

NEW TOOLS FOR MANAGING EVIDENCE IN COMPLEX LITIGATION

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(1) INTRODUCTION

The recent amendments to the Ontario *Rules of Civil Procedure*¹ and recent case law have confirmed a shift in the way civil litigation is run. Judges are no longer merely passive referees, but have increased power to actively manage litigation. The key principles underlying this shift include improved effectiveness, efficiency, proportionality and, ultimately, justice.

With this new focus, several new tools for litigation management have emerged. This paper will discuss some of these new tools, including: the use of summary judgment motions under the new Rule 20 to direct the way evidence shall be presented if the case is required to go to trial; the use of witness panels, or "hot-tubbing", to present expert evidence; and the use of affidavit evidence on an examination-in-chief. In addition, this paper will briefly report on the current state of the law with respect to the hearsay rule, which has also undergone significant changes over the past 10 years to come in line with the court's increased power and flexibility to make decisions that facilitate truth-seeking, judicial efficiency and fairness.

(2) THE COURT'S INHERENT POWER TO MANAGE LITIGATION & NEW RULES WITH NEW TOOLS

In his 2010 decision in *Abrams v Abrams*², Justice David Brown explained in detail the inherent power of the superior court to manage litigation. In this protracted and "high-conflict"

¹ RRO 1990, Reg 194 [the "Rules"].

² 2010 CarswellOnt 2915 (SCJ), aff'd 2010 CarswellOnt 6650 (Div Ct)[*"Abrams"*].

estates litigation, Brown J., having been asked by the applicant to manage the litigation, made several directions for the trial of the issues, including: (i) completing the trial within three days; (ii) primarily relying on filed affidavits for a witness' evidence-in-chief with limited additional examination-in-chief and cross-examinations; (iii) filing comprehensive documents in advance of the hearing; (iv) bringing any refusals motions in writing; and (v) preparing lists of any portions of pleadings or affidavits of the opposite parties to which a party objected.³ The applicant did not like these directions and thus challenged Brown J.'s jurisdiction to make them.

In response, Brown J. provided a fulsome discussion of the inherent powers of the superior court to manage its own process. He began by citing Sir I. H. Jacob:

*For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance.*⁴

Alternatively, Brown J. suggested that the court has inherent power to do what is necessary to manage the work it has been assigned in an appropriate fashion.⁵ Not only do the courts have the "inherent authority to control the processes of the court and prevention of abuse of the process," but the trial judge has "a *duty* to manage the trial process balancing fairness to the parties as well as efficient and orderly discharge of court process".⁶ These inherent powers exist at all stages of a civil proceeding, and not just at trial.⁷

³ *Ibid* at para 10.

⁴ *Ibid* at para 30, quoting I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Curr Legal Probs* 23 at 27.

⁵ *Ibid* at para 31.

⁶ *Ibid* at para 33, quoting Justice Casey Hill, "The Duty to Manage a Criminal Trial" (Paper delivered at the National Justice Institute, April 2009), and reasoning that this applies equally to civil proceedings [emphasis added].

⁷ *Ibid* at para 35.

Justice Brown acknowledged that this marks a "huge change in philosophy" from a tradition based on a classic adversarial system where the court assumed "that all parties would be represented by informed, skilled counsel whose professional skills and ethics would produce a fair trial".⁸ Instead, "[o]ur current rules reflect a recognition that such an approach too often produced delay, unnecessary cost and unfairness".⁹ Thus, "the role of the judge in directing a civil proceeding has changed" from "little more than a referee" to an active "case manager".¹⁰

The recent amendments to the Rules reflect this shift. Rules 1.04(1) and 1.04(1.1) encourage judicial management in civil litigation to ensure that a case "receives a just, expeditious and least expensive determination on its merits and that the pre-hearing and hearing steps unfold in a proportionate manner."¹¹

Moreover, Brown J. pointed to the "extensive 'check list' of directions" available to judges who believe a case, while requiring a trial, may also require significant directions as to the most efficient and fair way to conduct that trial.¹² Rule 20.05(2) specifically provides that "the court may give such directions or impose such terms as are just", including an order:

- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;
- (b) that any motions be brought within a specified time;
- (c) that a statement setting out what material facts are not in dispute be filed within a specified time;

⁸ *Ibid*, quoting DS Ferguson, *Ontario Courtroom Procedure* (Toronto: LexisNexis, 2008) at 21.

⁹ *Ibid*.

¹⁰ *Ibid* at paras 36-37.

¹¹ *Ibid* at paras 40-41.

¹² *Ibid* at para 48.

- (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;
- (e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;
- (f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
- (g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
- (h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
- (i) that any oral examination of a witness at trial be subject to a time limit;
- (j) that the evidence of a witness be given in whole or in part by affidavit;
- (k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
 - (i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

- (l) that each of the parties deliver a concise summary of his or her opening statement;
- (m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
- (n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;
- (o) for payment into court of all or part of the claim; and
- (p) for security for costs.

Brown J. considered it "significant that Rule 20.05(2) provides that a judge should consider when disposing of a summary judgment motion directions regarding how the trial should be conducted".¹³ In addition, Rule 50.07(1)(c) also encourages the use of the same tools by judges conducting civil pre-trial conferences.¹⁴ Given the foregoing, Brown J. concluded that he held the jurisdiction to make the directions he did, and Brown J.'s directions and authority were later affirmed by the Divisional Court.¹⁵

In *Healey v Lakeridge Health Corp.*,¹⁶ Perell J. expanded on the court's jurisdiction and authority under the new Rule 20. In discussing the balance between a litigant's right to a trial and court efficiencies considered in motions for summary judgment, Perell J. acknowledged that "former case law gave preference to the trial as the means for a litigant to have his or her day in

¹³ *Abrams*, *supra* note 2 at para 48.

¹⁴ *Ibid* at para 50.

¹⁵ 2010 CarswellOnt 6650 (Div Ct).

