A FEW THOUGHTS ON HYBRID TRIALS

By Tim Dickson

TRIAL BY TESTIMONY, TRIAL BY AFFIDAVIT

Trials have long been presumed within our legal system to be based on oral testimony, as opposed to sworn written evidence. Wigmore decried affidavits as "most unsatisfactory", lacking "[a]ll the circumstances which give to the system of English procedure its peculiar and characteristic merits—'*viva voce*' interrogation, cross-examination, publicity, examination in the presence of the tribunal, whereby an opportunity is afforded of observing the demeanor of the witness".[1] Affidavits are criticized as usually being drafted by counsel, who tailor the expression of the affiant's evidence to suit the case.[2] In many affidavits, the personality of the affiant is lost, uncertainties in the evidence are skirted over, and the sources of the affiant's knowledge—is it personal, or on information and belief, and how did he or she obtain it?—are not disclosed. For these reasons, our trial procedure presumes that evidence will be given orally: "Subject to any enactment and these Supreme Court Civil Rules, (a) a witness at a trial of an action must testify in open court, and (b) unless the parties otherwise agree, the witness must testify orally."[3]

Still, a comment variously attributed to Lord Buckmaster or Lord Justices Bowen and Chitty concedes that "truth may sometimes leak out from an affidavit—like water from the bottom of a well".[4] Hardly a ringing endorsement, yet in many ways we have resigned ourselves to the use of affidavit evidence in certain circumstances. We have long been accustomed to interlocutory applications being determined on affidavit evidence alone. Sometimes—particularly in the case of interlocutory injunctions—those applications are substantial, essentially determining the case. And for many years affidavits have been used to actually determine the final merits of proceedings commenced by petition.

Trials by oral testimony, moreover, can be long and expensive, in terms of the time of both counsel and the court. The province therefore enacted the summary trial provisions of the Civil Rules—long known as Rule 18A and now numbered Rule 9-7. Evidence on a summary trial may be introduced by affidavit, expert report, interrogatories, admissions or the transcript of an examination for discovery.[5] Summary trials have been a

well-used procedural amendment. According to one source, the rule is employed in 60 per cent of cases.[6] Still, the procedure carries considerable risk. Under Rule 9-7(11), the court may dismiss the summary trial application on the grounds that the issues in the case "are not suitable for disposition" under the rule, or that the application "will not assist the efficient resolution of the proceeding". A party who seeks to have the litigation determined by summary trial therefore risks spending considerable time preparing the application and the affidavit evidence on which it is based, only to have the court determine that the matter must proceed to trial.[7]

Court proceedings on evidence therefore generally fall into one of two kinds: a full-blown trial in which evidence is given by oral testimony, or a chambers application in which evidence is tendered by affidavit. But there has always been some scope for blending the two. Rule 12-5(59) allows the court to order that a witness's evidence in chief be given by affidavit, subject to the right of the opposing party to cross-examine that witness at trial pursuant to Rule 12-5(61). Rule 12-5(71) permits the court to relax the usual rules of evidence further and allow for the proof of facts by statements on information and belief, by documents in entries in books, or through publications (that is, a Brandeis brief). Rule 12-5(68) empowers the court to abandon the presumption of a one-size-fits-all process by ordering "that different questions of fact arising in an action be tried by different modes of trial". And within summary trials, Rule 9-7(12) allows the court to order that an affiant attend for cross-examination, either at the hearing of the summary trial application or before a court reporter.

Still, unlike certain types of arbitration proceedings,[8] it appears that trials and chambers applications are usually determined, respectively, either entirely on oral or entirely on written testimony before the court. In this article I present some recent experience with trials and a summary trial that proceeded through blended forms of evidence, incorporating both oral and affidavit evidence. In my experience, such "hybrid trials", if properly designed and particularly with co-operation from all counsel, can allow for very complex issues to be fairly litigated far more quickly.

THE HYBRID TRIAL

The central feature of a hybrid trial is the presumption that the evidence will include both oral and written testimony. In my experience, as discussed further below, the process has been that all evidence is exchanged in advance in writing through affidavits and expert reports, and then some or all of those witnesses are called to testify orally in court. The number of witnesses called to testify can vary according to the circumstances, and a

host of accompanying conditions can be agreed upon or ordered, including with respect to the time for and nature of an examination in chief and cross-examinations of the witnesses called. The goal is to tailor the process to fit the issues in the case.

