CANADIAN Lawyer

Hot-tubbing experts — should lawyers like it?

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Written by Judy van Rhijn
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Across the country, courts have been struggling with the best way to present expert evidence. If you have been listening to the latest debates on the subject, you will probably have heard the term "hot tubbing" as a method for organizing expert evidence in a hearing. It was coined in Australia to describe the procedure of organizing all experts in a case into a panel and hearing their evidence concurrently. The growing bulk of academic and legal papers on the topic seem to agree that both judges and experts like the idea. The question is "Should lawyers like the idea?"

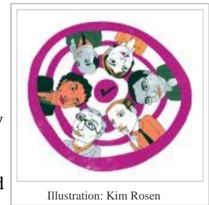
Illustration: Kim Rosen

One of the main difficulties in deciding the answer to this is that few lawyers in Canada have any experience with the practice. Professor Gary Edmond of the University of New South Wales in Australia, who has not only written extensively on the practice but watched it in action many times, describes the process in two parts. "In the first part, the experts are asked to comment generally on the issues and discuss any differences of opinion. Then they supplement their initial testimony with comments on the testimony of other experts. The judge, lawyers, and fellow experts ask questions. The judge can suggest topics and direct the experts to comment on legally relevant issues. The second part involves cross-examination by the lawyers."

In Australia, hot tubbing has a long history, having been employed in tribunals as far back as the 1970s. Its spread has been driven by enthusiasm from the bench. Edmond reports that it is most used in the Land and Environment Court but also regularly in medical negligence cases. "If the judge is at all willing, it will be used in any kind of expert dispute in civil cases in New South Wales. . . . The issue we are considering in Australia is the extent to which it can be used in criminal trials with juries." Edmond is concerned about going this far. "It is very easy for the experts to say something that is inadmissible or subversive in all sorts of ways. There are real dangers."

In Canada, various attempts at combining expert evidence are taking place, driven by the need to educate judges and reduce trial costs. John Buhlman, a partner at WeirFoulds LLP, believes procedures such as the appointment of joint experts, pretrial meetings of experts, and mediation between experts will evolve over time. "Everyone is using a lot of experts these days and the evidence gets very complicated. In most tribunals and courts, most fact-finders don't have any knowledge or expertise in the area the experts are talking about. You've got non-experts trying to figure out which expert is right."

Some examples of group testimony do exist in tribunals, particularly in the energy sector. Typically the experts for one side give collective direct testimony and are collectively cross-examined, then the experts for the other side do the same. "In regulatory energy tribunals, such as the National Energy Board and the Alberta Energy and Utilities Board, we deal with multiple experts all the time. There can be as many as 20 if the application calls for it," explains Lewis Manning of Lawson Lundell LLP in Calgary. "It has to work that way. These are complicated applications with many components. You can't expect one expert to know everything."

Manning sees no reason why this practice could not transfer to a court setting. "All you're doing is providing expert testimony at the same time with a view to assisting the decision-making entity." However, he does see that tribunals have some advantages that assist the practice. "In virtually all of the energy tribunals, the rules of evidence do not apply. That very important distinction means that we get a lot of discussion. Also, the utilities framework isn't so much about determining the truth on the balance of probabilities. It's determining what's in the public interest." He points out that although judges often have the power to seek their own expert advice, it's very seldom used, whereas tribunal adjudicators make use of many options for informing themselves on the issues.

Daniel Nugent of Webster Hudson & Coombe LLP in Vancouver has recently been involved in one of the first cases using joint experts under new civil rules promoting their use. He can see that a panel of experts would make sense in trying to reduce the cost of multiple experts and take the adversarial edge off litigation, the driving force behind the move to use joint experts. "The word everyone's using, which has a very loose definition, is proportionality. You can craft that word to advance any case you're presenting."

At the Ontario Municipal Board, a meeting of experts takes place as part of procedural meetings before hearing from which they prepare an agreed statement of facts and remaining issues. Recent changes to Ontario's Rules of Civil Procedure also allow for pretrial meetings between opposing sides' experts and Quebec courts allow for similar conferences. "It's a scoping exercise," notes Jeffrey Wilker of Thomson Rogers who appears regularly before the OMB. "Frankly as someone who represents municipalities and ratepayers, I would prefer to have my experts agree to certain issues before they take the stand. Generally when you put technical experts together, they narrow the issues very appropriately. This allows the trial to be focused and saves time and money."

