Evidence 101

November 5, 2009

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Evidence/Law of Evidence

- Adjudicative hearings are intended to answer questions and/or resolve controversies
- To do so, adjudicator must apply (substantive) law to facts
- Often facts are in dispute and need to be determined before substantive law can be applied to them

Evidence/Law of Evidence

- Evidence = information adjudicators use in performing fact-finding function
  - Generally adduced by parties, but tribunals are often authorized to rely, to some extent, on their own expertise
- Law of evidence = legal rules that regulate
  - What information adjudicator can receive (i.e., admissibility)
  - To a lesser extent, how the information can be used

Goals of Evidence Law

- Seeking the truth, by ensuring that reliable, but only reliable, evidence is admitted
- Protecting other interests and goals, which may sometimes conflict with truth-seeking
  - Trial fairness
  - Trial efficiency and finality
  - Other societal interests
    - E.g. protection of important relationships

Sources of the Law of Evidence

- Common law (i.e. court decisions)
  - Most of the law of evidence is still governed by judge-made rules
  - Judges continue to develop the rules
- Statute
  - No comprehensive code of evidence
  - Every jurisdiction has an act of general application that adds to or modifies the common law
    - E.g., *Canada Evidence Act*, Ontario *Evidence Act*
  - Individual statutes can also contain evidentiary rules applicable to the matters they govern

The Many Laws of Evidence

- Most rules of evidence are derived from criminal and civil traditional court proceedings
- Those rules often do not strictly apply in tribunal hearings

Statutory Powers Procedure Act

- 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

  (a) any oral testimony; and

  (b) any document or other thing,

  relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious

Why Relax the Rules?

- To ensure expeditious hearings
- To ensure accessibility
- Because consequences of failure for a party are often not disastrous and thus greatest protections are not necessarily required
  - To the extent that consequences are more significant, a tribunal has reason to be more cautious in exercise of its discretion

Rules of Natural Justice

- Tribunals bound by rules of natural justice
- What that means varies by context
  - "The content of the duty of fairness varies according to the structure and the function of the board or tribunal in question": *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (S.C.C.)

Rules of Natural Justice

- Broadly speaking, there must be procedural fairness
  - A party must have the opportunity to
    - Know the case against him
    - Present his case
      - But SPPA, s.23(2): A tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding
    - Appear before an unbiased adjudicator

Rules of Natural Justice

- Adjudicator must also base findings on
  - Evidence
    - Evidence does not include, for example, unaccepted suggestions put to witnesses
  - Adduced at the hearing
    - Should not rely upon information obtained outside of the hearing
      - Subject to judicial notice
  - That has some probative value
    - I.e., some tendency to prove a matter in issue

Why Care About Law of Evidence?

- Some of the law still applies
- Much or all of the law sometimes applies
  - E.g., in many professional discipline hearings
  - SPPA subject to statutory over-ride
- Even to the extent that the strict law does not apply, the concerns animating the legal rules can inform an adjudicator's use of or decision to receive the evidence

Burden of Proof

- Burden of proof = which party must establish the grounds for a disposition
- Generally on the party seeking a particular disposition
  - Statutes can contain reverse onus provisions

Standard of Proof

- Standard of proof = how persuasively the party carrying the burden must prove its case
- The applicable standard is generally the balance of probabilities
  - I.e., is it more probable than not?
    - *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2005 CanLII 24217 (Ont. C.A.): "In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities"

Standard of Proof

- Long been suggested that proof on a balance of probabilities is more onerous in some contexts than in others
  - E.g. allegations of professional misconduct, where allegations against defendant are grave
- This idea has now been rejected by the SCC
  - "... in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred"
    - *F.H. v. McDougall*, 2008 SCC 53 (CanLII)

Introducing Evidence

- Evidence can be introduced through
  - Live witnesses
    - Witnesses often testify under oath or affirmation, but may not have to (e.g. SPPA s.15)
      - Tribunal members can usually administer oaths: SPPA, s.22
    - Almost all witnesses are competent and compellable
    - SPPA, s.12: power to summons
  - Documents, recordings, etc.
    - These are often identified through a live witness, but may not have to be (e.g., SPPA, s.15)
  - Judicial notice