¹⁶ 2010 CarswellOnt 556 (SCJ).

court" while also recognizing that sometimes holding an unnecessary trial could constitute a failure of procedural justice.¹⁷ Perell J. explained that:

*Placed in the context of the other amendments to Rule 20, the purposes of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for a summary judgment are: (1) to make summary judgment more readily available; and (2) to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment.*¹⁸

Perell J. concluded that the court's expanded powers under the new rules represented a shift toward a "diminishment of the role of the trial in the administration of justice".¹⁹ Further, he suggested that summary judgment should only be denied where a trial is genuinely necessary, in that the "issues to be resolved cannot be truthfully, fairly, and justly resolved without the forensic machinery of a trial" rather than because a trial is "given some preferred status in the administration of justice".²⁰

Given the diminished role of the trial and the court's expanded powers to weigh evidence and streamline civil proceedings under the new summary judgment rules, counsel should consider as part of its litigation strategy which of the tools on the "menu of directions"²¹ provided by Rule 20.05(2) could be used to their advantage in focusing the trial process. Thus, in a motion for summary judgment, counsel should request in the alternative, should the case be allowed to go to trial, that the judge nonetheless make directions relating to one or more of those tools that would help to maximize the efficient and effective presentation of their case, whether it

¹⁷ *Ibid* at paras 16, 27.

¹⁸ *Ibid* at para 23.

¹⁹ *Ibid* at para 27.

²⁰ *Ibid* at para 28.

²¹ *Maynes v Med-Eng Systems Inc*, 2010 CarswellOnt 6811 (Master) at para 13.

be requiring expert witnesses to meet prior to trial to identify areas of agreement and disagreement or to have witnesses' evidence-in-chief be given by affidavit. Counsel should also keep in mind that these powers are also available to a court conducting a pre-trial conference and, if *Abrams* is to be relied on, at any time the court deems reasonable under its inherent powers to manage its own process. "This is important because [a summary judgment] motion is not the last opportunity to narrow the issues or to determine the most efficient method of adjudication."²²

Ontario judges and masters have indicated their intention to issue directions under Rule 20.05(2) and counsel should be prepared to make submissions on this issue upon the court's request.²³

(3) "HOT-TUBBING"

*Courts are . . . the masters of their own procedure and have the flexibility to modify to their own advantage the framework within which experts testify.*²⁴

One method that the civil courts in Canada may start employing with greater frequency is the use of expert witness panels, or, colloquially, "hot-tubbing". But what is "hot-tubbing"? It "does not mean hot bubbling water, champagne, candles and music".²⁵ Rather, it is a method of presenting expert evidence all at once by having the expert witnesses for both parties give

²² *Ibid* at para 14.

²³ See e.g. *Briggs v Rints*, 2010 CarswellOnt 5260 (SCJ)(Belobaba J. "welcome[ing] input from counsel . . . as to the preferred timing of the trial and whether any further directions should be given pursuant to Rule 20.05(2)" at para 27); see also *Chidley-Hill v Daw*, 2010 CarswellOnt 1568 (SCJ) at para 44; *Chanore Property Inc v ING Insurance Co of Canada*, 2010 CarswellOnt 6903 (Master) at para 83.

²⁴ Hon Justice Ian Binnie, "The Changing Role of the Expert Witness" (2010) 49 Sup Ct L Rev (2d) 179 at 190.

²⁵ David I Bristow, QC, "Do You Want to 'Hot-Tub'?" *Construction Law Letter* 23:1 (September/October 2006) at 1.

testimony, answer questions, and fully discuss the expert evidence on one panel. Another name for this is "concurrent evidence".

Hot-tubbing in civil trials originated in Australia and slowly seems to be gaining attention in Canada, the United Kingdom, and the United States. Professor Gary Edmond gives an excellent description of the rise and practice of hot-tubbing in Australia, including a sense of how the practice has been received by the various parties and how successful it has been in achieving its goals.²⁶

Edmond observes that the driving rationale behind hot-tubbing is "the need for more-efficient legal practice and more-impartial expert evidence".²⁷ According to him, there are two distinct parts to the presentation of concurrent evidence. The first part involves asking all of the experts to generally comment on the issues in the case and discuss their differences in opinions. Once each of the experts has explained his or her position, they usually supplement their initial testimony with comments on the testimony of the other experts. The judge, lawyers and even fellow experts ask questions of the experts, mostly of an elucidatory nature. The judge may also suggest topics and direct the experts to comment on legally relevant issues. At the end of the first stage, each expert is usually asked if there is anything they would like to add or clarify.²⁸ Edmond comments that this stage marks "a major shift from conventional adversarial proceedings".²⁹

²⁶ Gary Edmond, "Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure" (2009) 72 *Law & Contemp Probs* 159.

²⁷ *Ibid* at 162.

²⁸ *Ibid* at 164.

²⁹ *Ibid*.

Second, the lawyers reassert their control over the proceedings by more directly questioning the expert witnesses. As there is usually little need for examination-in-chief after the first stage, the lawyers move straight to cross-examination. Questions may be put to more than one expert at a time and witnesses can be asked to comment on the answers of other witnesses.³⁰

The exact practice of concurrent evidence may vary according to court rules, as well as the type of evidence being presented, and the preferences and predilections of the judges and lawyers.³¹

The extensive use and institutionalization of hot-tubbing in Australia can be attributed in large part to the significant promotion of the practice by senior members of the Australian judiciary.³²

Judges in Canada have also expressed approval for this procedure. Justice Binnie recently expressed frustration in the current role of expert witnesses, stating that "the courtroom, with all its formalities and evidentiary rules, is a poor schoolhouse, and 'duelling experts' may make bad teachers".³³ One solution Justice Binnie offered was that "a court should be able to require opposing experts to testify on the same panel and to be subject to questioning in the presence of each other, with the right to question each other in the presence of the trier of fact".³⁴

³⁰ *Ibid.*

³¹ *Ibid* at 164-165.

³² *Ibid* at 167.

³³ Binnie, *supra* note 24 at 190.

³⁴ *Ibid* at 191.

