# Practice and Procedure Before Administrative Tribunals



## Chapter 17 — Evidence and Witnesses

In this chapter I intend to canvass two related areas: i. a suggested approach to evidence before administrative agencies; and ii. a discussion of the qualification and testimony of expert witnesses.



### 17.1 — EVIDENCE AND ADMINISTRATIVE TRIBUNALS[1]

### 17.1(a) What Is Evidence?

There are several components which may go into making a decision:

- legal interpretation (i.e. what does a particular statutory provision mean);
- facts;
- policy (things which fall within the discretion of the decision-maker); and
- logical reasoning.

Evidence is the information that is presented to a decision-maker to establish the facts on which the decision-maker is to base his or her decision. The information may establish those facts directly or indirectly.[1.01] If the thing in question is not logically capable of serving as the basis for the existence of a fact then it is not evidence. It is something else.[1.1] (The reverse of that coin is that facts can only be established on the basis of evidence.[1.10] The exception to this principle is facts which may be judicially noticed or established through the concept of "official notice". Judicial notice and official notice are discussed earlier in chapter 12 under heading 12.33 "Judicial and Official Notice: Matters for Which Evidence Need Not be Tendered".)

For example, as a Commissioner of the Ontario Residential Tenancy Commission, in determining a particular rent increase I might have taken into account a certain amount of the financing costs a landlord incurred in purchasing the building whose rents were under review. In making this decision, I knew I have to take into account some of this financing costs because I read the statute and it directed me to do so. This was a matter of legal interpretation. The statute, however, gave me the choice as to how much of those financing costs I would take into account. The exercise of a decision-maker's choice is a matter of policy or discretion. But before I could decide how much of the landlord's financing I should take into account I had to know whether of not the landlord actually had any financing costs, that they had been incurred in purchasing the building, what the terms of that financing was and so forth. These were facts and to establish those facts I had to rely on evidence.

Thus, in simple terms, evidence is something that is logically capable of establishing a fact that is needed in order to make a proper decision.

### 17.1(b) Administrative Agencies Are Not Bound By the Rules of Evidence

For the most part, the traditional "rules of evidence" were developed for the courts, to help accomplish their mandates. These rules have not been developed to serve agency purposes. Thus, to a great extent, the technical rules of evidence do not apply, *and should not be applied*, to agency proceedings as they will not contribute to the tasks administrative agency decision-makers have to carry out:

> Parliament has seen fit to give administrative tribunals very wide latitude when they are called on to hear and admit evidence so they will not be paralyzed by objections and procedural manoeuvres. This makes it possible to hold a less formal hearing in which all the relevant points may be put to the tribunal for expeditious review.[1.2]

Some members of administrative agencies believe that a basic familiarity with the technical rules of evidence would assist them in dealing with the objections made by legal counsel which were based on these technical rules. In my opinion, this is not true. It is self-deceiving to think so.

Legal counsel spend several years in pre-bar training learning the rules and their exceptions. They practice them daily before the courts. There are massive texts arguing thousands of minutiae respecting these rules. This is the domain of trained and expert legal counsel. Members of administrative agencies who are not legally trained (and likely even many who are) cannot win, and likely cannot even compete, if they allow themselves to fight a battle on grounds not of their selection. A basic grasp of "rules of evidence" will not allow one to better deal with counsel's evidentiary objections. For one reason, it is impossible to limit the debate. Once one engages counsel in an evidentiary argument one will quickly be drawn out from the relatively safe shallows of the basics and into the dark and deep seas of the complex. Furthermore, you will have implicitly endorsed the correctness of counsel's approach that the "rule" in question is somehow determinative of the issue before you. Usually it is not, as I will explain.

A technical rule of evidence is usually not determinative of an issue before an agency simply because as a matter of common law the courts have said on many occasions that administrative agencies are not bound by the formal rules of evidence.[1.3]

Where did this bit of wisdom come from? Why shouldn't the rules of evidence apply equally to administrative agencies as to courts? To understand this, it helps to differentiate between matters of substantive rights and matters of procedure.

The law gives us certain rights and privileges. These are commonly known as substantive rights. The method by which you go about bringing these rights into effect is

known as procedure. For example, the right of the winning lottery ticket holder to the jackpot is a substantive right. How the winner goes about proving that he holds that winning ticket would be considered a matter of procedure.