Relevance

- Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a fact in issue more or less likely
- Thus, relevance is contextual. It depends on
  - The facts in issue
  - The position taken by the parties in respect of those facts
  - The other evidence adduced in relation to those facts

Relevance

- Not a high threshold
  - To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to increase or diminish the probability of the existence of a fact in issue
    - *R. v. Blackman*, 2008 SCC 37 (CanLII)
- But not a bottomless threshold

Relevance vs. Weight

- A piece of evidence may be relevant but nonetheless entitled to little or no weight
- Weight speaks to the significance that is accorded to a piece of evidence, and (assuming relevance) is largely a function of its reliability and credibility

Hearsay

- Loosely speaking, hearsay is an out-of-court statement offered for the truth of its contents through the testimony of someone other than the declarant
- Presumptively inadmissible under formal law of evidence
- Generally admissible in many tribunal hearings
  - E.g., SPPA, s.15

Hearsay

- Presumptively inadmissible under law of evidence because of the difficulty in assessing its credibility and reliability
  - "Hearsay evidence is not excluded because it has no logically probative value ... The rationale of excluding it as inadmissible ... is a recognition of the great difficulty ... of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination ... It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."
    - *R. v. Blastland*, [1986] A.C. 41 (H.L.)

Hearsay

- The danger is that hearsay evidence will be treated as having a probative force which it does not deserve
- Tribunals must keep this in mind when assessing weight of hearsay evidence
  - "... a trier of fact must always be vigilant of the inherent unreliability of hearsay evidence": *Dayday v. MacEwan,* (1987) 62 O.R. (2d) 588 (Dist. Ct.)
- Hearsay evidence can be given whatever weight is deemed appropriate by the tribunal
  - E.g., *Krabi et al. v. Ministry of Housing* (1982), 39 O.R. (2d) 691 (Div. Ct.)

Hearsay vs. Non-Hearsay

- Hearsay dangers only arise when the out-of-court statement is being offered for the truth of its contents, and not for some other purpose
- Thus, before worrying about the potential dangers, one must first determine whether evidence is actually hearsay by identifying the purpose for which the evidence is offered
- Often, the most useful question to ask is whether the statement has equivalent value even if the assertion contained in the statement is not true

Hearsay or Not Hearsay?

- A tenant complains that a landlord has harassed him. He wants to elicit from Witness A testimony as to a threat the landlord made. Hearsay?

Hearsay or Not Hearsay?

- A doctor is brought up on discipline charges for assaulting Patient X. X testifies to the assault. The College then seeks to corroborate her testimony by calling X's friend to testify that X said the doctor had assaulted her. Hearsay?

Inadmissible Hearsay

- A tribunal is not obliged to receive hearsay and can insist upon non-hearsay evidence
- Hearsay evidence should not be admitted if admission or use of the evidence would result in unfairness
  - E.g., *Bartashunas v. Psychology Examiners,* [1992] O.J. No. 1845 (Div. Ct.) (QL)

Inadmissible Hearsay

- Unfairness is rarely found, but has been found where admission of hearsay would deny a party an opportunity to cross-examine an important witness on a crucial matter
  - E.g. *Re B and Catholic Children's Aid Society of Metropolitan Toronto* (1987), 27 Admin. L.R. 295 (Div. Ct.)
- In considering unfairness, courts take into account that
  - The party can still cross-examine the hearsay witnesses
  - The party can call the original sources of the hearsay to attend and give their evidence in the form of direct evidence
    - E.g., *Lischka v. Criminal Injuries Compensation Board* (1982), 37 O.R. (2d) 134 (Div. Ct.)

Judicial Notice

- Allows a judge to take notice of facts (i.e. accept facts as true) without requiring evidence of them
- A strict test, given that the parties will not be able to contest the facts
  - "... a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy": *R. v. Find*, 2001 SCC 32 (CanLII)
  - Judicial notice can also be taken as authorized by statute
    - E.g. Ontario *Legislation Act*, ss.13 and 29: notice of contents of statutes and regulations

Expanded Judicial Notice

- Tribunals are often granted an expanded power to take judicial notice
  - E.g. SPPA, s.16(b): A tribunal may, in making its decision in any proceeding, ... (b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge

Expanded Judicial Notice

- But
  - Fact, information or opinion must be generally recognized and within its scientific or specialized knowledge
    - E.g. a mortgage interest rate faced by landlords is not properly the subject of notice
      - *Best Rank Investments Inc. v. 3161 Eglinton Ave. East, Scarborough (Tenants of)*, [1990] O.J. No. 1757 (Div. Ct.) (QL)
    - But the information can come within a tribunal's knowledge as a result of hearing other cases
      - *Re Carfrae Estates Ltd. and Gamble et al.* (1979), 24 O.R. (2d) 113 (Div. Ct.)

