

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850
Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties

Court File No. 2001 - 0673

AND BETWEEN:

THE CHIEF and COUNCIL OF RED ROCK FIRST NATION, on behalf of the RED ROCK FIRST NATION BAND OF INDIANS, THE CHIEF and COUNCIL of the WHITESAND FIRST NATION on behalf of the WHITESAND FIRST NATION BAND OF INDIANS

Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and the ATTORNEY GENERAL OF ONTARIO as representing her Majesty the Queen in Right of Ontario

Defendants

ORDER
(Procedure for Taking Elder Evidence)

THIS REQUEST, made by the plaintiffs in the *Restoule, et al v. Canada, et al* action, for the adoption of a protocol based on Part III D. of the Federal Court of Canada's "Practice Guidelines for Aboriginal Law Proceedings (April 2016).", in order to facilitate the presentation of Aboriginal Elders' evidence in keeping with the Court's requirements and in recognition of Aboriginal sensibilities, was discussed over the course of several case management conferences including the conference that occurred in Toronto on September 22, 2017;

AND ON HEARING THE SUBMISSIONS OF COUNSEL for the parties, including submissions in connection with specific practices suitable for the Elders who the plaintiffs anticipate will testify in these proceedings, and in response to the Court's suggestion that such a protocol, if adopted, be made the subject of a formal Order;

AND ON BEING ADVISED OF THE CONSENT OF THE PARTIES;

THIS COURT ORDERS that the hearing of Elder testimony during the summary trial that commenced on September 25, 2017 shall be guided by the Elder Protocol attached to this Order as Appendix 'A', which is based on Part III D. of the Federal Court of Canada's "Practice Guidelines for Aboriginal Law Proceedings (April 2016)", with the underlined text denoting specific practices that shall apply to the hearing of Elder testimony in these proceedings;

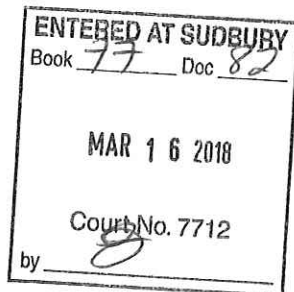
THIS COURT FURTHER ORDERS that this Order and the attached Elder Protocol are intended to guide the Court and the parties with respect to appropriate procedures applicable to the hearing of testimony from Aboriginal Elders in these proceedings, but shall have no bearing on the substance, weight or reliability of such testimony with respect to matters in issue;

THIS COURT FURTHER ORDERS that this Order may be spoken to by the parties and amended by the trial judge at any time;

THIS COURT FURTHER ORDERS that there be no costs of this motion.


The Honourable Madam Justice Patricia C. Hennessy

Date: March 15, 2018



APPENDIX 'A'

ELDERS' PROTOCOL FOR *RESTOULE ET AL. V CANADA AND ONTARIO* (Court File Nos. C-3512-14 & C-3512-14A)

As Per Case Management Conference, September 22, 2017

The Protocol is adapted from the Federal Court Practise Guidelines for Aboriginal Court Proceedings, Part III D. Specific Application to this case is in Highlighted Text.

1. Preamble

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

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

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

2. Guiding Principles

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

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

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

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

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

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

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3. Calling an Elder to Testify

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

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

4. Questions of Admissibility of Elder's Testimony

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

5. Preliminaries to Elder Testimony and Oral History

(a) Disclosure

The party calling an Elder to testify should provide information about the Elder and the basis of his or her knowledge about the subject matter of the testimony. Given the differing dynamics and logistical issues that may be associated with having an Elder testify, this disclosure need not necessarily coincide with document disclosure as long as it is timely.

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

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

Where issues arise between parties over the adequacy of the disclosure, the parties should seek assistance through case management or trial management for a direction or ruling on the disclosure to be provided and its timing. Without compromising its own role in the judicial process when addressing such issues, the Court will be sensitive to the role of each Elder within the community, and legal counsel for each party are encouraged to be similarly sensitive in this regard.