Tailoring the process in this way yields a number of advantages. An obvious one is that there is potential to substantially reduce the amount of court time by allowing for non-contentious evidence to be covered by affidavit, and for contentious issues that can nonetheless be adequately addressed through responding and reply affidavits to be determined without the need for oral testimony. Where the resolution of disputes depends not so much on credibility but on the court's interpretation of a long documentary record, for instance, affidavit evidence will often provide a far more expedient means of introducing that evidence. In many such cases, an evidentiary record based primarily on affidavits and expert reports will also better allow the parties to construct their written submissions ahead of time, and may provide the court with a more comprehensible record on which to craft the judgment.

In a case that is focused more on competing perspectives on a complex factual background—as opposed to narrower contests over credibility—the exchange of written evidence will better allow the issues between the parties to be raised and responded to, and so promotes the possibility of settlement. Where all evidence is exchanged in writing ahead of time, much of the surprise of trial is removed. As with the rules for examinations for discovery of parties, the disclosure of the evidence in chief of all witnesses allows the parties to determine the issues in dispute, obtain responsive evidence where it is available, and assess the merits of their case with a view to settlement. The existence of a right to cross-examine should discipline witnesses and counsel to ensure that affidavit evidence will stand up if challenged. In some cases, the opportunity to view the other side's evidence ahead of time sufficiently reduces the risk of ambush that the parties agree to limit documentary discovery.

But it is important to remember that the real benefit of a hybrid trial is that it allows the process to fit the issues. Issues revolving around credibility need not be addressed by affidavit evidence; rather, evidence on those issues could be given entirely, or additionally, by oral testimony. Hybrid trials recognize that the determination of some issues is amenable to affidavit evidence, while others will require some form of oral testimony. It is for the parties and the court to distinguish between the two and fashion the trial accordingly.

In a series of recent summary judgment decisions in Ontario,[9] Justice David Brown has urged counsel appearing before him to consider "creative

ways to structure and conduct trials, including using hybrid written and *viva voce* records".[10] In the most recent of these cases, he sought to abolish the bias within the profession toward conventional trials: "Under our *Rules* the 'conventional trial' no longer exists as a norm; the *Rules* have made the civil trial modular in nature, with counsel and the judge able to fashion trials tailor-made to the circumstances of each a particular case."[11]

That effort to loosen the hold of the conventional trial has now been taken up by the Supreme Court of Canada, as seen in its recent unanimous decision in *Hryniak v. Mauldin*.[12] In that case the court considered the use of Ontario's expanded summary judgment rules, which require judges to give summary judgment where "there is no genuine issue *requiring* a trial" and allow judges broader fact-finding powers on such an application, including receiving evidence by affidavit or orally.[13] In strongly endorsing the use of the expanded summary judgment procedure, the court observed that "[t]he full trial has become largely illusory" because of its prohibitive cost[14] and that "[t]here is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted".[15] The court urged a "shift in culture" toward closer embrace of the proportionality principle, which holds that "the procedures used to adjudicate civil disputes must fit the nature of the claim".[16] While the court noted that the power to hear oral evidence on a summary judgment motion will most often be appropriate where the oral evidence is limited, "there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure".[17]

LESSONS LEARNED

The court's endorsement in *Hryniak* of the use of hybrid forms of evidence should be taken as strong encouragement to counsel seeking ways to reduce the cost and duration of litigation. Below are a few observations drawn from four hybrid trials in which I was counsel.

Hybrid Trials Can Accommodate Vast Records with Fewer Hearing Days

A key benefit of a hybrid procedure is that it can allow for the evidentiary record to be compiled over fewer hearing days. Indeed, as three recent cases demonstrate, hybrid trials can be used to address highly complex factual issues and can accommodate very large evidentiary records.

Bentley v. Anglican Synod of the Diocese of New Westminster[18] arose out of the approval of the blessing of same-sex relationships by the Anglican dio-

cese that covers the Lower Mainland. Conservative congregations in certain parishes—angered by what they perceived to be a fundamental departure from Anglican doctrine—attempted to secede from the diocese while retaining control of the church buildings and properties they occupied. The litigation centred on whether an implied religious-purpose trust required that use of the properties be consistent with "orthodox" Anglican doctrines on human sexuality, and so what was ultimately a property dispute became a wide-ranging debate about theology, church history, governance and practice, and the expectations of congregants.