"Evidence" is considered, on the whole, to be a matter of procedure. It is an aspect of how one enforces or goes about bringing into effect one's rights rather than being a substantive right itself.[14]

As I have noted repeatedly in this text, administrative decision-makers are masters of their own procedure. They do not have to do things the way a court would do them. Subject to the dictates of statute law and natural justice, an agency has the authority to determine its own procedure. It follows, then, that because evidence is a matter of procedure an agency's mastery over its procedure means that it is not bound by the legal rules of evidence. (That common law freedom can, of course, be displaced wholly or in part by statutory direction respecting the evidentiary rules an agency must follow in its proceedings.[15])

As is discussed in more detail in chapter 9 "Powers of An Agency to Control Its Own Procedure", for the main part, administrative agencies are not set up to do the same things as courts. Thus, the rules of procedure, and of evidence, which were developed by the courts, to do the things courts do, are not applied to agencies because they are not geared to the types of things agencies have to do.[2]

This freedom from the rules of evidence is a principle of common law. Even if an agency's statute does not expressly provide for this freedom, the agency will usually be considered not to be bound by the rules of evidence.[2.01]

Notwithstanding this common law freedom, many agencies are, in addition, expressly freed by statute from the restrictions of the legal rules of evidence. The wording of these statutory releases vary. There are the direct, general and to the point, freedom clauses such as that found in section 19(1)(b) of the federal *Status of the Artist Act*, S.C. 1992, c. 33:

> 19. (1) In any proceeding before it, the Tribunal
>
> (b) is not bound by legal or technical rules of evidence.

Or, there is the slightly less direct, but equally broad, provision of which s. 17(c) of that same statute is an example:

> 17. The Tribunal may, in relation to any proceeding before it,
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> (c) accept any evidence and information that it sees fit, on oath, by affidavit or otherwise, whether or not the evidence is admissible in a court of law;[2.1]

Ontario's *Statutory Powers Procedure Act* contains another type of generic, although somewhat more limited, freedom from evidence for the agencies to which it applies:

> 15. (1) Subject to subsection (2) and (3), a tribunal may admit evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
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> (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.
>
> (2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence;[3] or
>
> (b) that is inadmissible by the statute under which the proceeding arises or any other statute.

A more subtle, but likely equally broad form of statutory freedom clause is illustrated by section 5(4) of the *Pension Act*, R.S.C. 1985, c. P-6:

> 5. (4) Decisions of the Minister shall be made as informally and expeditiously as the circumstances of fairness permit.[4]

The common law authority of agencies to admit information as evidence that might not otherwise be admissible in court is reflected in express statutory grants in the *Ontario Labour Relations Act*. In the context of the Labour Relations Board the *Act* provides that:

> 111(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.
>
> (2) Without limiting the generality of subsection (1), the Board has power,
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> ...
>
> (e) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.

In *EllisDon Corp. v. Ontario Sheet Metal Workers' and Roofers' Conference*, 2014 CarswellOnt 15975, 2014 ONCA 801 (Ont. C.A.) the Ontario Court of Appeal held that it was open to the Ontario Labour Relations Board to admit a document under this general statutory power respecting the admission of evidence which might not otherwise be receivable in court even if those documents might not be admissible under the legal principles respecting the admissibility of business records or the admission of "ancient documents".

In the case in point the Board had purported to analyze and admit the document in question as a "business record" under section 35 of the Ontario *Evidence Act* and as an "ancient document". Subsequently, on review, the Divisional Court, finding that the document did not meet the legal tests for admissibility under either principle, reversed the Board's decision. On appeal the Court of Appeal found that the Divisional Court had taken too formalistic view of the Board's decision. It was implicit in the Board's reasons that the purpose of the Board's analysis of the document under either legal rubric was to determine its authenticity and reliability. Implicit in the Board's findings was that the document was sufficiently reliable that the Board could have simply admitted it using its discretionary statutory authority to admit documents that might not otherwise be admissible in court. The Court noted that the Board, in approaching admissibility from the perspective of business records and ancient documents, had adopted a far more rigorous test for admissibility than would apply in the exercise of the Board's discretion to moderate any strict legal requirements respecting admissibility. Given that the Board had determined

that the document should be admitted on more exacting legal standards it was reasonable for the court to infer that the Board would also have admitted the document under its discretionary statutory authority to admit evidence had it occurred to the Board as being necessary.[4.0.1]

