

Credibility Assessment: Beyond Faryna v. Chorny

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Agenda / Introduction

- Introduction
- Overview of the Law and Recent Cases
- Unusual Circumstances
- Tips and Tricks
- Writing Credibility
- Discussion – Examples or Scenarios



Credibility Assessments – The Basics

- Purpose: Sets out whose evidence is preferred and why
- The Two Components: Honesty versus Reliability
(R. v. Taylor, 2010 ONCJ 396)
- Not All or Nothing Factors: Decision-maker can accept some, all or none of a witness's evidence and attach different weights to different parts of their evidence
(R. v. R. (D.), 1996 CanLII 207 (SCC) at para. 93)



Credibility Assessments – The Basics

*The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an **examination of its consistency with the probabilities that surround the currently existing conditions.** In short, the real test of the truth of the story of the witness is such a case must be **its harmony with the preponderance of the probabilities** which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

....



Credibility Assessments – The Basics

Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth.

Faryna v. Chorny [1952] 2 D.L.R. 354 (BCCA)



Key Takeaway from Faryna v. Chorny

Does the story “add up,” “hang together,” and “make sense”?



Recent Case Law – Fleshing out the Analysis

L.M. v. K.M., 2022 BCSC 689

- The capacity and opportunity of the witness to observe the events at issue;
- The witness's ability to remember those events;
- The ability of the witness to resist being influenced by their interest in recalling those events;
- Internal and external inconsistency in the witness's evidence, meaning did their testimony change over time;
- Whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- Whether their evidence seems unreasonable, improbable or unlikely;
- The witness's demeanour, meaning the way they presented while testifying (***although tread carefully here***)



Recent Case Law – Application

Health Sciences Association of Alberta v. Capital Care Group Inc., 2018 CanLII 105101 (AB GAA)

- Grievor terminated for bringing false B&H complaint against manager following independent investigation
- Arbitration panel reviewed investigator’s reasons and agreed grievor was not credible:
 - Story expanded on each re-telling; distinguished between “retrospectively filling in the gaps” vs. “conscious effort to expand and embellish”; no reference to physical threats in original complaint, later said concern manager would hit her
 - Independent witness supported the manager’s position



Recent Case Law – Application

Health Sciences Association of Alberta Cont'd

- Internal inconsistencies in the grievor's evidence – gave inconsistent evidence during her interview
- Grievor failed to distinguish between something she had observed and something someone had told her about
- Grievor's version of events not objectively reasonable – described scenarios as “threats” which were objectively legitimate feedback from a manager
- Grievor's motivation – two witnesses expressed concerns that the grievor was motivated by “hatred” of the respondent



Recent Case Law – Application

Aslam v. Ontario College of Pharmacists, 2023 ONSC 2549

- Importance of considering credibility as a whole
- Allegations of sexual harassment and sexual assault brought against a pharmacist
- Discipline Committee **dismissed** a number of allegations on basis complainant had contradicted herself, that she had included allegations of some events which clearly did not happen, and that she had a history of making claims which were ultimately found to be unsubstantiated. However, it found that **two of the allegations**, including the sexual assault, were **substantiated**



Recent Case Law – Application

Aslam v. Ontario College of Pharmacists Con't

- Overturned on appeal – Discipline Committee improperly compartmentalized its credibility assessments without considering its adverse findings of credibility respecting other allegations



Recent Case Law – Application

Key Takeaways from *Aslam v. Ontario College of Pharmacists*:

- While credibility is not an all-or-nothing proposition, and a participant can be found to be credible on one point and not another, the investigator still needs to consider the witness's overall credibility in making each finding
- Can't make credibility findings in isolation, without reference to the witness's evidence as a whole



Credibility Assessments

List of Factors you may wish to consider:

- Opportunity to observe events;
- Motive to lie;
- Statements against own interest;
- Bias or prejudice;
- Inconsistencies in evidence;
- Whether the testimony harmonizes with independent evidence;
- Whether evidence seems unreasonable, impossible or unlikely;
- How the evidence fits into the general picture revealed on a consideration of the whole of the case.



