Session 1: Hot Tubbing – No Longer Just for Après ski

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"Hot Tubs" and Concurrent Evidence: Improving Administrative Proceedings
Freya Kristjanson

In certain cases, witness panel testimony can enhance the search for truth. The objectives of giving concurrent testimony include: (i) creating a better presentation to improve understanding of the evidence; (ii) reducing the adversarial process to better assist the tribunal in a professional and respectful manner; and (iii) enhancing the efficient operation of tribunal proceedings (ex. reducing time and costs). For example, an expert witness panel can explain water contamination by identifying how contaminants reached the water to begin with and explaining how they spread. Moreover, the tribunal can gain an interdisciplinary and holistic view of the evidence when experts challenge each other's evidence in direct and cross-examination, if it is done in a respectful way.

There are two main models of giving concurrent evidence. First, the "complementary witness" panel can explain sequential causation by individuals that have different perspectives on the events. The aim is to construct a coherent narrative. Second, the "similar expertise" model involves a panel assembled by different parties to testify at one time on similar issues. This model is useful whenever there is competing expert evidence.

The "hot tub" is a variant of the "similar expertise" model. It generally involves the exchange of reports between experts, a joint meeting to discuss the reports and the preparation of a document summarizing points of agreement and disagreement. Experts are then sworn in together to give evidence as a panel. The model allows the tribunal to compare and contrast the evidence immediately to clarify the tribunal's understanding of the facts.

The impact of "hot tubbing" on expert evidence appears to be positive. Studies show that experts tend to be more comfortable with a collegial "hot tub" scenario versus the more traditional adversarial process. The model can help experts by reducing lawyerly trickery since witnesses are not tied down to "yes" or "no" questions. As a result, the "hot tub" is more akin to an expert debate.

In terms of efficiency, there are indications that panel testimony could save time and resources. A report on concurrent evidence by the Australian Administrative Appeals Tribunal states that in approximately 30 percent of cases experts spent less time giving evidence and the overall hearing was shorter.

Procedural fairness is another important consideration. There are some risks with respect to the use of "hot tubs" which include: (i) reasonable apprehension of bias due to overly active participation of the adjudicator; and (ii) counsel's inability to present its case because of a departure from the traditional approach of examining and cross-examining

witnesses. It is proposed that risks can be reduced or eliminated in Canada by having counsel chair the discussion instead of tribunal chairs and by allowing counsel to direct questions to the panel as a whole, or directly to one particular witness.

There is currently some procedural guidance on how to provide for concurrent evidence. The Canadian Federal Court has introduced rules on witness panels (Rule 282.1 of the Federal Court's *Rules of Civil Procedure*). However, it is proposed that requiring leave of the Federal Court inhibits the use of witness panels. In terms of counsel's involvement, the rules of the New South Wales Land and Environment Court allow experts to create a summary of agreed issues without the supervision of counsel. This is important because of the chilling effect that lawyers might have on the concurrent testimony process.

Real Life "Hot Tubs": The Public Inquiry Perspective
Justice Stephen Goudge

There are three main types of witnesses that could present evidence in a group setting: (i) pure fact witnesses; (ii) expert opinion witnesses; and (iii) policy advisory groups. The greatest benefit of having a witness panel is likely derived from the expert opinion scenario. All three achieve efficiency in terms of monetary resources and access, and all three contribute to enhanced quality of the end product, which is truth seeking.

In Justice Goudge's Inquiry into Pediatric Forensic Pathology (the Goudge Inquiry), all three panel types were used. One issue pertained to the kind of oversight or accountability available on the ground at the time of the events in question. In that case, fact finding did not require assessment of credibility. One should be reluctant to use a fact witness panel if credibility is at issue.