In her 2009 decision in *Eli Lilly & Co v Apotex*,³⁵ Gauthier J. of the Federal Court of Canada commented that "the use of hot-tubbing would have been particularly useful" in that patent infringement case.³⁶

Almost in response, in August 2010 new *Federal Courts Rules* 282.1 and 282.2 came into force, which specifically provide for the use of expert witness panels in federal proceedings:

Expert witness panel

282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.

Testimony of panel members

282.2 (1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.

Examination of panel members

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.³⁷

The Regulatory Impact Analysis Statement accompanying the new rules emphasized as "paramount" the duty of the expert witness "to assist the court through the provision of an independent and objective opinion about matters relating to the expertise of the witness" and described the use of expert witness panels as one of the tools that judges "require to ensure that expert evidence is adduced in the most efficient, least costly and most fair manner".³⁸ This

³⁵ 2009 CarswellNat 3042.

³⁶ *Ibid* at n 234.

³⁷ SOR/2010-176.

³⁸ *Regulatory Impact Analysis Statement*, SOR/2010-176, (2010) C Gaz II, 1552-1553.

sounds very similar to the reasoning underlying the new changes to the Ontario *Rules of Civil Procedure* discussed above.

As of yet, hot-tubbing does not appear to have been used in civil litigation in Canada,³⁹ though expert witness panels are frequently used in administrative proceedings. For example, the Ontario Municipal Board regularly (though not always) accepts the use of panels for the presentation of expert evidence.⁴⁰ The Alberta Energy and Utilities Board's Rules of Practice specifically provide for the use of expert (and non-expert) witness panels,⁴¹ and the Board has commented on the "salutary benefits" of allowing witnesses to confer among themselves in proceedings before the Board.⁴² In addition, sections 75-76 of the federal *Competition Tribunal Rules* provide that the Tribunal "may require that some or all of the witnesses testify as a panel at any time" and that it "shall direct the manner in which the panel shall testify".⁴³

In December 2009, Lord Justice Jackson published his report on a review of civil litigation costs in the United Kingdom.⁴⁴ In it, Lord Justice Jackson proposed a number of "interlocking reforms," designed to "control costs and promote access to justice".⁴⁵ One such reform was the use of concurrent evidence, or "hot-tubbing" in appropriate cases. Specifically, he proposed that panels begin to be used as a pilot program, but only in cases where the parties,

³⁹ Michael Crichton & Christopher C Van Barr, "Key Developments in Canadian Patent Law in 2010" *Lexology*, (24 January 2011), online: <<http://www.lexology.com/library/detail.aspx?g=e00c17d8-6595-44dd-9b88-c3121182f26e>> ("[t]o date, no trials have employed an expert hot tub. It remains to be seen how this . . . will unfold.").

⁴⁰ See e.g. *Re 555816 Ontario Inc*, 2005 CarswellOnt 3759 (OMB); *Beechridge Farms Inc v Durham (Regional Municipality)*, 2006 CarswellOnt 753 (OMB).

⁴¹ *Alberta Energy and Utilities Board Rules of Practice*, Alta Reg 101/2001, Rule 39.

⁴² *Re ATCO Electric Ltd*, 2003 CarswellAlta 2125 (EUB) at para 248.

⁴³ SOR/2008-141.

⁴⁴ Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (London: Her Majesty's Stationary Office, 2010).

⁴⁵ *Ibid* at i.

the experts, the lawyers and the judge all consent.⁴⁶ The results of this pilot program would then be evaluated at a future date to determine whether Part 35 of the *Civil Procedure Rules* regarding experts should be specifically amended to enable the judge to direct that concurrent evidence be used where appropriate.⁴⁷

As in Canada, hot-tubbing has not yet really been tried in civil trials in the U.K. However, there are indications that this may be changing. In late 2010, for example, the Technology and Construction Court referenced hot-tubbing in its new procedural guide, making it the first court in the U.K. to explicitly adopt this method.⁴⁸

There is less "buzz" in the United States over the idea of using expert witness panels. One main difference possibly behind this seeming reluctance is the prevalence of juries in civil trials as compared to Australia, the U.K. and Canada. As one author put it: "The introduction of the jury represents the most significant hurdle that the Australian hot tub method faces in American courts".⁴⁹ This coincides with Professor Edmond's comments regarding the effect of the recent move away from the use of civil juries in Australia: "[t]he elevation of legally trained judges to fact finder has changed many of the rules and trial dynamics in civil litigation."⁵⁰

Another possible difference is that the U.S. legal system appears to accept more readily the overt partisanship of expert witnesses and may also prefer that the judge maintain the role of

⁴⁶ *Ibid* at 384.

⁴⁷ *Ibid*.

⁴⁸ See Charles Blamire-Brown, "Fancy a dip in the hot-tub?" (14 February 2011), online: <<http://www.building.co.uk/legal/fancy-a-dip-in-the-hot-tub/?/5009348.article>>; Semple Fraser, "Expert Witnesses in Hot Water – TCC Looks Set to Introduce Concurrent Evidence" *EBulletins: Construction Industry Update February 2011*, online: Semple Fraser, <<http://www.semplefraser.co.uk/a/ConstructUpdateFeb11>>.

⁴⁹ Megan A Yarnall, Comment, "Duelling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?" (2009) 88 Or L Rev 311 at 336.

⁵⁰ Edmond, *supra* note 26 at 161.

passive overseer rather than participant in the proceedings.⁵¹ Joe Cecil of the Federal Judicial Center has commented: "Assuming the judge has an active interest in ferreting out the truth and the experts are candid, I prefer the hot-tubbing option . . . [b]ut those are two bold assumptions, and the procedure drives the attorneys nuts."⁵²

Nonetheless, some possible modifications to the hot-tub method that may make it more workable in the U.S. include using hot tubs at least in bench trials and/or pre-trial "*Daubert* hearings" and, in jury trials, allowing the jury to listen, but not participate, as the judge, lawyers and experts discuss the expert evidence.⁵³

The "pros" and "cons" of hot-tubbing have been extensively canvassed by legal and academic commentators. These comments can be loosely grouped into three main categories relating to: (i) efficiency in presenting the evidence; (ii) the experts' perspective; and (iii) the judicial decision-maker's role in understanding and evaluating the expert evidence.