Expanded Judicial Notice

- A tribunal should disclose to the parties matters of which it intends to take notice, or at least summary of them, and provide the parties an opportunity to respond

Opinion Evidence

- The law of evidence generally excludes opinion evidence
  - Witnesses are to confine themselves to facts they perceived, and refrain from offering opinions as to inferences or conclusions to be drawn from the facts
- It is the task of the tribunal to decide what secondary inferences are to be drawn from the facts proved
- Danger with opinion evidence is that it can usurp the province of the tribunal
  - I.e., lead the tribunal to abdicate its role and simply attorn to the opinion of the witness

Opinion Evidence

- The law of evidence contains exceptions allowing for admission of opinion evidence
- This strict law does not apply at most tribunal hearings, but principles animating the rules are still relevant

Expert Opinion

- Expert opinion evidence is evidence offered by a person with specialized knowledge, skill or experience as to conclusions that can or should be drawn from facts

Expert Opinion

- The danger of attornment is especially great when it comes to such evidence
  - “Faced with an expert's impressive credentials and mastery of scientific jargon, jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in their desire to reach a just result”
    - *D.(D.)*, 2000 SCC 43 (CanLII)

Expert Opinion

- Arguably, attornment is only a problem to extent that expert evidence is unreliable
- Unreliability can result from many factors
  - Expert misunderstanding her proper role (as impartial aide to tribunal)
  - Expert pursuing an agenda
  - Expert testifying beyond area of expertise
  - Difficulties in understanding and evaluating evidence
    - By tribunal and/or parties
  - Difficulties in testing evidence
    - Expert evidence is highly resistant to effective cross-examination by counsel who are not experts in the field
    - Expert opinions are usually derived from academic literature and out-of-court interviews, which material is unsworn and not available for cross-examination

Expert Opinion

- Under the law of evidence, expert opinion evidence is only admissible if it is
  - Relevant
  - Necessary
  - Tendered through a qualified expert
  - Not otherwise excluded by a separate rule of evidence

Expert Opinion

- Relevance takes into account not only factual relevance but also a cost-benefit analysis
  - The time the evidence will require
  - How important the issue to which the opinion evidence is addressed is to the outcome of the trial
  - How strongly the opinion evidence, at face value, supports the inference sought to be drawn from it
  - Whether the evidence is so technical that it is likely to invite deference (because it is incomprehensible to a lay person)
  - Whether the opposing party had any opportunity to call its own expert in reply
- These factors may be relevant to exercise of discretion to admit

Expert Opinion

- Relevance can also take into account the reliability of the evidence from a scientific perspective, which may be helpful in assessing weight

Expert Opinion

- Courts consider such things as
  - Whether the science, and the relevant application of it, can be and has been tested
  - Whether the science, and the relevant application of it, has been subjected to peer review and publication
    - And whether the peer review has been substantial, positive and evidence-based
  - The known or potential rate of error
    - Or whether the error rate is unknown or unknowable
    - If known, whether the errors were false positives or false negatives
  - The existence and maintenance of standards of operation
    - And whether they were followed in the case at bar
  - Whether the science used has been generally accepted
    - By courts, tribunals and/or scientists

Expert Opinion

- Necessity considers whether “lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts”
  - *D.(D.)*, 2000 SCC 43 (CanLII)
- Given that tribunals often possess their own expertise, necessity may be found less often than in court proceedings

Expert Opinion

- Expert evidence can only be given by a witness “shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify”
  - *R. v. Mohan*, 1994 CanLII 80 (S.C.C.)
  - A relatively modest status
- Consider, among other things,
  - Initial education
  - Ongoing training
  - Accreditation
  - Experience
  - Bias
- Formal qualification may not always be required, especially in minor matters when the witness is well known to the tribunal, but it is generally good practice to file the witness’ CV

Expert Opinion

- Advance notice of expert evidence is required in civil and criminal matters
- Tribunals sometimes have rules on this
- Generally advisable in any event

Lay Opinion

- An ordinary witness may be permitted to give opinion evidence when she is "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly"
  - *R. v. Graat*, 1982 CanLII 33 (S.C.C.)

