THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 17, 2012

Via email : Andrew.Baumberg@cas-satj.gc.ca

Mr. Andrew Baumberg
Executive Legal Officer to the Chief Justice
Federal Court of Canada
Ottawa, ON K1A 0H9

Dear Mr. Baumberg,

Re: Elder Testimony and Oral History Practice Guidelines (Draft)

I am writing on behalf of the National Aboriginal Law Section of the Canadian Bar Association (CBA Section) to comment on the July 4, 2012 letter from Kathy Ring for Justice Canada.

The CBA is a national association of over 37,000 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of lawyers specializing in Aboriginal law and related issues from across Canada.

The commitment of the Federal Court to the Aboriginal Law Bar Liaison Committee has been extremely helpful in looking at ways to improve Aboriginal law practice. The CBA Section, the Indigenous Bar Association and Justice Canada have all made a strong commitment to finalize Practice Guidelines on Elder Testimony and Oral History.

Indeed, we expected the Guidelines to be approved at the June 13, 2012 meeting. The Guidelines rest on years of work, submissions and compromise. This last draft was an effort by Justice Mandamin to bring together all perspectives in the hopes of having a practice guideline detailed enough to address the problems that gave rise to their development.

Throughout this process, the two main areas of contention have been early disclosure of Elder evidence [which Justice Canada wanted and has been incorporated] and the sensitivity of cross-examination [which IBA and CBA wanted and Justice Canada resisted].

These are not two isolated areas. The Guidelines as drafted by Justice Mandamin implicitly acknowledge the quid pro quo of these two areas. In exchange for the compromise and advantage to the Crown of early disclosure of Elder evidence, there is an even greater reason to address cross-examination sensitively, in our view. In short, the compromise is a two-way approach.

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In the continued spirit of collaboration that has marked the work of the committee we have carefully considered the revisions put forward by Justice Canada on June 13 and in the July 4 letter. Following are comments on the specific changes requested in the letter:

1) Cross-Examination of Elders

Justice Canada suggests striking out paragraph 10(c) on page 2 and suggests replacement text.

The CBA Section agrees with part of the proposed wording, with additional text added in italics: "The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination *should* be explored in appropriate cases on consent of the parties *or on direction of the Case Management Judge."*

Striking out of second bullet in 10(c).

We agree and suggest alternative wording: *Counsel should take into account the cultural approach of the Elders in making best efforts to ensure that the Elder understands the questions asked.*

This Committee has heard that in many Aboriginal cultures, an Elder will not ask for clarification or repetition of a question. Using the plural for "question" shows that clarification need not occur following each question and that counsel must make "best efforts", which should alleviate the concern that counsel will have to "guarantee" that the Elder has understood the questions.

2) Direction from the Court

Last paragraph of clause one (seeking direction from the court where the rules do not clearly address matters).

We agree to remove the words "or these Guidelines". The direction sought from the court would be based on the Elder Testimony and Oral History Guidelines but should not address the issues in a way that prevents parties from seeking guidance from the court.

3) Admissibility of Evidence

Clause 4

We agree to remove the word "weight" from the title but do not agree to remove the last part of the paragraph. Recognition by the community is a threshold indicator of whether a person is an Elder and whether they are considered to be truthful, respectful and representative of the community. This paragraph is permissive and indicates that the Elder's evidence will not automatically be admissible, but if it meets the community acceptance threshold it will usually be admissible. The last part of the sentence is helpful in understanding the special qualifications (i.e. community acceptance) for assessing the admissibility of this special type of evidence.

4) Best Practices and Lessons Learned

To date the Guidelines have not incorporated specific examples of Best Practices and Lessons Learned. Although the material Justice Canada circulated with their letter was first shared in June 2010, it was understood to be for information purposes and to help guide the development of the Guidelines. Content of an appendix could be the subject of future work of the committee. The CBA Section could also put forward some examples of best practices. In our view, the paragraph

suggested by Justice Canada is not necessary at this time and anticipated future work of the committee should not delay implementation of these Guidelines. Counsel can always raise specific cases with the case management or trial judge.

In conclusion, we respectfully suggest that the court revise the draft Guidelines as it deems appropriate. We do not see the benefit of having a teleconference debate on issues we have discussed for the last five years. We, of course, are committed to having the Guidelines finalized.

Yours truly,

(original signed by Marilou Reeve for Aimée Craft)

Aimée Craft
Chair, National Aboriginal Law Section