The freedom from the technical rules of evidence, however, may be a bit of a mixed blessing. While agencies may have greater freedom than the courts respecting evidence in that they need not be overly concerned with the technicalities of the legal rules of evidence, in some ways their task is harder than that facing the courts insofar as they cannot simply rely on such rules to determine whether something will be accepted or not as evidence in a proceeding. When an agency is faced with an evidentiary objection, the obligation on the agency is to determine what practical weakness is really being asserted as the basis for the rejection of the evidence and whether that weakness is sufficient to make the evidence sufficiently unreliable or unusable for the task it is intended to be put by the agency.[4.1] This is not necessarily an easy task.[4.2] What may be a weakness for some purposes, may not necessarily be a weakness for others. For example, the fact that some evidence may be pure opinion might not be a sufficient weakness justifying the CRTC's rejection of evidence in a broadcasting matter when it is attempting to gauge cultural values or needs. Thus, the agency must approach *each* evidentiary objection on the basis of the mandate facing that agency and the weaknesses and strengths of the particular evidence in question must be evaluated in light of that mandate.[5]

*Hamilton v. Alberta (Labour Relations Board)*[6] is an excellent illustration of this principle in operation. In that case the Alberta Labour Relations Board was considering a grievance by an individual against his union. When the individual had completed his case before the Board the union asked that his complaint be dismissed as he had not put in any evidence that could support it. There was evidence before the Board, but the union pointed out several weaknesses with it. In response the individual asked to be allowed to call further evidence which would rebut the weakness noted by the union. The Board refused on the ground that the individual was attempting to "split his case". The Board then proceeded to rule against the applicant on the basis of the weaknesses which the union had identified and which it had not allowed the individual to answer.

The Alberta Labour Relations Board's statute expressly stated that it was not bound by the rules of evidence relating to judicial proceedings.

On an application for judicial review, the Alberta Court of Queen's Bench overturned the decision of the Board because it had disregarded this freedom and bound itself by the legal rules of evidence. The Board had reasoned that its statutory provision gave it a discretion to use the common law rules of evidence and that in deciding whether to apply those rules the Board was to be guided by matters of logic and public policy. The Court disagreed. Justice Hutchinson wrote: "The effect of the section is not to give the Board a discretion to use common law rules of evidence, but liberates the Board from the strictures of the law relating to admissibility and evidence applicable to judicial proceedings."

The judge ruled that the task of the Labour Board panel was to ascertain all of the facts relating to the applicant's complaint. This it had not done. "Instead, the Asbell Panel seems to have been overly occupied with the question as to whether the applicant (or his solicitor) should have anticipated the evidence which was led by the Edmonton Police Association after the applicant had closed his case. In other words, the . . . panel became bogged down in a consideration of the rules of evidence and overlooked its fact finding mandate." In the Court's opinion:

> Section 13(5)(b) . . . says that the Board is not bound by the law of evidence applicable to judicial proceedings. Thus, the Board is permitted range beyond the restraints imposed in a court of law so as to adopt a more informal or flexible approach to its fact finding mission in order to permit the Board to exercise the powers given to it pursuant to the Code. The Board's primary duty in acting as a buffer between employers and employees is to act fairly and to be perceived at all times as acting fairly.
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> I am persuaded that in this instance the Board has misconstrued the way in which the Code instructs it concerning the application of the rules of evidence. Rather than having been liberated from the common law rules of evidence as provided in s. 13(5)(b) of the Code, the Board has purported to apply its discretion so as to use common law rules of evidence to exclude evidence. The Board has adopted an inflexible, formalistic approach to the acceptance of evidence which limits its ability to consider the facts presented by both sides. In doing so the Board has failed to take into account its mandate to be able to look beyond the evidence which is restricted in judicial proceedings and the Board has become enmeshed in the very rules of evidence from which it has been freed by s. 13(5)(b) of the Code. Rather than having placed itself in the position of hearing all of the evidence, its rigid adherence to rules of evidence leaves the impression that it has not acted fairly."[6.1] (at pp. 183-184)

**17.1(c) Despite Freedom from "Rules of Evidence" One Must Still be Concerned with Evidence**

Notwithstanding all the foregoing, however, individuals appearing before agencies and agency decision-makers cannot simply ignore the *concept* of evidence. The fact that an administrative decision-maker may not be bound by the legal "rules of evidence" does not mean that anything should go respecting the material which you receive in the course of a proceeding. The rules of evidence exist for a reason, and while, perhaps, one need not know the formal rules, one *must* know what the rules of evidence are trying to accomplish and one should try to guide one's approach to evidence according to those aims.

