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ABORIGINAL & TREATY RIGHTS PRACTICE

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This release features updates to the case law and commentary in Chapters 1 (Parties), 5 (Interlocutory Injunctions and the Duty to Consult), 8 (Discovery), and 9 (Evidence).

Highlights

- **§ 8:16.50. Secrecy**—It has been held that oral histories which have not yet been reduced to recorded form are not producible under Alberta Rule 5.6(1). In *Anderson v. Alberta*, 2025 CarswellAlta 607 (R.A. Jerke J.), a treaty rights claim brought by the Beaver Lake Cree Nation (BLCN), the Court dismissed Alberta’s application to require BLCN to produce oral history as part of its document disclosure. In this regard, the Court observed that the oral histories at issue existed only in human memory and had not yet been reduced to a recorded form. He held that uncollected oral histories were not producible for two reasons; first, they were not records and second they were not under BLCN’s control. With regard to the first reason, the Court found that oral histories do not meet the generally accepted interpretation of records under Rule 5.6(10). With respect to the issue of control, the Court observed that the oral histories as they exist in the minds of BLCN’s members were not in the Nation’s control, and BLCN could not legally compel its members to share their oral histories to satisfy Alberta’s demand. “While BLCN has a legal interest in this legacy [of oral history], it does not exercise any kind of legal control over it.”
- **§ 9:48. Qualifications, Specialized Knowledge and Necessity**—In *Nepanik et al v. Canada*, 2025 CarswellNat 2045 (under appeal), Zinn J. dismissed the plaintiff’s application for certification of the action as a class proceeding under Federal Courts Rule 334. In the context of this application, Canada had raised a preliminary objection regarding the admissibility of specific portions of the plaintiff’s record, including an affidavit authored by historian Dr. Leo Baskatawang on the basis that it contained inadmissible opinion evidence. The Court found that Dr. Baskatawang was a qualified historian capable of providing factual and analytical insight into the history surrounding Treaty 4. However, Zinn J. also found that his assertions regarding the Crown’s legal obligations and declarations of invalid authority crossed into legal advocacy. These statements did not satisfy the requirements of expert testimony which mandates that expert opinions must be grounded in specialized knowledge and must not determine ultimate legal conclusions. On these grounds, Zinn J. held that the paragraphs of Dr. Baskatawang’s report that interpreted Crown obligations or declared treaty breaches were excluded from his consideration of the certification motion. Purely factual or historical background free of legal inferences in the report were found to be admissible and could form part of the application record.