On being an expert witness

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Is it possible to resolve long-standing aboriginal rights issues through litigation? Is the courtroom a suitable place to discuss and dissect the historical records and the scholarly works we relied upon so heavily? Do judges really hear and give appropriate weight to oral history and oral tradition?

These are some of the important questions raised by those who question the wisdom of going to court, however, regardless of where we stand on these issues, both First Nations and the Crown continue to seek solutions through the court rather than through negotiations and other dispute resolution mechanisms. Once the litigation arena has been chosen, each side looks to expert witnesses to built their case and support their legal arguments.

I have acted as a witness in three cases: the Mike Mitchell Border Crossing Case, the Samson Cree Trust Case (both of which we will hear much more about in the next two days) and a third case which involved fishing charges against an Anishnaabe from a small non-status community in Ontario. Each one of these experiences taught me something different as a researcher, a consultant, and as a witness. This morning I am going to share my thoughts on those experiences as many of you may find yourselves called to be a witness or in the position of having to use expert witnesses.

<u>Accepting the assignment</u>

Being a witness often comes out of two different circumstances:
(1) you do research for a particular group who later become involved in a court action and wants you to testify about your work, or alternately you have published and have expertise in an area that a client wants to tap into

to support their case. In these situations they may or may not want you to conduct additional, more focused work to supplement the original material.

(2) you are contacted by a client to prepare a report specifically for a case in which they are involved.

In either case it is extremely important to be careful about what you agree to undertake. You must be comfortable with the general legal arguments and approach to the case that the client is going to rely upon, confident that your work supports their approach and that you have the required expertise to contribute to the case.

The Research Stage

If you are dealing with an existing report or body of work you need to ask yourself if the research and analysis is appropriate to the questions being asked. While the existing information may be useful to the legal team, it may not be a good reflection of the scope and range of material you would consider if the report had been originally designed to address the questions and issues at hand. This is fundamentally a question of good methodology. You may feel that you need to do additional exploration or research, add background or explanation to existing material This will likely raise problems of time and funding, however it is essential that your are comfortable and confident with your material.

If you are designing original work again the methodology you use is of the utmost importance. Ideally, you will work with the counsel to focus the research on the area they need covered using your professional knowledge to draft research questions that address the issues in as full and balanced a manner as possible given the limits of time and resources. The practical considerations of funding will often force you to limit your research in some way. Again it is imperative that the parameters you select are consistent with good research methods and design.

In planning your research keep in mind that you must be able to confidently defend your work in keeping with your own professional standards. Sometime there is a temptation to include statements or material that is

suggested to you by your client. While clients often have useful and relevant material that assists you in your work, make sure that you are satisfied with its reliability before agreeing to use it. You are not doing a favour to your client or your integrity by incorporating inconsistent or indefensible material in your research

Writing the Report

In the report writing stage be very careful of what you write, ensuring that each statement is supportable and clearly defined. In the case of most historically-based reports this translates into an extreme reliance on documentation and carefully constructed argument involving a combination of documents, context and interpretation.

While it is advisable to avoid being overly-complex or esoteric in your presentation, it is far more difficult to deal with aboriginal history and the nuances of Aboriginal-Crown relations in a balanced and informative way than it is to simply rely upon mainstream interpretations of the past. To even attempt to present a reliable picture of the past, we must look more deeply and more critically at our written records and listening more closely to the oral traditions and offerings of Aboriginal elders. This is not a simple task and not easily explained and defended in written reports. It is the grand challenge of bringing information across the cultural divide of the courtroom.

One practical piece of advice is to closely scrutinize the work of academics that you are going to cite in support of your conclusions. All too often academic work is built upon a house of cards that crumbles when the footnotes are followed to non-existing files and the misreading of documents. This same weakness can, of course, be used to discredit and dissemble the work of the opposing witnesses.

Actual appearance as a witness -

A good deal of time may pass between finishing your report, having it filed as evidence and your appearance as a witness. During this period, usually close to the trial dates, you should spend time preparing with your counsel.

Preparation is critical. My own experience of preparation corresponded directly to the resources available in the different cases.

While you are the expert on the material in your report, the lawyer is the expert in courtroom procedure and the way in which evidence must be entered. Legal counsel will want to make sure that you are aware of the important features of your work that need to be clearly stated for the court record and will likely also review the way in which you will be asked to go through your report and offer further explanation. You may need to be prepared to take the court to your documents, indicate locations on maps or provide other clarifying information. You will want to make sure you let the counsel know if there are areas you are uncomfortable with, or where you anticipate difficulties. In practice you may have a great deal of time to prepare or very little time, again this is largely a factor of resources.
After being sworn in, you will need to qualify yourself as an expert in the area in which you will testify. Your counsel will take you through your academic and professional qualifications. The opposing council will then challenge or try to limit and minimize your qualifications and experience. This is no time to be modest. Upon being qualified you then move into the main part of your testimony, which is the examination-in-chief.

The examination-in-chief works best when you are communicating well with your counsel. This is your opportunity to explain the material as you understand it and to fortify and back up your interpretation of events. Work with your counsel on how best to go through this material so that it makes sense and is most comfortable for you, especially in relation to managing documents.

In the best of all possible worlds the job of the expert witness is to explain and educate. Its quite the challenge to maintain that attitude and approach when you are trying to remember that you need to make particular points and cover certain material so that it is in the court record. Adopting the attitude that I am explaining the history to the judge has work for me person in my efforts to stay relatively focused and relaxed. In one case the judge asked me questions directly. At first I found this very unnerving as it was not what I expected. But then it became almost comforting because I knew

when I was not making my point not getting the information across and I knew what needed explaining. I also learned an important lesson from this experience. Professionally we spend our time talking to people with some level of knowledge on aboriginal rights, aboriginal history and the historic interaction between the First Nations and the colonial governments. When we go to court we are bringing cases in front of judges and JPs with widely varying levels of knowledge, information, misinformation and preconceptions and biases. The education needs to be at a very fundamental level.

The educating-the-court approach is very hard to maintain when faced with cross-examination. Some say they find the cross less stressful than the examination in chief, but most dread this step. After Chief is over, you cannot have any contact with your clients or counsel. You are very much on your own with no one to assist you or give your feedback or encouragement. Remember that the job of the opposing counsel is to shake your credibility, unsettle you, challenge your thesis and conclusions and generally lead you down the garden path into a bramble bush. Some do this is a very professional and competent manner others are devious, rude and belittling. You have to prepare yourself not to be intimidated and not to take any of their tactics personally. One of the most important things to do is listen very carefully to their question and answer as briefly and succinctly as possible, so as not to give them more areas in which to challenge you.

A critical factor and a disadvantage to the court system and legal proceedings in general is that they seek yes and no answers, "facts and truths" and a black and white picture of the past. Most of us who work in this field are well aware of the many colours and nuances there are to truth or fact. If you still think there is a single truth, shame on you, you're not reading and listening deeply enough. This becomes very problematic when you are required to answer yes and no questions - the answer you want to give is much more complicated and qualified. You have to be prepared to deal with your material within these restricted conditions.

An important piece of advice given to me in my preparation is not to be afraid to say you don't know something. This protects you from entering

areas where you are not well founded. When you tread on shaky ground that's when you lose credibility and your credibility is what is being judged and measured from the bench.

After the cross-examination is over, you may be asked a few questions in re-direct. This is an opportunity for your counsel to give you an opportunity to clarify some of your answers made in cross-examination.

Your job is now over. The legal team will work with your testimony to support their final statements and submission.