Failure to do so will usually result in judicial review by the courts. Most administrative decisions have to be made against the backdrop of some factual determination. Although the type of factual basis which may have to be established in an administrative proceeding may be different from that in a court, some factual underpinning usually has to be established.[6.2] This can lead to judicial intervention from a number of approaches:

i. Generally the courts assume that Parliament intended agencies to operate fairly and according to the rules of natural justice or procedural fairness. While the degree of rights flowing from these principles will vary from circumstance to circumstance one can say that as a general rule natural justice and procedural fairness require:

   i) that a party has an opportunity to know the case against him or her and to present his or case to the agency; and

   ii) that the decision will be made by an unbiased adjudicator.

If an agency fails to operate with a concern to the underlying purposes of the rules of evidence it will likely find itself in breach of one or both of these principles. For example, a refusal to admit relevant and material evidence, which cannot be justified, will likely amount to a breach of a party's right to present his or her case. (The determinative point here is that the information is relevant. There is no requirement that an agency receive information which is not relevant to the issues before it. Fairness does not dictate that an agency to have before it a document which is not relevant, probative or material to the proceeding before it. (*Jones v. IWA-Canada, Local 1-3567*, 2011 CarswellBC 1834, 2011 BCSC 929 (B.C.S.C.))

In *Mooring v. Canada (National Parole Board)*,[7] the Supreme Court of Canada held that the National Parole Board, although it was not bound by the legal rules of evidence, was bound by both a common law and statutory duty to be fair. In the context of evidence, this meant that the Board had to ensure that the information upon which it acted was reliable and persuasive. As in every other aspect of fairness, the Court noted that the "fairness" of admitting any particular piece of evidence was to be determined in light of the overall mandate of the agency.

In *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 CarswellBC 2390, 2010 BCSC 1279 (B.C.S.C.) the B.C. Supreme Court held that the failure to consider relevant evidence could be considered to be a breach of fairness.

> "63 The assertion by the decision-maker that no evidence existed when, in fact, there was evidence in the record on a particular point can conceptually be addressed in different ways. One can argue that the failure to consider relevant evidence is a form of procedural unfairness, which causes the process engaged in by the decision-maker to be unfair. This appears to be the analysis undertaken by the court in Bagri v. Workers' Compensation Appeal Tribunal, 2009 BCSC 300, 94 Admin. L.R. (4th) 110 at paras. 44-48 and was the analytical framework that counsel for WCAT advanced before me."

Similarly, the Alberta Court of Queen's Bench held that an agency may be required, as an aspect of both the common law principles of fairness and the due process provisions of Alberta's *Bill of Rights*, to consider the propriety of admitting facts into evidence not only on the basis of relevance but on the other considerations which underlie the rules of evidence as well. (*Lavallee v. Alberta (Securities Commission)*, 2009 CarswellAlta 27, 2009 ABQB 17 (Alta. Q.B.), affirmed 2010 CarswellAlta 235, 2010 ABCA 48 (Alta. C.A.)).[7A]

> ii. Secondly, agencies only have the authority to do such things as Parliament, either expressly or implicitly, authorized them to do. Failure by an agency to concern itself with the underlying purposes for which the rules of evidence were created will often lead the courts to find they have acted outside of the jurisdiction given to them by Parliament. For example,
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> a. Parliament has not, to my knowledge, yet created an agency which it intended to act irrationally or at whim. Where an agency bases its decisions on facts for which there is no logical evidence whatsoever the decision may be considered to be irrational. The Court will intervene.[7.1]
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> b. Equally, if an agency takes into account facts which have no logical connection to the decision it has to make, or fails to take into account relevant and material facts, the courts will intervene on the grounds that Parliament never intended the agency to take into account irrelevant considerations or to make decisions without considering the relevant facts.[8]
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> c. Some statutes provide for a right of appeal but only on a question of law. Whether material is capable of leading to a particular conclusion can be a question of law, thus, a nonchalant approach to evidence can give rise to such appeals.
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> d. Another ground of judicial review by the courts is that a decision is patently unreasonable. A decision which is poorly supported by evidence might be seen as such. A decision which the evidence does not at all support *will* be viewed that way.

Beyond the question of judicial intervention, I assume that most agencies want their decisions to be as good as possible; where they are establishing social policy, that they will be capable of effecting the policy they are intended to accomplish; and where they are determining disputes between individuals that their decisions will be accepted by the concerned parties. A decision will only be as good as its underpinnings. Decisions which are not supported by good factual underpinnings, or which are perceived as having been arrived at unfairly, or which, indirectly cause more harm than any possible good the making of the decision can have, will not be good decisions. They will not serve their purpose.