Recent Case Law – Trauma Informed Approach

A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107

- Helpful in understanding how a party's trauma-related symptoms can affect memory, causing inconsistencies in evidence
- Tribunal preferred applicant's evidence despite significant gaps in her memory and limited details in her descriptions of what the respondent did to her



Recent Case Law – Trauma Informed Approach

A.B. v. Joe Singer Shoes Limited Con't

- Credibility assessment informed in part by medical evidence of the applicant's depression and PTSD, which impacted her memory and, therefore, were not signs she had falsified her evidence

[94] Given Ms. B's memory issues... inconsistencies in her evidence took on less significance as a test of her truthfulness than they might in the case of a witness who was not suffering from such issues.



Unusual Circumstances



Adverse Inference

....

The Respondent had an opportunity to produce his phone records for the relevant time frame which were requested of him more than once, and clearly expressed in terms of the time frame that was relevant. His failure to produce his own records for the relevant time frame, and Ms. [B]'s willingness to do so, has also been considered in assessing credibility in this case.



Adverse Inference

Tolko Industries Ltd (Lakeview Lumber Division) v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1

The general rule on adverse inference is that where a party fails to adduce evidence, either through witnesses or by documents, which it would naturally be expected to bring before the trier-of-fact, an unfavourable inference may be drawn against that party. The unfavourable or "adverse" inference which may be drawn from the omission is that the evidence, if called, would have been injurious to, or at least not supportive of, that party's case.

....



Adverse Inference

Tolko Industries Ltd (Lakeview Lumber Division) v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1

....

The inference does not detrimentally affect the tenor of the party's entire case, but rather only the proof of the specific facts which the missing evidence, if called, could have supported. However, it is always open to a party that has not produced evidence to explain the omission (e.g., the witness in question is incompetent to testify). Where the explanation is satisfactory, no adverse inference will be drawn.



Alcohol Impairment

R. v. Jensen (1996), 106 CCC 3d 430

- Overturned sexual assault conviction which relied on assumptions about Complainant's capacity to provide or withhold evidence
- Concluded the evidence about the Complainant's capacity had to be considered in light of all other evidence
- Drunkenness is not the equivalent of incapacity



Circumstantial Evidence

Lafarge Canada (Coquitlam Sand and Gravel) and Teamsters, [2013] BCCAAA 136

[33] I take the prevalent legal guideline as to the quality of evidence required when there is a high reliance on circumstantial evidence, to be as adopted and articulated in the 2009 decision United Steelworkers Local 1-500 v. Hartmann Canada Inc., supra;

[37] The basis on which this determination is to be made is the civil test, that is, on the balance of probabilities. The recent Supreme Court of Canada decision in R.F.H. v. McDougall clarified that there are no degrees of probability inside this standard, and that the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. ...

....



Circumstantial Evidence

Lafarge Canada (Coquitlam Sand and Gravel) and Teamsters, [2013] BCCAAA 136

....

[39] ... circumstantial evidence is perfectly good evidence that can be as convincing and compelling as direct evidence. The test remains on the balance of probabilities with the burden remaining on the employer to prove its case with clear, convincing, and cogent evidence.



Child Witness

The credibility of all participants must be carefully assessed, with a common-sense approach taken to the evidence of young children. As described in R. v. B.(G.), 1990 CanLII 7308 (SCC), [1990] 2 S.C.R. 30:

The Student presented as nervous and uncomfortable and, with a few minor exceptions, unwilling to speak directly to me. Given his age and the unfamiliar formality of the Investigation process, I made no adverse inference because of this, but the result was that I was unable to obtain direct evidence from the Student.

....



Tips and Tricks



Factors to Consider in Assessing Credibility

- Internal consistency
- External consistency
- Spontaneity, ability to move through the event contextually
- Appropriate degree of detail
- Appropriate admissions and doubts
- Does the evidence relate to observations or conclusions?
- Admissions against interest



Factors to Consider in Assessing Credibility

- Powers and abilities of the witness to observe
- Motive or bias
- Asserting direct knowledge/facts based on hearsay/gossip
- Body language/attitude/lack of cooperation/refusal to answer
- Human nature to have inconsistent or imperfect recollection



Example – Where the Evidence Isn't Perfect

Within the circumstances just described, the Complainant presented as forthcoming, honest, and cooperative. He did not recall the details, context, or sequencing of many of the events he described. He readily acknowledged those gaps in his recollection and did not make any attempt to fill in information if he did not remember it. ... His evidence was internally consistent and, as described further below, consistent with the evidence of other Witnesses and documents; there were gaps in his recollection but nothing to indicate false recollections.