(i)
Efficiency

Hot-tubbing is said to significantly reduce the court time and costs associated with presenting expert evidence. "Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary."⁵⁴

⁵¹ See e.g. Adam Liptik, "In U.S., Expert Witnesses are Partisan" *New York Times* (23 August 2008), online: <http://www.nytimes.com/2008/08/12/us/12experts.html?_r=1>.

⁵² *Ibid.*

⁵³ Yarnall, *supra* note 49 at 337-338.

⁵⁴ Edmond, *supra* note 26 at 167, quoting Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of N.S.W., Address at the LAWASIA Conference: Expert Witnesses – The Experience of the Land & Environment Court Of New South Wales (21 Mar 2005), online: <<http://www.lawlink.nsw.gov.au/lawlink/lec/>>

*Concurrent evidence might well reduce costs in large-scale litigation in which many experts are scheduled to testify. Compelling two, but especially more, experts to testify simultaneously will often reduce the length of a trial by allowing them to each give an answer to the same question and to merely endorse or qualify the opinions of other experts. Also, the lawyers do not have to reintroduce the various issues or the opinions of other experts over and over.*⁵⁵

However, some lawyers have raised concerns that hot-tubbing may actually increase costs in some cases. As one lawyer pointed out:

*[T]he Rules of Professional Conduct prevent a lawyer from communicating with their experts while they are being examined, meaning that all experts on the panel are then off limits for consultation. This would result in the added expense of retaining separate consulting experts during the panel.*⁵⁶

Another suggested that the cost of preparing the expert would increase because the expert would be expected to not only answer questions but also to pose questions to the other experts.⁵⁷

Perhaps these additional costs would be offset by the savings incurred by reducing the expert's time in court. Then again, time savings are not guaranteed. While in some cases the use of concurrent evidence reduced the amount of time to present the expert evidence, in other cases the use of hot-tubbing served only "to highlight the absence of any likelihood of agreement between [the expert witnesses] on important issues", leading to "an interdisciplinary brawl".⁵⁸

There are also some logistical concerns that may affect the overall efficiency and effectiveness of the hot-tubbing procedure. For instance, many courtrooms are designed to allow for the presentation of only one witness at a time (i.e. in the witness box), and there may not be

ll_1ec.nsf/vwFiles/Speech_21Mar05_CJ.doc/\$file/Speech_21Mar05_CJ.doc>.

⁵⁵ *Ibid* at 176.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at 180, quoting *Perpetual Trustees Victoria Ltd v Ford*, No. 10685, 2008 WL 278422, ¶ 43 (N.S.W., Feb. 1, 2008).

room to accommodate a panel of witnesses. In addition, the free form structure of the experts' discussion during the hot-tubbing session might make it difficult for the court reporter to reliably identify the speakers for the record.⁵⁹

(ii)
The Experts' Perspective

Experts tend to like the hot-tubbing method. The procedure allows them to more fully flesh-out and discuss their positions in, at least at the beginning, a less adversarial way. They like the opportunity to pose questions to each other.⁶⁰ An Australian judge commented that "[w]ithin a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion".⁶¹

Others have suggested that "the physical removal of the witness from his party's camp into the proximity of a (usually) respected professional colleague tends to reduce the level of partisanship",⁶² and that "[b]ecause the experts are confronting one another, they are much less likely to act adversarially".⁶³

Hot-tubbing may also improve the quality and accuracy of the experts' testimony. In support of his recent recommendation for the use of expert witness panels, Justice Binnie cited the theory that "experts testifying in the presence of one another are likely to be more measured

⁵⁹ *Ibid* at 176-177.

⁶⁰ *Ibid* at 184.

⁶¹ *Ibid* at 167, quoting Justice McClellan, see *supra* note 54.

⁶² *Ibid* at 168, quoting Peter Heerey, Judge of the Federal Court of Australia, *Recent Australian Developments*, 23 CIV JUST Q 386, 391 (2004).

⁶³ *Ibid*, quoting Brian Preston, Chief Judge of the Land and Environment Court of N.S.W., Address Before the Australian Environmental Business Network: Ongoing Reforms of Practice and Procedure (16 June 2006), online: <[http://www.lawlink.nsw.gov.au/lawlink/lec/ll_jec.nsf/vwFiles/Paper_14Jun06_Preston_Reforms.doc/\\$file/Paper_14Jun06_Preston_Reforms.doc](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_jec.nsf/vwFiles/Paper_14Jun06_Preston_Reforms.doc/$file/Paper_14Jun06_Preston_Reforms.doc)>.

and complete in their pronouncements, knowing that exaggerations or errors will be pounced upon instantly by a learned colleague, as opposed to being argued about days later, perhaps by unlearned opposing counsel".⁶⁴

However, some lawyers are not so sure. One major concern is that "[a]n expert who is more aggressive may dominate the panel discussion" and this may, in turn, "motivate counsel to put greater emphasis on aggressive personality traits when selecting an expert, rather than level of expertise and special knowledge".⁶⁵ This would seem to go against the spirit of the current reforms to the role of expert witnesses.

In addition, hot-tubbing may give rise to certain procedural difficulties. For example, experts are not trained in civil procedure or the concepts of relevance or admissibility of evidence. "Essentially, the change would result in an entire panel of unrepresented persons attempting to advance their positions."⁶⁶ Likewise, it would be difficult to control the boundaries of the panel discussion, for example, preventing the experts from introducing and commenting on something previously mentioned during the confidential expert witness pre-trial conference.⁶⁷

(iii)
Judicial Comprehension and Evaluation of the Expert Evidence

The strongest proponents of the hot-tubbing method are judges. Is this because, as one barrister in Australia put it, "[t]he judges miss being barristers half the time because cross-

⁶⁴ Binnie, *supra* note 24 at 191.

⁶⁵ Jeilah Y Chan & Barbara J Murchie, "Hot-Tubbing with the Federal Court" (Paper delivered at The Advocates' Society and the American College of Trial Lawyers- (Toronto), *Spring Symposium 2010: Mastering the Art of Advocacy*, 28 May 2010) at 10.

