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**Session Summary: Concurrent Session 3 - Can You Believe It? Evidence Law and Credibility**

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Speakers: **Andrew Lokan**, Paliare Roland Barristers; **Ronalda Murphy**, Dalhousie University, Schulich School of Law and Ontario Ministry of the Attorney General

*Assessment of credibility can be one of the most challenging tasks in a hearing. This session provided expert guidance on what the law requires adjudicators to consider on this and other evidence issues.*

The presentation began with a brief survey of the legal principles in relation to assessing credibility. It was stressed at the outset that many of these principles originate in the criminal law context, and therefore may not be entirely appropriate in the administrative decision-making process. Nonetheless, they could serve as helpful guides in assessing credibility. The basic legal principle, as articulated by Chief Justice McLachlin in *R v Marquard*, is that “credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis.” As such, it is not an inherently legal principle but is within the capacity of all persons to assess.

Yet, despite the fact that every person is capable of assessing credibility, it is, in fact, extremely difficult to do so accurately. Despite this difficulty, individuals have a high degree of confidence in their assessments of credibility.

There is no legal test for assessing credibility, but there are some general rules: What is important is whether a witness is telling the truth in relation to the particular fact they are being questioned about, and not necessarily whether that person is truthful in general. This latter concern is considered to be collateral, as it does not relate to the substantive issue in the case, and therefore should not be afforded a lot of weight. Furthermore, evidence showing a witness’ general untruthfulness cannot always be introduced, but can only be introduced in relation to establishing bias, a prior criminal conviction, or a prior inconsistent statement. In addition, evidence also cannot be introduced to support the general truthfulness of a witness – this is known as the ban on “oath-helping.” Indeed, it is this ban on “oath-helping” that prohibits the introduction of polygraph test results to bolster the apparent truthfulness of a person’s testimony.

The Supreme Court has recognized that not only is it extremely difficult to accurately assess a person’s credibility, but that it is also very difficult to explain why one has reached a particular conclusion about that credibility, stating that it is often the result of both impressions and reflection. Thus, courts will generally be very deferential to findings of credibility made by prior decision-makers as long as the prior decision-maker explains to the best of their ability why they found a person credible or not.

In the administrative law context, the legal rules for admissibility are typically less stringent, though that will depend greatly on both the decision-maker’s enabling statute and whether they are subject to the Statutory Powers Procedure Act or the Evidence Act. However, while the traditional rules of evidence are not the focus for determining if some piece of evidence is admissible – if it is relevant, it usually is admissible - those rules may be used in determining how much weight a piece of evidence should be given. This is particularly true in the case of hearsay evidence, as can be seen in both *Bond v New Brunswick (Board of Management)* and *Telus Communications Inc. v Telecommunications Workers Union*.

It is also important to note that the Divisional Court in *Re Pitts and Director, Family Benefits Branch* has cited the following factors for a tribunal to consider in making credibility assessments: (1) the witness’ consistency with other witnesses, (2) discrepancies within the witness’ own testimony, (3) the witness’ demeanour, (4) the witness’ opportunity and capacity to observe the events in question, (5) the witness’ interest in the outcome of the litigation, if any, (6) whether the witness is partisan or biased in any way, (7) the inherent probability of the evidence presented, and (8) any prior inconsistent statements made by the witness.

Of the factors above, the least reliable is the demeanour of the witness, though, paradoxically, a witness’ demeanour is also the factor that we intuitively place the greatest trust in when assessing credibility. The exercise that the panel engaged in demonstrated this clearly. Both presenters performed the exact same script, only altering the demeanour in which it was presented. The first version was presented in a nervous, confused, vulnerable, yet earnest manner, while the second was controlled, calm, totally reasoned and matter-of-fact. Some of those in attendance found the first presentation more credible precisely because it seemed less rehearsed, and thus came across as sincere, while others found the prepared professionalism of the second presentation more credible. The exercise also helped to emphasize how we get caught up in whether the person before us is being truthful rather than assessing whether or not what they are saying is true.

The presentation then turned to some issues that are at the leading edge of evidence law. First, they discussed aboriginal oral history evidence. The Supreme Court has stated that oral histories need not adhere to the traditional rules of evidence, but lower courts have struggled with how to assess such evidence, and have in some cases looked to see whether they bear certain “markers of credibility”. This itself may be the subject of expert evidence.

The second issue that was discussed was whether it is necessary for a decision maker to see a witness’ face in order to assess their credibility. This was the issue in *R v N.S.*  where the complainant in a sexual assault case sought permission to testify without removal of her niqab. The Supreme Court decided that, where religious freedom is engaged, there should be a presumption in favour of the witness being allowed to exercise their freedom of religion. However, they also found that this presumption only applied when it did not interfere with the exercise of another person’s rights, such as, in the criminal context, the right to a fair trial. While it is unlikely that the right to a fair trial will arise in the administrative context, administrative decision-makers must be aware of the obligation to ensure all rights are respected if at all possible.

The presenters then turned to the role of experts. Experts are allowed to state their own opinion as evidence, but only in relation to their areas of expertise. Thus, because no expertise can be gained over lay people in assessing credibility, generally no expert evidence can be given on whether a witness is telling the truth. It is very important to establish from the outset what the expert’s expertise is so that his or her opinion evidence can be restricted to that topic, as experts may have a tendency not to restrict their opinions to the topic in question once they are called to testify.

Finally, the presenters turned to the most recent advances in lie detection: the fMRI, which is basically an MRI lie detector. In the approximately 20 studies done so far, the testing has been able to locate a “deception” sector of the brain that lights up when a person is telling a lie. Promoters of fMRI claim it has an accuracy rate between 78-93%, which is far more accurate than the best human attempts, which come in around 54%.