

1. For the Inquiry to undertake its fact-finding function, it will inevitably be necessary to assess the credibility of respective witnesses, and to make a decision regarding which witness' evidence should be preferred. The City has made submissions on the credibility of witnesses throughout its submissions. Nevertheless, it is also useful to review the factors that have been judicially recognized as relevant to the assessment of credibility.

2. In the case of *Re Pitts* the Divisional Court reviewed the factors relevant to credibility assessment by adapting a standard form of jury instruction. Reid J. wrote that:

In weighing the testimony of witnesses you are not obliged to decide an issue simply in conformity with the majority of the witnesses. You can, if you see fit, believe one witness against many. The test is not the relative number of witnesses, but in the relative force of their testimony. With respect to the testimony of any witness, you can believe all that that witness has said, part of it, or you may reject it entirely.

Discrepancies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is a fact also that two persons witnessing an incident or transaction often will see or hear it differently. Discrepancies on trivial detail may be unimportant, but a falsehood is always serious.

In determining the credit to be given to the evidence of a witness, you should use your good common sense and your knowledge of human nature. You might, in assessing credibility, consider the following:

The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge shade his evidence in order to lend support to his cause.

Does the witness exhibit any partisanship, any undue leanings towards the side which called him a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?

It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?

Was the testimony of the witness contracted by the evidence of another witness, or witnesses whom you considered more worthy?

Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.¹

¹ *Re Pitts and Director of Family Benefits Branch of MCSS* (1985) 51 OR (2d) 302 (Div. Ct.)

3. Another classic explanation of the process of assessing credibility is described by the BC Court of Appeal in the case of *Faryna v. Chorney* where the court stated that:

If the trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes axiomatic that the appearance of telling the truth is but one of the elements that enter into the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to clearly describe what he has seen and heard, as well as other factors, combine to produce what is called credibility.... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he actually telling the truth. I am not referring to the relatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of 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 the conviction of 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 truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities in which a practical and informed person would readily recognize as reasonable in that place and in those conditions.²

² *Faryna v. Chorney* [1952] 2 DLR 354 B.C.C.A., cited with approval in *R. v. Norman* (1993) 16 OR (3d) 295 Ont. C.A.