

Hot-Tubbing With Experts (and Other Procedural Tools)

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Context: Ontario 2010

- Integration
- Continued streamlining, cost concerns, search for efficiencies
- Proportionality and administrative processes
- Importance of soft law

Overview

- Hot-tubbing
- Proportionality
- Procedural flexibility

Hot Tubbing With Experts

- Concurrent Evidence (two or more experts for different parties give evidence at the same time)
- Australia – used in both courts and administrative proceedings
- Canada – Federal Court Rules amended August, 2010

Hot-Tubbing – the Good

- Addresses concerns with respect to independence of experts, costs and length of hearings
- Experts confer in advance of hearing
- Testify as a panel – give own views, comment on testimony of other expert, counsel cross-examine, judge/tribunal members pose questions

Hot Tubbing and Experts

Concerns raised by the profession

- Costs of requiring pre-hearing conferences
- Concessions made by experts?
- Will personality of expert dominate?
- Effect on non-professional experts?
- Should leave be required for questions *inter se*?

Proportionality

- Ontario Civil Rules – Osborne Report – January, 2010 (section 1.04(1.1))

“In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”

Same Concerns in Admin Law

- Disclosure – e-mail and electronic data
- Self-represented parties
- Costs and length of motions
- Expert evidence
- Criminal vs. administrative standard
- Complexity of rules
- Charter/Human Rights Code
- Access to justice

Public Inquiries Act (unproclaimed)

5. A commission shall,

(b) ensure that its public inquiry is conducted effectively, expeditiously, and in accordance with the principle of proportionality

(2009, c. 33, Sched. 6, s. 5)

Proportionality and Procedural Fairness

- What are the implications of proportionality for administrative proceedings?
- Investigations/disclosure?
- Effect on ADR?
- Effect on hearings?
- Costs?
- SPPA s. 25.1 Rules important

Procedural Flexibility

- Use of investigative summaries, filing evidence with opportunity to challenge
- Filing detailed chronologies
- Limiting standing to portions of evidence in which interests are engaged (witness by witness/area by area)
- Expert panels (facts and policy) (SPPA s. 15.2)

Procedural Flexibility

- Commissioning and circulating background research/consultation papers
- Hearings – circulate detailed issues list to parties in advance, revise on a going-forward basis
- Role of counsel at tribunal

Thank You

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