Rules of evidence are geared to establishing sound factual underpinnings which do not create greater social harm in establishing those underpinnings than the social good those factual underpinnings are capable of producing.

### 17.1(d) What are the Underlying Concerns of the Rules of Evidence?

Underlying the rules of evidence are three basic purposes. And these should also be the heart of an agency's evidentiary concerns. The rules of evidence exist to:

> i. establish a sound factual basis for decisions;
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> ii. ensure a proper balance between the harm in accepting evidence and the value in doing so; and
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> iii. maintain a fair and effective process.

I suggest that these concerns should also serve as an agency's guide. Whenever there is no statutory restriction on the admission of evidence and the agency is called upon to decide whether something should or should not be admitted in the proceeding before it, it should ask itself the following questions:[8.0.1]

> 1. Is this evidence capable, if believed, of creating a factual basis for the decision in question, and if so, how far can it logically be taken to do so?
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> 2. If it is capable of supporting the necessary factual base, is there some other reason why it should it be rejected? Will its receipt lead to

some greater social harm than the good likely to be accomplished by accepting it?

3. Assuming that the evidence meets the first two concerns, is there anything about the way the evidence is coming which threatens the fairness or the smooth operation of your hearing? And if so, is this threat of sufficient importance, in light of your mandate, to warrant its exclusion?

Furthermore, a statutory direction purporting to require an agency to admit any and all evidence solely on the basis of relevance, to the exclusion of the other evidential considerations, may be of no force or effect in proceedings subject to the fundamental justice provisions of the *Charter of Rights* or the due process provisions of the Canadian or Alberta *Bill of Rights*.

In *Lavallee v. Alberta (Securities Commission)*, 2009 CarswellAlta 27, 2009 ABQB 17 (Alta. Q.B.), affirmed 2010 CarswellAlta 235, 2010 ABCA 48 (Alta. C.A.), leave to appeal S.C.C. refused 2010 CarswellAlta 1382 (S.C.C.), in the context of the Alberta *Bill of Rights*, the Alberta Court of Queen's Bench held that in proceedings subject to a high degree of fairness, an administrative agency which is not bound by the rules of evidence must have the discretion to refuse to accept evidence where it would be unfair to do so. Consequently, the Court held that statutory directions in the Alberta *Securities Act* to the Alberta Securities Commission that in a hearing before the Commission or the Executive Director that it must accept all relevant evidence was contrary to the due process guarantee in section 1(a) of the Alberta *Bill of Rights*. Those sections provided that the rules of evidence did not apply to the proceedings (s. 29(f)) and that the Commission and the Executive Director "shall receive that evidence that is relevant..."

Section 1(a) of the Alberta *Bill of Rights* provided that:

1. It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:

(a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law...

The Court held that the due process requirements in section 1(a) of the *Bill of Rights* were the same as the requirements of common law procedural fairness. In light of the extensive potential penalties at stake in proceedings before the Commission, the Court held that those proceedings would require a high level of procedural fairness.

...The ASC is not required to be procedurally perfect. However, considering that an order from the ASC may have a devastating effect on respondents before the ASC, when considering the combination of potential bans and administrative penalty and in order not to be inconsistent with s. 1(a) of the Alberta Bill of Rights, an ASC panel will need to exercise its discretion not to admit relevant evidence in appropriate circumstances to preserve the mandated level of procedural fairness. In my opinion, due process requires this.

The Court rejected the argument that either the ability of the agency to give different weight to "unfair" evidence, or the fact that a decision could be appealed, were sufficient to offset the harm in being required to receive evidence, the receipt of which was unfair.

Relying on the weight given to evidence without regard to admissibility principles does not guarantee that a breach of the duty of fairness will never occur. For instance, even if, generally, it is not necessarily a breach of procedural fairness for a tribunal to admit relevant evidence obtained in breach of the Charter, in some cases the simple fact of admitting this type of evidence, obtained in a manner which rendered the evidence unreliable and unfair, may be in and of itself a breach of that duty of fairness....