In terms of opinions, expert evidence is becoming more commonplace as the world becomes more specialized. In the Goudge Inquiry, panel evidence, whether it was sequential or adversarial, was very effective for efficiency and truth-seeking purposes. It was helpful for a layperson to fully understand the intricacies of the applicable science. The experts seemed to find it comforting as well. After all, science develops through group discussion. Therefore, it may be that a group setting is more appropriate in certain cases. Experts may think that the traditional approach of the justice system, to hear evidence from one party and then another, is a strange way for the truth-seeker to establish facts. A discussion is more akin to their daily work as experts.

Before the hearing, it is profitable to allow experts to discuss the issues without lawyers. It's difficult for counsel to give up control, but we need that culture shift to allow witness panels to provide the best evidence possible.

For purposes of efficiency, witness panels can be very helpful. The Goudge Inquiry had 48 witnesses and only 11 testified by themselves. This assisted the commission to meet its timeline. An active tribunal will assist the witness panel process. In the end, expert evidence is reliable and this is promoted by the use of panels.

Real Life "Hot Tubs": The Expert Witness Experience
Gregory Levine

Mr. Levine participated in "hot tubbing" as part of the expert witness panels for the Oliphant and Cunningham Inquiries. Generally, the expert retention process and preparation was more formal for the Oliphant Inquiry and less formal for the Cunningham Inquiry. For example, in preparation for the Oliphant Inquiry, there was a formal report to deal with questions asked by the commission, witnesses read reports of other experts and witnesses prepared questions for invitees to other panels. By comparison, in the Cunningham Inquiry, the structure was not as detailed and experts read one another's notes. This demonstrates flexibility in terms of how a witness panel can be conducted.

The format for testimony was also different in some respects. In both inquiries, testimony was not under oath and questions were put to the expert panel by Commission counsel and subsequently by counsel for the parties. In the Oliphant Inquiry, experts questioned other experts and there was a question and answer format to the presentation of evidence. In contrast, the Cunningham Inquiry had a more conversational structure amongst expert panel witnesses.

On a personal level, Mr. Levine felt it was a privilege to be asked to participate and felt that he learned a lot from the experience. He felt that the witness panel provided both an environment for genuine information sharing and for testing ideas. This was possible because counsel were respectful throughout the process.

While there are many advantages to having witness panels, there are also some disadvantages worth noting. First, dominant personalities may trump others. Second, if the environment becomes more adversarial, defensiveness can be exacerbated. Third, different levels of expertise could skew the discussion. With this in mind it is important to consider other impacts on the witnesses themselves. For instance, seminar formats may suit academics, but not other witnesses because of occupational differences. In addition, preparation can be difficult in terms of time given to review others' materials and insecurity about what to expect. Finally, it may also be challenging to know how to approach the conversation and avoid the glib.

Panel Discussions

1. The Role of Counsel and the Tribunal

As counsel for Mayor Hazel McCallion in the Mississauga Inquiry, Ms. Kristjanson observed that lawyers can be nervous about giving up control of proceedings in a witness panel scenario. In reality, experts are not property of the parties. The Australian Administrative Tribunal's Practice Directions direct adjudicators to remind the experts of their duties to assist the tribunal and set out what is expected of them. Justice Goudge agrees that tribunals may want to remind counsel that the expert is not there to help them win the case.

Paul Muldoon of ELTO – Environmental Review Tribunal shared his experience as a tribunal member with witness panel testimony. In his view, the expert panel helped the tribunal learn the subtleties of an emerging science. The "hot tub" focused counsel's submissions on the important issues and made the panel's job difficult because both sides had persuasive arguments that were directly on point.

2. Communicating the Importance of Conferring Without Lawyers

Justice Goudge noted that the experts ought to be able to meet and see if there is common ground, to discuss differences and perhaps even narrow them. To that end, Ms. Kristjanson advocated for tribunal practice directions to counsel. After all, the tribunal makes the rules.

3. Practicality: Whose witness is it and who will pay?

Ms. Kristjanson pointed out that the counsel who calls the witness is still the one who normally pays. In Australia, parties have coordinated efforts to minimize costs. For instance, if geography is an issue then the experts can meet by videoconference instead. In the alternative, some parties have the experts meet the morning of the hearing to avoid added costs.