⁶⁶ CBA Intellectual Property and Aboriginal Law Sections, "Submissions on Rules Amending the Federal Courts Rules (Expert Witnesses)" (18 January 2010) at 6, online: <www.cba.org/CBA/Submissions/2010eng.pdf>.

⁶⁷ *Ibid.*

examination is the best part of the job and so they sit up on the bench and have a bit of a go"⁶⁸
More likely, it is as a result of some of the following benefits as described by Australian judges who have employed this method:

*[M]y experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced.*⁶⁹

*[T]he judge sees the opposing experts together and does not have to compare a witness giving evidence now with the half-remembered evidence of another expert given perhaps some weeks previously and based on assumptions which may have been destroyed or substantially qualified in the meantime.*⁷⁰

However, Edmond expresses doubt that concurrent evidence will ease decision-making as the fact finder still needs to weigh the differing opinions.⁷¹

In addition, the increased participation by judges in guiding the panel discussion and posing questions to the experts raises concerns about judicial impartiality and procedural fairness.⁷² These concerns would be especially heightened if hot-tubbing was required, and not just employed on consent of all the parties involved.

*By forcing expert witness panels on a case and taking some measure of control over the questioning of these witnesses, the judge takes from the parties the right to control the manner in which they tell their story.*⁷³

⁶⁸ Edmond, *supra* note 26 at 183.

⁶⁹ *Ibid* at 167, quoting Justice McClellan, see *supra* note 54.

⁷⁰ *Ibid* at 168, quoting Judge Heerey, see *supra* note 62.

⁷¹ *Ibid* at 181.

⁷² Robert Todd, "The hot topic of hot-tubbing," *Canadian Lawyer Magazine* (January 2010), online: <<http://www.canadianlawyermag.com/The-hot-topic-of-hot-tubbing.html>>.

⁷³ *Ibid*, citing Judith Robinson, Ogilvy Renault LLP.

The idiosyncratic ways in which expert witness panels are implemented by various institutions and individual judges are also troublesome.⁷⁴

Based on his observations regarding the Australian experience with hot-tubbing so far, Edmond concludes:

*Concurrent evidence is not a panacea for partisanship, adversarial bias, or the difficulties created by expert disagreement and decision making in the face of uncertainty. . . Nevertheless . . . [t]he procedure has the potential to improve communication and comprehension and the conditions under which lay fact finders make decisions about the evidence before them.*⁷⁵

And:

*At its most modest, concurrent evidence has the potential to improve communication and comprehension in the courtroom. Concurrent evidence may reduce costs, encourage settlement, and expedite legal proceedings, and the presence of opposing experts may exert some discipline on witnesses . . . Simultaneously, its use may create difficulties and introduce new risks. Whether potential improvements in the provision and reception of testimony outweigh hurdles and dangers is a question that probably depends on the circumstances of individual cases, the proclivities of the participants, and the way in which different legal systems value rights, efficiency, fairness, accuracy, public confidence, and empirical evidence.*⁷⁶

(4)

EVIDENCE-IN-CHIEF BY AFFIDAVIT

In *Abrams*, Brown J. defended his authority to direct that witnesses' evidence in chief be adduced in part by way of affidavit:

⁷⁴ Edmond, *supra* note 26 at 185.

⁷⁵ *Ibid* at 186.

⁷⁶ *Ibid* at 189 [emphasis in original].

Stephen Abrams submitted that requiring the use of affidavit evidence at trial ignored "the general principle that evidence should be submitted orally in court" which "has been a cornerstone of our legal system for more than 200 years." With respect, that submission ignores how civil trials have evolved in this province in recent years.⁷⁷

In a 2007 presentation, Justice Brown elaborated on the benefits of using affidavit evidence for examination-in-chief. In particular, he identified two important purposes served by affidavit evidence: (1) trial management; and (2) proof of evidence.⁷⁸ Trial management includes saving time in pre-trial disclosure and trial preparation and also by eliminating the need to take a witness orally through his or her evidence-in-chief during the trial. The judge and opposing counsel will also have clearer understandings of the issues and evidence in the case prior to trial. As for the evidentiary issues, Brown J. provided several recommendations for the successful use of affidavits for examination-in-chief, including that:

- (i) the parties file a joint exhibit brief and then have each witness's affidavit refer to documents included in the brief (either by referencing tab number or by incorporating extracts from the brief into the affidavit);
- (ii) counsel consider having their witnesses frame their affidavits in a question and answer format, similar to a script for an oral examination-in-chief, and also using headings and clustering of issues;
- (iii) the affidavit address questions going to the witness's credibility, including the witness's background, ability to attest to certain facts, and purposes for testifying;

⁷⁷ *Abrams, supra* note 2 at para 79.

⁷⁸ Hon Justice David M Brown, "Use of Affidavit Evidence as Evidence in Chief: Strategic and Evidentiary Issues" (Paper delivered at Osgoode Professional Development CLE, *Evidence Law for the Civil Litigator* (19 September 2007) at 2.

- (iv) the affidavit must be that of the witness and not of counsel; failure to do so will do one's witness a disservice in establishing credibility; and
- (v) counsel ensure that the affidavit does not contain inadmissible hearsay evidence; any contentious hearsay evidence should be addressed separately, either by seeking to resolve the issue with opposing counsel prior to filing the affidavit, or by moving at the commencement of trial for leave to file the additional evidence and have the judge make an evidentiary ruling on it.⁷⁹

Brown J. concluded by encouraging "the increased use of affidavits as a substitute for oral examination in chief in virtually any kind of civil trial. Not only do affidavits reduce trial time, they focus the issues for trial and, I think, can result in a higher quality of advocacy service provided to a client since their use compels a disciplined approach to trial preparation".⁸⁰

As mentioned in *Abrams*, Rule 20.05(2)(j) provides a judge who denies a summary judgment motion the power to nonetheless manage the litigation by directing "that the evidence of a witness be given in whole or in part by affidavit". Note that Rule 20.05(4) states that in considering whether to order affidavit evidence under 20.05(2)(j), "the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration."