Pitfalls

Over-reliance on demeanor

Unconscious bias

- does not have to be racial or socio-economic – could be reminder of someone you associate positive or negative traits with

Confirmation bias

- can build a case deliberately if in an advocacy role – or can do so unwittingly in a neutral role when seeking to confirm what you believe

Biases are not easy to control but they can be counteracted with awareness



More Pitfalls

Failing to consider possible impact of trauma

Assessing credibility too soon

Erroneously believing that you cannot make a credibility call

Making a credibility call when you do not need to

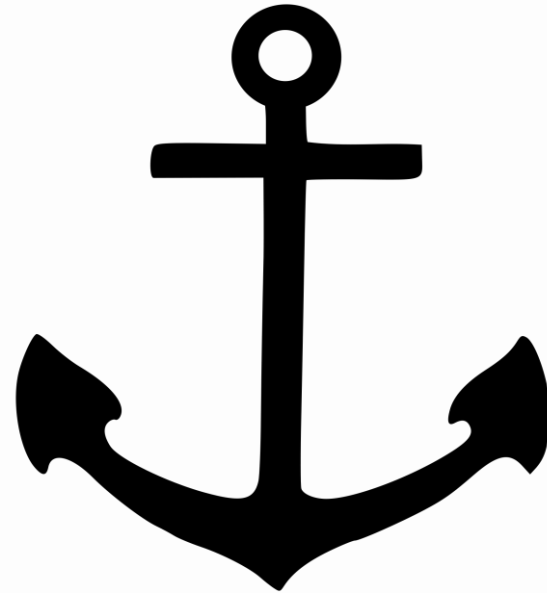


The Importance of the Anchor

- Establish anchors or reference points
- Look for: other evidence that corroborates evidence

Such as:

- documents
- timelines (irrefutable dates)
- third party witnesses
- expert evidence



Writing



Writing Process

- What do you find most challenging when writing credibility sections?
- What is your process?



Writing Credibility / Reliability Findings

- No adjectives
- No adverbs
- No obiter (only say what you need to say, only answer what you need to answer)
- Aim for Goldilocks in terms of how much you write – never too little, never too much
- Do you even need to make a credibility assessment?



Writing Credibility / Reliability Findings

- Give examples to illustrate the point
 - Did the participant's evidence seem bizarre or grossly exaggerated? If yes, say so and give examples
 - If the participant is belligerent / argumentative / defensive / refuses to concede reasonable points, say so and give examples
 - If you accept a participant's evidence despite inconsistencies, pick some inconsistencies and explain why they have not changed your view that the participant's evidence should be accepted



Writing Credibility Findings – Cautionary Tale

“The reasons relating to C.T.’s complaints ... do not address the ‘why’ component required in reasons for judgment. The Hearing Panel’s reasons are a combination of generic generalities (e.g. ‘gave her evidence in a forthright manner’), unexplained conclusory observations (e.g. ‘withstood cross-examination well’), material omissions (e.g. the failure to articulate any analysis of Mr. Neinstein’s evidence) and uncertainty as to the legal principles applied to the credibility analysis (e.g. the corroboration finding). Taken together, these inadequacies render the reasons in respect of C.T.’s allegations so inadequate as to prevent meaningful appellate review.”



Tie to the Totality of the Circumstances ...

I do not accept the Respondent's explanation that his login to the District's photocopying records on October 9 may have arisen simply because he had opened his laptop and not because he had purposefully logged into the photocopying system. That evidence is inconsistent with the activity shown in the Applications Log.

...

The Respondent's explanations do not align with the documentary evidence, nor do they align with the preponderance of probabilities in all of the circumstances of this case.



Great Example

[Blackhawks report \(October 2021\)](#)

Scope of investigation includes discussion of document collection, witness interviews, anonymity, and witness memory

Overview of biases and how they addressed them

A form of credibility assessment outlined in the process



Final Thoughts



Credibility of the Process

Includes:

- Voice for participants
- Neutrality
- Respectful treatment
- Thoughtful decision making (and explaining decision made)



Thank You