As section 2 of the Alberta *Bill of Rights* provided that absent an express legislative direction to the contrary, every law of Alberta was to be construed and applied as not to abrogate, abridge or infringe any of the rights or freedoms provided in the *Bill of Rights*, the Court held that sections 29(e) and (f) were inoperative but only to the extent where the admission of relevant evidence would violate due process of law.[8A]

It is my contention that agencies should not focus their energies on the technical rules of evidence but instead focus on the three concerns noted above. As stated by the Ontario Divisional Court in *Letherston v. College of Veterinarians (Ont.)*[8.1] it is not the technical recitation of the rules which makes or unmakes a decision. It is what was actually done and why:

The question ... is not whether the lay tribunal recited legal principles in the same way as a court or a tribunal of lawyers. The question is whether the decision of the tribunal, in light of the evidence and the reasons taken together, discloses reviewable error.

Therefore, let us now consider the operation of the three concerns noted above.

CONCERN I:

*Is this evidence capable, if believed, of creating a factual basis for the decision in question, and if so, how far can it logically be taken to do so?*

Rules of evidence deal with what can be admitted in proceedings to ensure the creation of a good factual basis (i.e., that material submitted was capable of establishing the fact in question). Translated into the agency sphere, this means that the decision-maker has to be concerned with whether the material which it will be taking into consideration is sufficient to create the type of factual basis necessary for its proceedings.[8.2]

The relevance of particular pieces of evidence is not always readily apparent. It is not uncommon for different small pieces of evidence to take on a particular significance when viewed together. Nor need every piece of evidence address all of the issues in a proceeding — some evidence will only address specific points, other evidence may be tendered to help explain or provide background against which other evidence may be better viewed.[8.2.1] All of that type of information could be considered to be relevant in a proceeding.

One has to be concerned with two things in deciding whether a particular piece of evidence is capable of establishing a good factual base for a decision: its relevance and its weight.

a. **Relevance**. The information which is offered must be capable, assuming that it were true, of logically establishing some fact which an agency needs in order to accomplish its mandate.[8.3]

When evidence is admitted in a proceeding the agency is saying that it is capable of logically proving the existence of some fact or matter which has to be established in order for the agency to perform its statutory mandate.

Obviously, then, relevance is going to be affected by the mandate of the agency. If an agency has been created by Parliament to determine if an aeronautics licence holder flew an aircraft in a dangerous way that was not permitted by the regulations it is a waste of everyone's time to tender reams of material that go to establishing the economic effect of television shows produced in Canada. The economic state of Canada is not a requirement of the *Aeronautics Act* or the regulations made under it. However, the statement by a witness that he saw the plane in question buzz bomb pedestrians may be relevant if there is something in that legislation which prohibits such actions (and one hopes there is).

As a practical matter, then, it will obviously assist decision-makers if they know the type of things which have to be proven for an application to be successful. This allows them to see where lines of questioning or the tendering of evidence may be going and to gauge its relevance.

If a matter is not relevant it cannot be taken into account. It should not be admitted into evidence.[9] Nor does the refusal to accept irrelevant evidence give rise to a reasonable apprehension of bias against the person attempting to put it in.[9.1]

b. **Weight**. In addition to determining its relevance, a decision-maker will have also to be concerned with how much weight the tendered evidence has. In other words, how much can the agency rely on it to establish the matter it is submitted to establish.

Weight should not be confused with relevance. Relevance goes to the logical connection of one thing to another. Weight goes to reliability. Something could be relevant to a question and yet actually have very little probative value. Weight is affected by the nature and circumstances of evidence. For example, an unsigned, undated, and anonymous letter attesting to a fact in question is logically connected to the question of the existence of that fact. However, because the truths of that letter cannot be checked in any way it may have little probative weight.[9.2] Similarly, the weight of self-serving oral evidence by a party may be less insofar as it is not objective.[10] Weight can be very important. For example, conflicts between evidence may be resolved on the basis of weight.[10A] Thus, evidence given under oath or affirmation is generally considered to have more weight than evidence that is not given in that way.[10.01]

As discussed earlier, the mandate of the agency may affect the weight to be attributed to evidence. Where the mandate of the agency requires that decisions be based upon established facts, opinions (other than expert opinion — which is discussed below in chapter 17.4 "Opinion Evidence") and speculate evidence might have little weight.[10.1] Where decisions are to be made respecting things which by their nature cannot be factually or objectively established opinions, views and conjecture might be given more weight.

Reliability plays a large role in determining weight. The more reliable evidence is, the greater the weight which is generally accorded to it.

Evidence which is relevant, but of little weight, may be admitted. Its lack of weight may be compensated for by the rest of the record, or, alternatively, the agency's mandate may be such to warrant taking into account matters of lesser weight than would a court.