In addition, Rule 53.02 provides as follows:

53.02(1) Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial.

⁷⁹ *Ibid* at 3-5.

⁸⁰ *Ibid* at 6.

53.02(2) Where an order is made under subrule (1) before the trial, it may be set aside or varied by the trial judge where it appears necessary to do so in the interests of justice.

It has been said that "there is no automatic right of cross-examination under rule 53.02".⁸¹

While historically rule 53.02 has been used in cases where the witness, after providing the affidavit evidence, subsequently dies or becomes otherwise unavailable at trial,⁸² a recent case from the Ontario Superior Court of Justice has clarified that this was not the purpose of rule 53.02. In *Cormack Animal Clinic Ltd v. Potter*,⁸³ Corbett J. explained:

I am uncomfortable . . . with the reliance placed on Rule 53.02(1) to support the decisions to admit evidence at trial by way of affidavit where the deponent has died or is otherwise unavailable to testify, and the proposed evidence is controversial.

*In my view, Rule 53.02(1) is not designed to address the principled exception to the hearsay rule. Rather, it is designed to enable the court to achieve efficiencies in the trial process. Where a certain point must be proved, but is not contentious, valuable court time should not be occupied by receiving this evidence orally. It should be done by way of affidavit. Rule 53.02(1) permits this.*⁸⁴

Corbett J. went on to explain that if Rule 53.02(1) would have been designed to address situations where witnesses are not available, it would have included unavailability as a condition precedent. Accordingly, in his view, "the proper reading of the Rule is that where there is no

⁸¹ Linda S Abrams & Kevin P McGuinness, *Canadian Civil Procedure Law*, 2d ed (Toronto: LexisNexis, 2010) at 1315.

⁸² See e.g. *Leclerc v St-Louis* (1984), 47 OR (2d) 584 (Div Ct); *Johnson Estate v Nagy* (2006), 34 CPC (6th) 159 (Ont SCJ).

⁸³ [2009] 306 DLR (4th) 548 (Ont SCJ).

⁸⁴ *Ibid* at paras 26-27.

reasonable *need* to cross-examine, there is no need to call the witness in person, and the evidence may be received in affidavit form".⁸⁵

In that case, involving the affidavits of a plaintiff who, at the time of trial, was 83 years old and suffering from dementia and therefore could no longer testify, Corbett J. held that the better way to consider admitting the affidavits as evidence was under the principled exception to the hearsay rule.⁸⁶

In addition, under Rule 50.07(c), if a proceeding is not settled at the pre-trial conference, the presiding judge may "make such order as the judge . . . considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05(1) or (2)", including that evidence be given by way of affidavit.⁸⁷

In *Abrams*, Brown J. pointed to these Rules as support for the position that a superior court has the inherent power to direct that evidence-in-chief be adduced by affidavit where appropriate:

Rule 53.01 states that the general rule of using viva voce evidence at a trial applies "unless these rules provide otherwise". The Rules now "provide otherwise" in order to reflect the reality that if proportionality is to have any meaning as a guiding principle, pre-hearing judges must be able to exercise some control over the length and process for the trial of the proceeding. Of course, any pre-trial directions given regarding the conduct of a trial ultimately are subject to the discretion of the judge presiding at the trial.

⁸⁵ *Ibid* at para 27. By contrast, evidence-in-chief by affidavit is *required* in a summary trial under Rule 75.12, whether the evidence is contentious or not. The adverse party is then given a limited amount of time to cross-examine the deponent on the affidavit evidence.

⁸⁶ *Ibid* at para 34.

A judge engaged in case - or litigation - management also possesses the inherent powers to give directions regarding the mode of giving evidence-in-chief and the length of the oral examination of any witness at trial. Such powers are a necessary incident to the judge's ability to manage the case in a proportionate manner. That Rules 20.05(2) and 50.07(1)(c) do not specifically refer to judges involved in managing litigation is neither here nor there. A judge managing a case could easily direct the holding of a formal pre-trial conference and thereby engage the powers granted by Rule 50.07(1)(c). To require such formality is unnecessary; a case management judge can issue such directions, as an incident of his or her inherent powers, at an appropriate stage of the case or litigation management process.⁸⁸

It has also been the practice in certain specialized Ontario courts to encourage affidavit evidence.

For example, Practice Direction # 58 of the Commercial List states:

For trials, the Court encourages the use of sworn witness statements to replace examination in chief, in whole or in part, in appropriate circumstances. All such witness statements must be exchanged with all other parties and counsel well in advance of the hearing and, unless a prior order is made, the witness should be available for cross-examination at the trial. (Also see rule 53.02)⁸⁹

Sections 68 and 74 of the federal *Competition Tribunal Rules*⁹⁰ also provide for witness statements setting out lay witnesses' evidence in chief in full. In addition, the use of evidence by affidavit has been widely accepted and encouraged in family and estate matters.⁹¹

Similar rules permitting the use of affidavit evidence for examination-in-chief exist in all other provinces.⁹²

⁸⁸ *Abrams*, *supra* note 2 at paras 82-83.

⁸⁹ Superior Court of Justice, Commercial List, *Practice Directions*, r 58, online: <http://www.ontariocourts.on.ca/scj/en/notices/pd/Toronto/commercial_list_2010.htm>.

⁹⁰ *Supra* note 43.

⁹¹ See e.g. *LeVan v LeVan* (2006), 82 OR (3d) 1 (SCJ) at para 8 (Backhouse J. commenting that the use of affidavit evidence saved a substantial amount of time and encouraging others to adopt this approach in family trials); *Abrams*, *supra* note 2.

In the United States, Rule 43(a) of the Federal Rules of Civil Procedure requires that witnesses' testimony at trial be taken "in open court". For "good cause in compelling circumstances and with appropriate safeguards" the court may alternatively allow testimony by contemporaneous transmission from a different location (i.e. by satellite video or possibly telephone). A requirement that the testimony be given "orally" was omitted from the Rule in a 1996 amendment.

Although evidence by affidavit is not particularly common or accepted under the rules generally, at least some courts have accepted it as a good way to shorten bench trials, particularly in the bankruptcy context.

