Evidence 2.0 – Why Hearsay Matters Even When It Doesn't

Moderator: Catherine Bickley, Pay Equity Hearings Tribunal and SJTO – Human Rights Tribunal of Ontario
Speaker: Professor Randal Graham, Faculty of Law – University of Western Ontario

Professor Graham explained that Canadian evidence law prohibits the admission of hearsay evidence in court, subject to certain narrow exceptions. He contrasted this regime with what is found in the *Statutory Powers Procedure Act* (*SPPA*). The *SPPA* authorizes an administrative tribunal to consider hearsay evidence as long as it is relevant. Nevertheless, Professor Graham emphasized that the evidentiary hearsay rules can still serve as useful guides to tribunals by helping adjudicators differentiate between relevant and irrelevant hearsay evidence.

While generally useful, Professor Graham noted that the hearsay rules can be arbitrary. This arbitrariness is the result of changing societal norms as well as overly technical decisions made by the courts. One example of a changing societal norm is the decline of religious practice in Canada. Accordingly, Professor Graham posed the question of whether the classical hearsay exception that allows hearsay statements that are tied to religious practice (for example sworn statements) to be admitted as evidence should be reconsidered.

Professor Graham described hearsay as an out of court statement that is repeated in court to prove the truth of its contents. He stressed that the statement is not hearsay if it is being made for a purpose other than to prove the truth of its contents.

Professor Graham explained that the problem with hearsay evidence is that it is missing all of the usual guarantees of reliability present in evidence law. These guarantees include the oath, cross-examination, and the ability to assess credibility (i.e., by assessing the declarant's credibility). In other words, hearsay evidence is inherently unreliable.

Yet, Professor Graham noted that despite the usual concerns, there may be circumstances that increase the reliability of hearsay evidence. He explained that the classical hearsay exceptions attempt to capture these conditions, which are termed "circumstantial guarantees of trustworthiness". Professor Graham highlighted some of the classical hearsay exceptions including: statements against pecuniary interest, statement made in the course of a business day, spontaneous utterances, and dying declarations.

Professor Graham noted that some of the classical exceptions are not entirely logical. For example, the spontaneous utterance exception states that the declarant's statement should be admitted both because he/she would not have the time to suddenly concoct a story and because the declarant would be more aware of his/her surroundings. However, Professor Graham asserted that current academic literature has rejected this thinking, noting that instead it points to the declarant being even less aware than under normal circumstances.

Also, Professor Graham noted that some hearsay exceptions are too technical and therefore overly arbitrary. For example, the dying declarations exception can only be used in cases involving the homicide of the dying declarant. Thus, the exception would be unavailable on charges other than homicide or charges not pertaining to the death of the declarant.

Professor Graham then went through several practice problems aimed at identifying hearsay. These problems demonstrated that identifying hearsay often poses a challenge to adjudicators.

Professor Graham concluded by stating that when deciding whether to admit hearsay evidence, administrative tribunals should care less about arbitrary hearsay rules and should instead think more about whether the statement has the required "circumstantial guarantees of trustworthiness" to be believable. Professor Graham added that the case law can often be a useful tool in order to assess whether these guarantees are present.