Obviously, the fact that some evidence may have greater weight than other evidence will often place an agency in the position of having to prefer one party's evidence over conflicting evidence provided by opposing participants. Provided that the weighing and choice of evidence is properly carried out the mere fact that an agency prefers one party's evidence over another's is not equivalent to the agency ignoring the latter's evidence.[10.2]

The technical issue arose in *P.S.A.C. v. Canada Post*, 2011 CarswellNat 4581, 2011 SCC 57 whether in determining the weight to be ascribed to information tendered as evidence an agency is applying the concept of "standard of proof". From a technical perspective the act of determining the weight of evidence is not applying the standard of proof — albeit that the exercise is a necessary action in order that the standard be applied. In reversing the decision of the Federal Court of Appeal the Supreme Court of Canada adopted the dissenting reasons of Justice Evans in the Court of Appeal. Justice Evans had stated (among other things) that while there is a similarity in the concepts of weight and standard of proof technically the formal concept of standard of proof should only be applied to the determination of whether at the end of the day, after considering all of the pertinent evidence, a fact which needs to be proven has been proven or not. Technically, the legal concept of standard of proof is not relevant to the intermediate weighing of items of evidence to determine their probative value.

Nonetheless, the gist of the civil standard of proof (that something is more likely than not) also arises in the context of the weighing of evidence. The weight (i.e. believability) of evidence is relevant to the question of whether a fact has been proven. A fact cannot reasonably be said to be proven on a balance of probabilities if the only evidence to establish that fact is unreliable. And evidence cannot be described as being reliable unless it was more likely than not to be true. Thus, to refer to the standard of proof in assessing the weight of evidence does not amount to an error of law and does not indicate that an agency (in this case the Human Rights Tribunal) deviated from the task of assessing the reliability of submitted evidence and asking whether, taken as a whole, the established the required facts on a balance of probabilities.[10.3]

Although weight can arise in a number of situations, one of the most common ways it will arise before one is in the context of hearsay evidence. It is also, I suggest, an excellent example of why one should not permit oneself to become bogged down in the discussion as to legal technicalities but instead be concerned with agency realities. I would like to illustrate this principle by looking, for a moment, at hearsay evidence.

*Hearsay*

Generally speaking, hearsay evidence is written or oral statements made by persons, otherwise than in testimony at the proceeding in which it is offered, which is offered in order to prove the truth of the matter asserted in the statement.[11]

An easy example is a statement by a witness, Ms. Robinson, in a proceeding held to determine if Mr. Jones burnt down his barn, that Mrs. Smith had told the witness that she saw Mr. Jones light the fire. The purpose of the evidence is to prove that Mr. Jones lit the fire, yet the statement which is offered to prove this, "I saw Mr. Jones light the fire", was made by Mrs. Smith who is not present at the hearing. Hearsay can take many forms: witnesses recounting of oral conversations, newspaper reports, audited financial statements, etc. Documents are technically hearsay if offered as proof of their contents.[11.1]

Hearsay is not, as a rule, admissible in judicial proceedings. (There are of course, numberless exceptions.) Consequently, it is very common for parties in an administrative proceeding to object to evidence being received on the grounds that it is hearsay.

The formalistic (and less desirable) response to such an objection is, of course, simply that agencies are not bound by the formal rules of evidence and can receive hearsay evidence.[11.2] The agency may also point to any statutory codification of that rule that may apply to it. However, the formalistic response is not always the best one.

I suggest that the prudent decision-maker will not become overly concerned with whether or not something is or is not hearsay. Practically speaking this exercise is not worth the effort and the determination as to what constitutes hearsay can be very complex.[12] Furthermore, there are many exceptions to the technical rule against hearsay. Since an administrative agency can receive hearsay evidence in most cases anyway, the conjuring of that baleful term should have no power over it.

However, what is sauce for the goose is sauce for the gander, and I suggest that it is not a fully satisfactory response to a hearsay objection merely to say that you are not prohibited from receiving hearsay evidence because you are not bound by the rules of evidence. This amounts to a simple exchange of mystical formulae with very little actual communication.

The better approach, I suggest, is not to concentrate on whether something amounts to hearsay or not. Instead, concentrate on why the objection is being made. Why should the evidence, even if it were hearsay, be rejected? Have the objector identify and explain the weakness.[12.01] This will also force the objector to clearly formulate the basis for the objection. Some objections may be based more on habit than on any real concern over the evidence.[12.0]

More likely than not, the objection will go to the fact that, because the evidence cannot be tested, it is unreliable.