In *In re Adair*,⁹³ the Ninth Circuit Court of Appeal addressed a challenge to the bankruptcy court's procedure requiring that direct testimony be presented by written declaration. The Court described the process as follows: "Under this procedure the parties submit written narrative testimony of each witness they expect to call for purposes of direct evidence. The witness then testifies orally on cross-examination and on redirect".⁹⁴ The Court held that the bankruptcy court's procedure was consistent with the Federal Rules of Evidence, which allow the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the

⁹² See Alberta Rules of Court, Alta Reg 124/2010 s 8.17; BC Supreme Court Rules, BC Reg 168/2009, s 12-5(59)-(65); Manitoba Court of Queen's Bench Rules, Man Reg 553/88, s 53.02; Rules of Court of New Brunswick, NB Reg 82-73, s 55.02; Newfoundland and Labrador Rules - Rules of the Supreme Court, 1986, SN 1986, c 42, Sched D, ss 46.03-46.04; Nova Scotia Civil Procedure Rules (1972), ss 31.04-31.05, 51.02(2), 51.07; PEI Rules of Civil Procedure, s 53.02; Yukon Regulations Judicature Act, Yuk Reg OIC 2009/65, s 42(46)-42(51); Northwest Territories Rules – Rules of the Supreme Court of the Northwest Territories, NWT Reg R-010-96, s 351.

⁹³ 965 F2d 777 (9th Cir 1992).

⁹⁴ *Ibid* at 779.

ascertainment of the truth, [and] (2) avoid needless consumption of time...."⁹⁵ The Court went on to explain that "[t]he use of written testimony is an accepted and encouraged technique for shortening bench trials".⁹⁶

At the time, the Advisory Committee had proposed amending Rule 43(a) to explicitly permit direct examination by written statement or affidavit of the witness; however, the final amendment stopped short of this, omitting only the requirement that testimony be given "orally".⁹⁷

Other U.S. courts have rationalized that by swearing in the witness and having the witness affirm his or her declaration in open court, and then being open to cross-examination and redirect, the requirement of taking testimony in open court under Rule 43(a) is satisfied.⁹⁸

Some practice points suggested from the U.S. system that may be helpful to us include:

- (i) If you believe your client's case will be prejudiced by the use of declarations in lieu of direct testimony, object early and provide specific reasons why it would be prejudicial and/or would not promote efficiency in this case;
- (ii) Prepare the declaration with great care. Expert declarations must establish credentials and should pre-empt any possible *Daubert* challenge by, among other things, establishing the methodologies used and why they do not deviate from established methodologies;

⁹⁵ *Ibid*, citing Fed R Evid § 611(a).

⁹⁶ *Ibid* [internal citations omitted].

⁹⁷ 33A Fed Proc L, Ed § 80:68.

⁹⁸ See e.g. *Union State Bank v Geller*, 170 BR 183, 185 (Bankr SD Fla 1994) at 186.

- (iii) To the extent that hearsay is incorporated, the declaration should also establish the relevant exception to the hearsay rule; and
- (iv) Prepare the witness as if the declaration will not be used such that the witness could provide live, in-court testimony if required.⁹⁹

The use of direct testimony by written statements has also been recommended in complex litigation, "[w]here credibility or recollection is not at issue, and particularly when the evidence is complicated or technical".¹⁰⁰ This procedure is said to be "particularly appropriate for expert witnesses, witnesses called to supply factual background, or those needing an interpreter".¹⁰¹ The advantages include: "[t]he proponent can ensure that it has made a clear and complete record; the judge and opposing counsel, having read the statement, are better able to understand and evaluate the witness's testimony; opposing counsel can prepare for more effective cross-examination; and the reduction in live testimony saves time".¹⁰²

(5) HEARSAY

*Modifications have been made to a number of rules, including the rule against hearsay, to bring them up to date and to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process. However, the traditional rules of evidence reflect considerable wisdom and judicial experience. The modern approach has built upon their underlying rationale, not discarded it.*¹⁰³

⁹⁹ Robert J Keach, "Using and Defending against Written 'Nontestimonial' Evidence in Bankruptcy Court Cases and Proceedings" (2009) Am Bankr Inst J 20 (WL).

¹⁰⁰ Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 12.51.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *R v Khelawon*, [2006] 2 SCR 787 at para 59 ["*Khelawon*"].

"The hearsay rule has occupied a great deal of the Supreme Court of Canada's time lately."¹⁰⁴

In *R v Khelawon*,¹⁰⁵ Charron J. defined hearsay as follows:

*The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.*¹⁰⁶

The following step-by-step enunciation of the current hearsay analysis was provided in *R v Post*:

1. A hearsay statement is an out-of-court statement adduced to prove the truth of its contents, in the absence of a contemporaneous opportunity to cross-examine the declarant.
2. Hearsay evidence is presumptively inadmissible.
3. It is inadmissible because generally it is not possible to test the reliability of a hearsay statement.
4. A hearsay statement may be admitted for its truth if it is shown to be both necessary and reliable.
5. Its reliability must be sufficient to overcome the dangers arising from the difficulties of testing it.
6. The onus of establishing, on a balance of probability, both necessity and reliability is on the person who seeks to adduce the evidence.
7. The overarching principle is trial fairness which embraces not only the rights of the accused, but broader societal concerns including truth as the goal of the trial process.
8. There are two main ways of establishing reliability. The first is that because of the circumstances in which the statement was made, there is no real concern about the statement's truth. This

¹⁰⁴ Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Markham, Ontario: LexisNexis Canada Inc, 2009) at § 6.24. These cases include: *R. v. Smith*, [1992] 2 SCR 915; *R. v. B. (K.G.)*, [1993] 1 SCR 740; *R. v. U. (F.J.)*, [1995] 3 SCR 764; *R. v. Hawkins*, [1996] 3 SCR 1043; *R. v. Khan*, [1990] 2 SCR 531; *R. v. Starr*, [2000] 2 SCR 144; *R. v. Mapara*, [2005] 1 SCR 358; and *Khelawon*, *supra* note 103.