Lay Opinion

- Lay opinion evidence is only of concern if
  - The witness can adequately communicate the observation by describing with particularity what she observed
    - Opinion is unnecessary
  - The trier of fact is in as good a position as the witness to form the relevant conclusion
    - Opinion is unnecessary
  - The conclusion is not one that people of ordinary experience are able to make
    - Opinion is unreliable

Character Evidence

- Many rules of evidence regulate admission of character evidence
  - I.e., circumstantial evidence that the person acted in a certain way on a particular occasion because that would have been consistent with her character
- Such evidence is not generally at issue in tribunal hearings

Character Evidence

- Tribunals sometimes conduct hearings in which a person's character is directly in issue
  - E.g. good character hearings of Law Society licensees
- There are no special evidentiary rules regarding character evidence when character is directly at issue
  - Although note SPPA, s.8: "Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto"

Self Incrimination

- Many regulatory statutes compel the assistance of one or more parties in the applicable inquiry
- In the criminal context, s.7 of the *Charter* offers protection against statutorily compelled statements
- This is generally not an issue in administrative hearings

Self Incrimination

- Many authorities hold that compelled statements are admissible in regulatory prosecutions
  - E.g. *R. v. Fitzpatrick*, 1995 CanLII 44 (S.C.C.)
- Several authorities also hold that they are admissible in disciplinary matters
  - E.g., *Ontario (Police Complaints Commissioner) v. Toronto (Metropolitan) Police Force*, 1997 CanLII 1106 (Ont. C.A.)
  - E.g., *Scott v. Ontario (Racing Commission)*, 2009 CanLII 34782 (Div. Ct.)
- In non-adversarial contexts, where liberty or security of the person is not at risk, s.7 of the *Charter* is not even engaged
  - E.g., *Scott v. Ontario (Racing Commission)*

Privilege

- Absent a specific statutory exception applicable, privileged information is not admissible
  - Unless the holder of the privilege waives it
- Many privileges
  - E.g. solicitor-client
  - E.g. dispute settlement
  - E.g. case by case privilege

Solicitor-Client Privilege

- Protects against compelled disclosure of confidential communications made for the purpose of obtaining legal advice
- Privilege belongs to the client, not the lawyer
  - Thus, only client can waive it

Solicitor-Client Privilege

- Will only attach if
  - The communication was made between a solicitor and a client
    - Lawyers and their agents acting in their professional capacity
  - The communication was intended to be made in confidence
    - Presence of a third party at the time of the communication may vitiate the privilege unless the presence of the third party is essential or of assistance to the consultation
  - The communication was made for the purpose of seeking legal advice
    - Only applies to communications, not pre-existing documents
    - Does not apply to communications made for seeking, e.g., business advice

Dispute Settlement Privilege

- Communications, written or oral, made with a view to settling a litigious matter are privileged in the event that settlement is not reached
  - This is to encourage settlement

Dispute Settlement Privilege

- A litigious dispute must be in existence or contemplated
- There must be an express or implied intention of confidentiality in the event that negotiations fail
  - This will often be assumed if lawyers are involved
- The communication must have been made for the purpose of attempting to effect a settlement
  - Although it extends beyond actual settlement offers to include related communications

Case by Case Privilege

- Refers to communications for which there is a *prima facie* assumption that they are not privileged, but which may be held to be privileged in a particular case by the application of the 'Wigmore test'
  - See *R. v. Gruenke*, 1991 CanLII 40 (S.C.C.)

Case-By-Case Privilege

- The Wigmore test:
  - The communications must originate in a confidence that they will not be disclosed
  - This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
  - The relation must be one which in the opinion of the community ought to be sedulously fostered
  - The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
- Relatively few communications are ultimately found to be protected by case-by-case privilege