(b) Consultation

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

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

The Elders in this case welcome an opportunity to consult with counsel for all parties and the court in a case management process in advance of the date scheduled for hearing the Elder testimony.

6. Commission Evidence

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

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

Such evidence is usually taken *de bene esse*, and the general rule is that the commission evidence will be disregarded if the witness is available at the time of trial. However, the parties may apply to the Court to use the recorded evidence where both parties have had opportunity to participate in the taking of commission evidence and sufficient reason exists for not requiring Elders to testify twice.

7. Protective Measures when Warranted

If the Aboriginal oral history evidence to be tendered at trial contains sensitive or confidential information, the party tendering such evidence may consider an application to Court for measures that may be required to maintain confidentiality or ownership of the information.

The *Rules* provide for handling of confidential material.

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

8. Demonstrative Evidence

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

In this case, the Elders may have their Sacred Pipes and Drums. The Chiefs who will be giving evidence have also indicated that they will be wearing their ceremonial Headdresses.

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

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9. Special Hearing for Receiving Elder Testimony

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

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

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

Aspects of the procedure for a special hearing may be worked out in the case management process or in the trial management process. The approach adopted by Justice Vickers in the *Williams* Order may be a guide but must be informed by the requirements of the Elders and the Aboriginal community involved. There is not one standard practice among Aboriginal groups for hearing Elders or oral history. The approach adopted should be in keeping with the practices and perspectives of the Aboriginal community concerned.

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

10. Elder Testimony

The procedures adopted for hearing Elder testimony should be chosen to achieve the best environment to receive that testimony. These may include use of the Elder's native language, observance of cultural protocols, choice of a suitable venue, mode of testimony, viewing of sites and admission of demonstrative evidence. These subjects should be addressed beforehand in the case management or trial management processes.

The Elders giving testimony would prefer to affirm the truth of their testimony and may also wish to do so while holding an Eagle Feather. The Elders have also asked that a Smudging ceremony be conducted before the start of the hearings in Thunder Bay, and at the hearings dealing with Anishinaabe and Elder evidence, at Manitoulin and Garden River.

The Elders have asked that the seating be arranged in a circular or semi-circular fashion at Manitoulin and at Garden River as well, if possible.

The Elders would like a Sacred Fire during the proceedings, especially at Manitoulin and at Garden River.

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(a) Language and Interpretation

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

- Simultaneous interpretation is likely the most efficient method of entering lengthy Elder testimony in the native tongue. Sequential interpretation may suffice where the Elder narratives are not long.
- Elders may be willing to testify in English or French even if their command of the language is limited. An interpreter should be available to assist if they need to better express themselves in their own language. In such cases, it is best to first interpret the questions put to the Elder, so they have a clear understanding of the question they are asked to answer. Where Elders choose to testify principally in English or French, they may still use individual terms in their native tongue for specific places or ideas. A glossary of Aboriginal terms should be provided to the court reporter.
- Under the rules, the party calling a witness provides for the interpreter. Parties may have their own interpreters to assist counsel whose interpretations are not part of the record. In some cases, the Court may wish to appoint interpreters with apportionment of interpretation costs. The Court may require an orientation for interpreters touching on the approach to interpretation (word for word or sense of), duty to interpret accurately, court procedure, and legal language.

In this case, the Elders will be testifying primarily in English. However, two of the Elders, Irene Stevens and Irene Makadebin, may need to express themselves in Anishnaabemowin in the course of their testimony. An Interpreter will need to be available for these Elders.

(b) Venue

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

- What effect will a community or other special venue have on the ability/ease of Elders to testify in the trial. Are some issues or testimony more appropriately heard in a community venue or in a court room?
- What facilities are available? Are they suitable? Do members of the community have ready access to the chosen venue? Does the public?
- What facilities and accommodations are available for the judge, court staff and counsel for the parties? What are the anticipated challenges with respect to travel, accommodation, court equipment and records that may arise in a community venue away from established court locations?

Specific venues for receiving Elder and Anishnaabe evidence have been set up at Manitoulin and Garden River. The Elders have asked for the seating to be set in a circular or semi-circular fashion. The Elders do not have a problem with counsel wearing gowns.