The litigation was a test case for similar disputes in Anglican dioceses across Canada, and there was an added time pressure arising out of the disputed control of the buildings. The parties therefore asked the Chief Justice for an early trial date and the appointment of a trial judge, and later received Justice Kelleher's approval of a hybrid trial process. Under the plan, all witnesses provided evidence by affidavit but each party could call a limited number of those witnesses to also give *viva voce* evidence. Documentary discovery was limited and no examinations for discovery were to be conducted; instead, the parties could pursue pre-trial examinations on affidavits. The result was that leave that was estimated to take two or three months of conventional trial was completed in three-week hearing that ended seven months after the claim was filed; 87 affidavits were filed and 12 witnesses were called to testify orally. The trial judge's decision was appealed (and upheld), but no party alleged any procedural defect in the hearing below.

The *Polygamy Reference*[19] is certainly not ordinary litigation, but it again demonstrates that a hybrid trial process can result in the adjudication of a huge body of evidence in a compressed timeframe. The reference, which considered the constitutionality of the criminalization of polygamy, was the first to be brought in the trial courts in British Columbia. Under the hybrid process that the parties proposed and then Supreme Court Chief Justice Bauman ordered, affidavits or expert reports were tendered for all witnesses in advance, according to an agreed-upon schedule. The parties were then free to call any of those witnesses to testify in court, at which point the party could examine them in chief and the other parties could cross-examine. A party could also require that the witness of another party be produced for cross-examination; where that was done, the witness could also be examined in chief. The interveners also had the right to tender evidence and to cross-examine witnesses. The record was further supplemented with Brandeis brief evidence, which ultimately consisted of several hundred legal and social science articles and books.

The hybrid structure of the evidentiary hearing allowed for the development of an extensive evidentiary record. Well over 100 affidavits and expert reports were filed, in which the perspectives ranged from anthropology, sociology, evolutionary psychology, economics, theology, history, demography and legal history to personal experiences with polygamy in Islam, fundamentalist Mormonism and polyamorous relationships. Twenty-two of the affiants and experts were examined and cross-examined before the court. The hybrid trial structure allowed the evidentiary portion of the trial to be completed in just over 30 days (spread over several months), despite the creation of an enormous record of evidence. Argument lasted another 10 days. The resulting judgment was 1,367 paragraphs long and was not appealed.

In *Carter v. Canada (Attorney General)*[20]—the "assisted dying" litigation—the plaintiffs challenged various *Criminal Code* provisions that together criminalize physician-assisted suicide and euthanasia. The plaintiffs sought to proceed by way of a summary trial on affidavits, but after Canada objected the trial judge, Justice Lynn Smith, ordered that the case proceed in a hybrid format and on compressed timelines. As with *Bentley* and the *Polygamy Reference*, the process allowed the parties to assemble a large evidentiary record (116 affidavits, 18 pre-trial cross-examinations and 11 examinations before the court) and to proceed through trial with remarkable speed: the trial lasted only 23 days and ended approximately one year after the claim was filed. On appeal, Canada challenged the compressed timelines set by the trial judge, but not her order that the proceeding be heard through a hybrid process; the Court of Appeal dismissed that aspect of the appeal.

None of the three cases described above was ordinary litigation. All of them were relatively large disputes involving well-staffed counsel teams. Two of them were *Charter* challenges (which often proceed by petition), one was a reference, and even *Bentley* turned on evidence similar to the kind of social and "legislative" facts that form the basis of many *Charter* challenges. But hybrid trials can also be appropriate for more ordinary cases.

An example is a case involving Gemex Developments Ltd. ("Gemex") and the City of Coquitlam (the "Gemex case") which arose out of the city's construction of a bridge across the Coquitlam River where it bisected a portion of the plaintiff's property. The city expropriated some of the land now occupied by the bridge within the property, but not the present and former beds of the river. The plaintiff claimed, among other things, that the city was trespassing on its land, which raised the immediate question of the ownership of the former and present bends of the river.