¹⁰⁵ *Supra* note 103.

¹⁰⁶ *Ibid* at para 35.

approach is embodied in traditional exceptions to the rule against hearsay such as dying declarations, spontaneous utterances, and statements against pecuniary interest.

9. The second way of establishing reliability is because the statement's truth and accuracy can be sufficiently tested. The optimal means of testing reliability is to have the declarant state the evidence in court, under oath, and subject to contemporaneous cross-examination. In some cases where the optimal means are unavailable, it will still be possible to sufficiently test the truth and accuracy of the evidence because of the presence of adequate substitutes, including (a) an oath or its equivalent; (b) an opportunity to observe the statement being made (e.g. a video); and (c) the opportunity to cross-examine the declarant on his or her earlier statement.

10. Trial fairness requires consideration of factors beyond necessity and reliability. Even if those two factors are met, the trial judge has a discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

11. The trial judge must also be satisfied on a balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

12. There is a distinction between threshold reliability (i.e. reliability sufficient to be admissible) which is a legal question for the judge; and ultimate reliability, which is a question for the trier of fact.¹⁰⁷

Necessity will usually be easily demonstrated, either by showing that the witness is dead or otherwise unavailable at the time of trial, or because the witness's prior statement differs from his or her current story (for example, where the witness has recanted the prior story or cannot recall the facts supporting that story).¹⁰⁸

¹⁰⁷ 2007 CarswellBC 381 (CA) at para 47; leave to appeal to SCC refused, 2007 CarswellBC 2057 (SCC).

¹⁰⁸ Maria G Henheffer & Margaux Savoie, "The Principled Approach Exception to Hearsay Evidence in Civil Litigation," in Justice Todd L Archibald & Justice Randall Echlin, *Annual Review of Civil Litigation 2008*, at 8-9 (WL).

The more difficult prong is demonstrating threshold reliability. The courts have emphasized the importance of differentiating between threshold and ultimate reliability; nonetheless, at least one author has suggested that the effect of *Khelawon* has been to muddle the two because it removed clear limits of what should be considered in the *voir dire* as opposed to by the trier of fact at the end of the trial.¹⁰⁹

The following is a list of factors the courts have considered in determining threshold reliability:

- statements made where there has been or still is an opportunity for cross-examination;
- statements made under oath;
- statements which have been videotaped;
- statements which have been audiotaped;
- statements made by persons without interest;
- statements made to persons in authority;
- statements made by persons with no motive to lie;
- statements made against self-interest;
- statements made where the importance of accuracy and truthfulness have been impressed upon the declarant;
- statements made where it is known or expected the statements could be easily verified or would be publicized;
- statements made close in time to the event such that issues about memory or accuracy are not present and opportunity to concoct a story is more unlikely;

¹⁰⁹ See Hamish Stewart, "*Khelawon*: The Principled Approach to Hearsay Revisited" (2007) 12 Can Crim L Rev 95.

- statements made where there is no concern regarding perception, memory, or credibility issues, or at least not present to any significant degree;
- statements corroborated by physical evidence;
- statements corroborated by other evidence;
- statements emerging naturally;
- statements made without prompting or leading or any form of investigatory misconduct;
- statements made in a clear dispassionate manner without embellishment or indication of vindictiveness;
- statements made by children on matters expected to be beyond their knowledge;
- statements made by persons with a peculiar or special means of knowledge;
- statements made by persons with a duty to record; and
- statements made which leave little, if any value for cross-examination.¹¹⁰

The recent cases refining the new approach to hearsay evidence discussed above all involved criminal matters; however the same approach applies in civil trials, particularly the standards for determining threshold reliability. "A review of civil decisions applying the principled approach does not clearly illustrate a relaxed grade in assessing reliability."¹¹¹

Some have suggested that the court's new focus on expediency and reducing the costs of civil litigation would merit a relaxation of the hearsay rules in civil cases where "there is no countervailing concern about protecting the liberty interests of an accused."¹¹² For example, in England, "the hearsay rule has been abolished in civil cases and hearsay concerns are dealt with

¹¹⁰ Henheffer & Savoie, *supra* note 108 at 16-17.

¹¹¹ *Ibid* at 14.

¹¹² David M Paciocco & Lee Stuesser, *The Law of Evidence*, revised 5th ed (Toronto: Irwin Law, Inc, 2010) at 119.

by way of notice requirements and weight."¹¹³ Others have argued that an across-the-board relaxation of the hearsay rules in civil cases may be "too blunt an approach", but that instead, "case-by-case consideration of the hearsay evidence in the context of the issues in the case and the potential impact of receiving the evidence in hearsay form" should be considered.¹¹⁴

We would propose, however, that *any* relaxation of the hearsay rules in civil litigation should be avoided. The tradition and orthodoxy of the rule against hearsay preserves the important rigor that is essential to ensure a fair and just hearing. The hearsay rule serves an important gatekeeper function – it proximates a search for truth while yet protecting against a search for truth "at all costs". The current principled approach to hearsay applied in both criminal and civil contexts sufficiently provides courts with the flexibility to admit hearsay evidence when such evidence is necessary and reliable. Further relaxation of the rules for civil litigation would lead to excessive uncertainty in the process. Strict and uniform enforcement of the hearsay rules, taking into consideration the flexibility already built into the current analysis, allows participants to walk away, even when they have lost, feeling that they have participated in a fair and just process.

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¹¹³ *Ibid.* Section 1(1) of the *Civil Evidence Act 1995* (UK), 1995, c 38 (the "Act"), provides: "In civil proceedings evidence shall not be excluded on the ground that it is hearsay". Section 2 of the Act requires a party intending to adduce hearsay evidence to give notice of that fact; failure to so give notice would go to costs and weight, but not admissibility. Moreover, if one party adduces hearsay evidence of a statement but does not call the maker, the other party may do so and treat him as though he was the first party's witness (section 3). See generally Hodge M Malek, *Phipson on Evidence*, 17th ed (London: Sweet & Maxwell, 2009), c 29.

¹¹⁴ *Ibid.*