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(c) Examination

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

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

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

Addressing the Elder

- The trial Judge can set the tone of the proceeding by expressing respect and appreciation to the Elder for coming to share their knowledge with the Court. The judge has the opportunity to explain the process, providing the Elder with information and orientation about the Court's fact finding process.
- The trial Judge must be mindful to avoid statements which may be taken to be to the detriment of one party or the other.

Examination in Chief

- Generally, counsel should address issues that may arise with an Elder's testimony in case management or trial management conference, advising the Court whether they have an agreed approach worked out amongst themselves or in the case management process. Alternatively, such issues can be addressed later in a trial management conference before the Elder is to testify.
- Special procedures may be adopted to govern Elder testimony and oral history evidence at trial, including:
 - Decorum and respect to be afforded an Elder in keeping with Aboriginal sensibilities for respecting Elders;
 - Whether examining counsel will need to direct the Elder's attention to testimony the party wishes to elicit;
 - How objections may be raised without disrupting the flow of an Elder's testimony;
 - Procedures for challenging the admissibility and weight of an Elder's testimony;
 - Being mindful of the Elder's age and physical health and the need for health breaks in the Elder's testimony so as not to tax the Elder's limitations in prolonged questioning.

During the examination in Chief, counsel may be seated next to the Elder, this is particularly for Irene Stevens and Irene Makadebin, who are hearing impaired.

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

Cross Examination

- All witnesses are entitled to respect. Questions put to Elders should be courteous in keeping with the respect afforded the Elder by his or her community.
- Counsel should take into account the cultural approach of the Elders in making best efforts to ensure that the Elder understands the questions asked.
- The Court should intervene where questions stray from the bounds of examination or cross examination, or where the Elder may have difficulty understanding the questions.
- The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination should be explored in appropriate cases. This exploration should be done on consent of the parties or on direction of the Case Management Judge.

The Elders have been informed that other counsel and the Judge will be asking questions and they are open to consultations with all parties to discuss the manner of conducting appropriate cross examinations.

Re-examination

- The usual practices regarding communications with witnesses giving evidence apply including during breaks in testimony and between the completion of cross-examination and the commencement of re-examination. This process should be explained to the Elder beforehand by counsel.
- The Court may grant leave for the discussion of certain subjects with a witness where it is necessary and where it is in the interest of advancing the trial process.

11. Alternative Modes of Testimony

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

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

The Elders have asked for the Manitoulin and Garden River hearings to be in a circular setting.

12. Audio/Visual Recording of Testimony

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

A party may wish to have its oral history recorded for posterity including recording by audio or video media. The taking of such recordings may be done in accordance with any applicable court media

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guidelines, orders or directions on recording in court. If a recording is made, it may be shared with the other party or parties but not for use in the court proceeding unless specified by the court.

13. Ceremony

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

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

As indicated above, the Elders giving testimony would prefer to affirm the truth of their testimony and may also wish to do so while holding an Eagle Feather. The Elders have also asked that a Smudging ceremony be conducted before the start of the hearings in Thunder Bay, and at the hearings dealing with Anishinaabe and Elder evidence at Manitoulin and Garden River.

The Elders would like an Eagle Staff in the Courtroom and Sacred Fire during the proceedings, especially at Manitoulin and at Garden River.

14. Expert Evidence

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

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

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

NOTE: This Protocol sets out procedures for dealing with Elder Evidence. It is not meant to establish or displace existing substantive rules or principles of law.

Restoule, et al
Plaintiffs (Moving Parties)

-and-

Attorney General of Canada, et al.
Defendants (Responding Parties)

Court File Nos: C-3512-14 &
C-3512-14A

Red Rock First Nation, et al.
Plaintiffs (Moving Parties)

-and-

Attorney General of Canada, et al.
Defendants (Responding Parties)

and 2001 - 0673

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings commenced in Sudbury and Thunder
Bay

**ORDER
(Procedure for Taking Elder Evidence)**

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Dated: March 15, 2018