.cba.org

TABLE OF CONTENTS

Expert Witnesses in the Federal Court

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

Expert Witnesses in the Federal Court

I. INTRODUCTION

The Canadian Bar Association's National Aboriginal Law Section (CBA Section) is pleased to offer its initial response to the Federal Court Rules Committee Discussion Paper on Expert Witnesses. We realize that the Rules Committee has attempted to fashion rules or practice guidelines for all the practice areas appearing before the Federal Court. The comments and concerns we outline are to some extent related to evidentiary peculiarities of our particular area of practice, Aboriginal law.

In that context, we agree that Aboriginal litigation, a significant component of Federal Court practice, raises the potential "for special provision to be made in relation to expert evidence".[1] The appropriate treatment of Aboriginal elders and use of oral history testimony are ongoing issues for the Federal Court. As the Discussion Paper recognizes, some of the proposed requirements and presumptions for approaching expert witnesses may require further specific consideration in regard to the testimony of Aboriginal elders. For example, a binding code of conduct might unnecessarily constrain Aboriginal elders as expert witnesses, preclude them from being qualified as experts, or mean that some experts unused to the court process, such as Aboriginal elders, would be less willing to participate.

A. Issue 1 – Recognizing the Duty of Expert Witnesses

The CBA Section supports the idea of a code of conduct for expert witnesses obliging an expert to assist the court impartially, and agrees that this duty should override any duty to a party in the proceedings.

---

[1] See "Background" of the Discussion Paper, at 1.

However, the proposed restriction, that an expert witness "is not an advocate for a party", may be problematic. For example, an Aboriginal expert in linguistics or traditional hunting, trapping or other practices may also be a member of a particular Aboriginal nation and have a sense of representing that nation. The restriction could lead to extensive cross-examination and even criticism of the witness, and inappropriately impede the expert witness from being recognized as such if that witness also represents the Aboriginal party before the court.

Experts' duties when testifying are already qualified by certain professional ethical duties. For example, the American Anthropological Association's Code of Ethics states:

> Anthropological researchers have a primary ethical obligation to the people, species and materials they study and to the people with whom they work…
>
> Anthropological researchers must do everything in their power to ensure that their research does not harm the safety, dignity, or privacy of the people with whom they work, conduct research, or perform other professional activities…[2]

An expert would not usually be dismissed as an 'advocate' of a party simply because that party happens to be the community with which that expert works and owes ethical duties. This is particularly so when these ethical duties have led to a relationship of trust which has allowed the expert to gain the knowledge to be shared with the court.

We also do not support the suggestion that an expert witness must agree to be bound by a code of conduct before giving evidence. Retaining an expert can be difficult in any case, and to require the expert to be bound in advance by a code of conduct could make experts, and especially "non-professional" experts (i.e. those who do not normally testify in court) more reluctant to testify.

---

[2] June 1998, see: http://www.aaanet.org/committees/ethics/ethcode.html

The CBA Section suggests that any code of conduct would best be considered as a guideline, rather than as binding. Experts would be expected to generally follow the code of conduct to the extent possible given the particular circumstances and the opinion report being provided. They would be alerted to the likelihood that they would be cross-examined on whether they complied with the code of conduct. Any issues of enforcement arising from non-compliance with the code could be left to the discretion of the trial judge. This approach would also provide greater flexibility and address some concerns regarding Aboriginal experts who provide expert evidence on matters relating to language, traditional knowledge or Aboriginal practices.

B. Issue 2 – Streamlining the Process of Qualifying Expert Witnesses

The CBA Section supports the recommendation that the Rules of Court be amended to direct experts to set out their proposed area of expertise in an affidavit or statement, with a copy of their *curriculum vitae*, where appropriate. However, this direction should not be an absolute prerequisite, as Aboriginal elders may not have formalized documentation. The amended rule could avoid this problem by stating simply, for example, that "a *curriculum vitae* shall be provided, if available".

We also agree with the proposal that challenges to qualifications could be made at pre-trial conferences, as this would avoid delay during the course of the trial.

C. Issue 3 – Content of Expert Reports

Different experts formulate their reports based on their own professional background or expertise, and this should be recognized. We generally support the proposed list in the Discussion Paper on the appropriate content of expert reports, with two qualifications.

First, an expert should not be required to list "any issues that fall outside the expert's field of expertise". That list could be very long and, if not entirely inclusive, the expert may be subject to needless and extensive cross-examination on what is or is not appropriately

included. To avoid violating the Rules of Court, experts may be reluctant to be brief, resulting in unnecessarily lengthy reports.

Second, the reference to "any literature or other material specifically relied upon in support of the opinions" should clarify the application of the word "specifically". Of course, many experts rely on years of background research and work in a particular field. In our view, the word "specifically" should relate to material relied upon in the particular opinion report provided. Any amendment to the rules should clarify that the intent is not to restrict experts from relying on years of experience in the field or familiarity with other scholars or opinions.

D. Issue 4 – Requiring Experts to Confer with One Another in Advance of Trial

The CBA Section does not support the suggestion that expert witnesses be required to confer with one another before trial. The Discussion Paper seems to contemplate the litigation as being directed by the party bringing the action and by the defense, which is not typical. Narrowing issues for trial could better be addressed between the parties at case management conferences, and the court could encourage or even sometimes require experts to meet with the court on how to frame the issues. A case management judge can discuss with the parties whether it is appropriate for experts to meet in advance to narrow the issues for trial.