That turned out to be a complicated question. The original deed reserved the bed of the river to the province, but a large flood in 1961 carved out a new channel, and the old channel dried up thereafter. On the usual common law tests, Gemex as the upland owner would only acquire ownership of the old channel if it dried up slowly through a process of accretion; if the bed was abandoned quickly (which is avulsion), then ownership would remain with the province (which joined in the case). That issue became the subject of a number of expert reports, but there was also a considerable history of dealings between the parties to be addressed through lay evidence. The trial judge ordered a hybrid process on the parties' joint recommendation, which allowed the lay evidence to be put in by affidavit, with the right for each party to call any witness to also testify orally. After the exchange of affidavits, none of the parties found it necessary to cross-examine on the lay evidence, and the original estimate of two weeks for the trial was revised down to five days. Ultimately this aspect of the case settled on the first day.

Tailor the Process to Fit the Issues and the Evidence

The key to making a hybrid trial successful is carefully considering the form in which evidence on particular issues is presented. An advantage of a hybrid trial is that it allows for more difficult evidentiary issues—such as contests of credibility—to be addressed orally, while allowing other issues to be presented in writing, thereby reducing hearing time and often producing a more complete and comprehensible record. The *Polygamy Reference*, for instance, involved some vigorous cross-examinations by the provincial and federal Crown of lay witnesses who testified about highly personal experiences within polygamy; that evidence was quite seamlessly integrated into a mainly written evidentiary record.

The form of evidence, however, is not the only procedural element that can be tailored. In *Bentley*, the parties realized that the dispute centred on the interpretation of documents and other information to which both sides had access, and that the opportunity to view and respond to the other party's evidence in advance removed any remaining risk of ambush. The parties therefore agreed to limit documentary discovery to the documents each party intended to rely upon at trial or requested of the other side. With forethought and co-operation by counsel and the approval of the case planning judge, many of the default procedures under the Supreme Court Civil Rules can be modified to achieve more "proportionate, timely and affordable" litigation.[21]

Consensus Is Best, But Not Always Necessary

The hybrid processes followed in *Bentley*, the *Polygamy Reference* and the Gemex case were all adopted by the agreement of all parties, and certainly

that is the preferable course: the process can best be tailored through the co-operation of counsel, and deviating from a conventional trial over the objections of one party risks raising a ground of appeal. Nonetheless, consensus on a hybrid process is not always necessary, as *Carter* and indeed *Hryniak* demonstrate. As the court stated in *Hryniak*, "the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute".[22]

ENDNOTES

1. *Wigmore on Evidence*, Chadbourn Revision, vol V, para 1384, p 85; quoted in *Dixon v Deacon Morgan McEwen Easson* (1989), 41 BCLR (2d) 180 (SC; Bouck J.) [*Dixon*].
2. See *Dixon*, *supra* note 1, for Wigmore's further criticisms in this regard, as well as Justice Bouck's.
3. Supreme Court Civil Rule 12-5(27).
4. "Truth and the Law", an address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales, given on May 26, 2011.
5. Rule 9-7(5).
6. The Honourable Coulter Osborne, QC, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Ontario: November 2007) at 39.
7. *Dixon*, *supra* note 1, is one example.
8. For instance, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations provide for direct evidence to be provided in writing and subject to oral cross-examination.
9. *Dr Thomas Dentistry v Bank of Nova Scotia*, 2010 ONSC 1227; *Abrams v Abrams*, 2010 ONSC 2703; *Optech Inc v Sharma*, 2011 ONSC 1081; *Dent Wizard v Catastrophe Solutions*, 2011 ONSC 1456; *1318214 Ontario Ltd v Sobeys Capital Inc*, 2012 ONSC 2784 [*Sobeys*]; *George Weston Ltd v Domtar Inc*, 2012 ONSC 5001 [*Domtar*].
10. *Sobeys*, *supra* note 9 at para 23.
11. *Domtar*, *supra* note 9 at para 37.
12. 2014 SCC 7 [*Hryniak*].
13. Ontario Rule 20.04 [emphasis added].
14. *Hryniak*, *supra* note 12 at para 24.
15. *Ibid* at para 27.
16. *Ibid* at paras 28–29.
17. *Ibid* at para 63.
18. 2009 BCSC 1608, aff'd 2010 BCCA 506 [*Bentley*].
19. *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.
20. 2012 BCSC 886, appeal allowed 2013 BCCA 435, leave to appeal to the Supreme Court of Canada granted.
21. *Hryniak*, *supra* note 12 at para 28.
22. *Ibid* at para 50.