There are also meetings of experts in mediation prior to arbitration. Doug Tupper, a partner at McInnes Cooper in Halifax, describes this as a dog and pony show. "Your expert gives his view, then their expert gives their view, then there's an opportunity for a discussion, without formality." In Nova Scotia's courts, new formal requirements reduce the possibility of any discussions. Expert witnesses now have to prepare reports in a certain format, which includes a certification of independence. There is no pretrial discovery and the report stands as it is unless the other side chooses to cross-examine. Interaction between experts can only occur in expert-only pre-settlement conferences where the discussion is off the record.

All these approaches are quite different from hot tubbing, where experts from both sides are sworn in together and have a technical, high-level discussion. Manning sees that it could be an effective way of quickly highlighting the areas where experts disagree. "The question is whether experts can best do that themselves with appropriate input from counsel and the tribunal." Buhlman thinks hot tubbing could be a beneficial process but thinks pretrial meetings are a better way to proceed. "If experts talk you can often isolate what the real issues are. They may find that they made different assumptions or had a different starting point. They find they can understand the other expert's position and may be able to agree."

In an interesting twist, reforms in Australia require experts to meet pretrial as part of the concurrent process. Edmond says they only need hot tubbing afterwards if there are differences that the fact-finder ought to hear. He also refers to reductions in time and costs as an undisputed benefit, stating with confidence that the greater efficiency in presenting evidence means the expert evidence takes 20 per cent to 50 per cent of the usual time. "You don't have to lead all the witnesses through the factual history in a serial fashion," he explains. "It's more efficient just because of that."

It may also help with the age-old problem of polarization of witnesses under the adversarial approach. Supreme Court of Canada Justice Ian Binnie has said, "The theory is that experts testifying in the presence of one another are likely to be more measured and complete in their pronouncements, knowing that exaggeration or errors will be pounced upon instantly by a learned colleague, as opposed to being argued about days later, perhaps by unlearned opposing counsel."

Bruce Outhouse, a partner at Blois Nickerson & Bryson LLP in Halifax, who is external counsel for the Nova Scotia Utility and Review Board, believes that much depends on the issue and the expert. “We’re used to seeing certain experts who always have the same approach. They make a living testifying frequently on the same subject in different jurisdictions. They are unlikely to make compromises on the record. A debate with an expert who usually takes the opposite approach would probably not achieve much.”

Another concern lawyers have is losing control of how they present their evidence and perhaps of the proceedings as a whole. The risk of an interdisciplinary bunfight seems to depend on the experience of the experts themselves. “It can be difficult to keep it on track,” admits Edmond. “However, most of the participants have come out of the conventional adversarial system so they are generally fairly restrained and don’t give too much unsolicited material.”

Edmond watched a case in a federal tribunal in “Australian wine country” where the experts were geographers and viticulturalists. “They were people you don’t usually see in court. There were eight witnesses, all of different disciplines, all arguing with each other. It was genuinely a free-for-all.” The solution to this is that judges have to be far more active. But this raises concerns too, as Buhlman notes: “A judge is supposed to be neutral and let the lawyers run the case. If they get too involved, are they in fact stepping down from the bench?”

Hot tubbing is slowly creeping into the legal consciousness of the northern hemisphere. In the United Kingdom, Lord Justice Jackson’s review of civil litigation costs in December 2009 proposed that a pilot program should be run with the consent of everyone involved to see if the Civil Procedure Rules should be amended. A new procedural guide to the Technology and Construction Court also has an explicit reference to the practice.

In Canada, only the new Federal Courts Rules introduced in August 2010 and the federal Competition Tribunal Rules explicitly allow judges to force lawyers to serve up their experts in a hot tub, while stressing the duty of the expert to the court. While there is certainly much ambivalence about the panel approach amongst the bar, Outhouse voices the thought that might cause Canadian lawyers to give the hot-tubbing option a try. “If it’s so entrenched in Australia, maybe they’ve found a better answer than the regulators have found here.”