Meetings may well be appropriate for experts such as actuaries or economists, for example. In other areas and particularly in the context of Aboriginal law, experts often have diametrically opposed views and methodologies. The trial court can benefit from seeing the very different interpretations of history, archaeology or anthropology, where those differences are critical to the relevant issues.

In regard to specific points raised under point #4:

(a) Provision should be made to direct expert conferences in appropriate cases and after consultation with counsel for the parties;

(b) Such conferencing should only be ordered at the discretion of the court, after taking into account the position of the parties as to its benefit

It is a positive development to suggest that parties should consider the value of experts conferring at case management, pre-trial and trial management conferences. However, an automatic requirement for experts to meet if both parties agree it is fruitless will only increase, rather than decrease, the costs of litigation.

E. Issue 5 – Assessors, Court Appointed Experts and Single Joint Experts

An amendment to the Rules of Court enabling parties to nominate a single joint expert in appropriate circumstances is reasonable. It is important for the parties to assess this possibility though, rather than being required to so nominate by the court.

Further study might also be given to the use of Aboriginal "assessors" to understand oral history traditions evidence.[3] Federal Court Rule 52 provides for assessors to "(a) assist the Court in understanding technical evidence; or (b) provide a written opinion in a proceeding." To the extent that oral traditions evidence requires an understanding of a particular knowledge system, that evidence might be seen as "technical", perhaps requiring additional dialogue between a judge and someone familiar with this knowledge. The assessor could be an Elder or another community member with knowledge of oral traditions.

Professor John Borrows advocates greater participation of Aboriginal people in the interpretation of their own oral traditions before the courts. The assistance of Aboriginal Elders and other Aboriginal community members could help judges appreciate the unique cultural context underpinning oral traditions evidence. Borrows states:

> Unless Aboriginal peoples more strongly participate in the future interpretation of these narratives in the Canadian judicial system, the process and purpose of Aboriginal oral history may not be appropriately accommodated, despite the best efforts of the judiciary. This loss might occur for Indigenous peoples because the language and culture of law will not really be their own, as the legal

---

3 This idea is reviewed in greater detail in "Discussion Paper on the Role of Elders and Oral History Evidence in the Courts" (Ottawa: CBA, October 2007) at 24-25.

> interpretation of their traditions and history is centralized and administered by non-Aboriginal people. [4]

F. Issue 6 – Applications of the Rules Governing Expert Witnesses to Both Actions and Applications

Rules of Court governing expert witnesses should not apply to applications, which ideally should be short and direct. The Chief Justice has indicated that having applications heard and resolved more quickly are among the court's goals. If rules relating to experts and requirements for disclosure are to apply to applications, it is likely to instead make applications more time consuming and more costly.

G. Issue 7 – Status of Treating Physicians

Difficulties have arisen in litigation in some provincial superior courts when treating physicians provide both treatment and expert opinion evidence. We agree that the rules should be amended to provide for that special status. Recognition of dual roles in this context could also provide some guidance for Aboriginal elders providing expert evidence, as previously discussed

H. Issue 8 – Need for Cross Examination

In our view, Rule 279 adequately addresses this issue, and further change is not required. The court may already order that a party is not required to tender the expert witness for cross-examination. This issue should be addressed by the parties at case management conferences before the trial, specifically after delivery of the expert opinion reports and their exchange between the parties. Rule 400(3)(i) and (j) can also be applied to address the possibility of unnecessary and lengthy chief and cross-examinations in a cost award. Making this unnecessary change could suggest that something more than what already exists is intended. This could lead to more confusion about the onus of showing whether or not an expert is expected to testify. Vigorous use of the case management process should allow the court to address this in particular cases.

---

4 John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall L.J. 1 at para. 37.

I. Issue 9 – Panels of Expert Witnesses: Hot-Tubbing

Although it may be that the use of panels of expert witnesses ("hot-tubbing") is appropriate in certain other areas of law, it would generally not be a positive development in Aboriginal law. Often, the court cannot assess the importance and complexity of different expert opinions until the evidence is actually heard. Further, the trial judge's determination of the facts and acceptance of the facts and opinions heard carries significant consequences, including being relied upon by appellate courts.

We suggest that in Aboriginal litigation and possibly in other areas of litigation as well, expert panels should only be ordered with the consent of all parties.

J. Issue 10 – Limiting the Number of Experts

Parties already have a right to call five expert witnesses under the *Canada Evidence Act* and so the exercise of discretion is only appropriate in limiting the number of expert witnesses called to testify in excess of the five allowed as a right. Still, it may be helpful to have an explicit direction in the rules to limit the number of experts a party may call to testify and to expand the number of experts allowed in appropriate cases. We agree with the factors suggested in the Discussion Paper for consideration of such requests.

II. CONCLUSION

The CBA Section appreciates the opportunity of providing these initial comments, and trusts that they will be of benefit to the Rules Committee. We look forward to further engagement in this discussion as the Rules Committee continues its consideration of the role of experts before the Federal Court.