Divergent opinions

Canada's judges want expert witnesses to be less partisan and more independent. Lawyers are less convinced.

Lawyers are bracing themselves for new Federal Court and Federal Court of Appeal rules governing testimony by expert witnesses.

The changes — conceived as a way of reducing the length of trials and the cost of litigation – introduce a range of new measures, not least of which is a new code of conduct, which requires that experts fulfill their independent advisory role to the court, instead of acting as advocates for a party. Expert witnesses must even disclose how their relationship with the parties might affect their paramount duty to the court. And both courts can also order that experts confer in advance of a hearing before a judge.

But it is the practice of presenting concurrent expert evidence at trial, also known by the more colourful term "hot-tubbing", which has many litigation lawyers shaking their heads.

Hot tubbing, is an oft-used practice in Australian courts that consists in getting two or more experts to testify as a panel. Sworn in together, and with the judge present, each expert opines on the various issues in litigation. After this first go-round, witnesses can comment on the approach of others or ask for clarification. The aim is to prune the number of contentious issues by identifying areas of agreement.

The judge can raise questions. Once the experts have provided answers to these, lawyers can cross-examine experts for the opposing side.

Predictably, hot tubbing tends to appeal to judges, but less so to lawyers.

Robert Graesser, associate chief justice of the Alberta Court of Queen's Bench, says hot tubbing is "useful for a judge looking for the truth, but of no help to the lawyer and his client wanting to persuade the judge of their truth."

"At present, expert testimony is a disaster," says André Wery, associate chief justice of Quebec's Superior Court. Justice Wery says he is eager for Quebec's courts to adopt the practice. "Hearing all the expert witnesses concurrently would help us validate their positions and draw clearer conclusions on technical issues. It would be especially helpful in the case of medical liability, where expert witnesses sometimes testify over three weeks."

"We should at least try this approach because today's way of doing things is too slow, too expensive and not a great help to the judge."

Peter W. Hutchins, of Hutchins Legal in Montreal, says the present confrontational system is no longer working and that it's time to try new approaches.

And former Supreme Court justice Ian Binnie has expressed his view that hot tubbing tends to foster less partisan testimony among expert witnesses weary of being exposed by their colleagues for exaggerations or errors in their testimony.

Still, the idea is alarming to more than a few lawyers, says Hutchins. Many want to protect their experts from becoming involved in a free-for-all. Some also see it as grafting a consensual technique onto the adversarial process. That might suit certain specialized tribunals, but it could be a problem in civil trials, they say.

Simon Potter, a former president of the Canadian Bar Association and partner at Montreal's McCarthy Tétrault, adds that hot tubbing scares some lawyers and their clients who worry that the approach will lead to expert witnesses determining the outcome of trials.

Potter also expresses concern that having experts decide among themselves what should be discussed takes away from the judge's decision-making role.

Robert-Jean Chénier, also a partner at McCarthy Tétrault, who regularly acts in medical liability cases, says that the panel approach in which the debate is limited to contentious issues is more appropriate in front of specialized administrative tribunals. "When the decision-makers are knowledgeable in the field and familiar with the notions used by the expert witnesses, and especially with the applicable legal concepts, such as in the field of property assessment.

It remains to be seen whether the practice of hot tubbing will be introduced in other trial courts across the country. Quebec's Civil Code and the Ontario Municipal Board allow for pretrial conferences of experts. But for now, only the Competition Tribunal and Federal Courts have the power to require lawyers for opposing parties to participate in such conferences. **N**

— Margot Gibb-Clark