In the context of administrative proceedings, this type of objection really goes to the weight to be accorded the information rather than its acceptability.[12.1] The issue before the decision-maker is not "Is the information hearsay, and if so what can I do with it." The questions are really, "What is the weakness with this evidence with respect to establishing a factual basis?" and "Given this weakness, to what degree can or should I rely on it in making my decision?"

Determine how reliable the evidence is. For example, is it supported by other evidence on the record? Is it reliable for some other reason?[12.01] There are numerous exceptions to the hearsay based on the fact that the courts have determined that the evidence contained therein is actually reliable, notwithstanding that it comes to you in the form of hearsay. Dying declarations and admissions against interest, for example, are types of hearsay which the courts have found sufficiently reliable for judicial proceedings notwithstanding that they are hearsay.

Let us say that the decision-maker concludes that the tendered evidence is not completely reliable. It will then have to determine if the evidence is *sufficiently* reliable for the agency's purposes. To answer this question, the decison-maker will have to look to the function which it is performing. Does it require the same degree of certainty as the courts do? Is the agency performing a function that goes to ensuring public safety? Is it merely making an advisory report on some aspect or other to another decision-maker? Is the agency deciding someone's career future? Given the task before it, does the decision-maker believe that it would be reasonable to rely on evidence suffering from this particular weakness?

I'll just give you two contrasting examples of how differences in task can affect the use of hearsay. In *Bond v. New Brunswick (Board of Management)* (1992), 8 Admin. L.R. (2d) 100 (N.B.C.A.) the New Brunswick Court of Appeal found that in an employment arbitration where someone's career hinged on the determination of sexual harassment charges, the gravity of the question indicated that the arbitrator should not base his decision almost wholly on hearsay evidence. In another case, however, after the employee's guilt had already been determined and the only thing left for the arbitrator was to determine the appropriate penalty, the Newfoundland Supreme Court held that it was perfectly acceptable for her to take into account hearsay evidence to establish facts in mitigation of the punishment *(Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* (1992), 99 Nfld. & P.E.I R., 315 A.P.R. 232 (Nfld. S.C.)). In the latter case, the hearsay was being used in a less destructive or important way.[12.2]

There is a continuing debate, which rises or falls in importance from time to time, as to whether hearsay should only be admitted as a fall back position where better evidence is not available or whether it should be admitted as a matter of course. In my opinion, this question should be determined in light of the importance of the evidence in question as well as the function which you are performing. Greater latitude should likely be extended to evidence which only goes to collateral, incidental or minor matters. Evidence which goes to the heart of a question may require a greater degree of reliability than hearsay is capable of.[13]

Any hearsay evidence which is received should be assessed in light of the other evidence in a proceeding. Where there is conflict an agency must have a valid reason for preferring some evidence over any other conflicting information. In *Crêpe It Up! v. Hamilton*, 2014 CarswellOnt 17080, 2014 ONSC 6721 (Ont. Div. Ct.) the Ontario Divisional Court held that an Adjudicator of the Ontario Human Rights Tribunal erred in making a material finding of fact based on hearsay evidence while failing to evaluate the direct evidence of another which was inconsistent

with that hearsay evidence. The Adjudicator relied on the hearsay evidence of two individuals who testified that the complainant had told them what had happened after an alleged incident for the basis of the Adjudicator's finding of fact as to what had happened. The Court acknowledged that the Adjudicator had the power to admit hearsay evidence under section 15 of the Ontario *Statutory Powers Procedure Act* but held that it was unreasonable to rely on that hearsay evidence as the Adjudicator had done in this case. The Court noted that statements to third party others who were not present at an incident as to what had happened in the incident are not probative of what had originally happened between the two direct participants. Nor did the fact that the complainant repeated the same story to others — that only showed only that the complainant consistently repeated his or her version of the incident over time. Such consistent repetition does not prove what actually occurred or was said. Rather, the Court stated that the determination of what had happened between the complainant and the respondent required a close examination of their evidence. Rather than simply relying on the hearsay evidence the Adjudicator should have considered both the complainant's and the respondent's version of events and explain why the respondent's evidence was not accepted.

The Court in *Crêpe It Up!* may have been somewhat absolute in finding that hearsay evidence cannot be probative that something happened. Courts have long cautioned about relying solely on hearsay in the establishment of material facts. However, there may be situations where hearsay may reasonably be logically and reliably relied on to establish facts — the situation respecting medical or business records immediately suggests itself. The determinative error in *Crêpe It Up!* was likely not simply the reliance on hearsay but the doing so in a vacuum. The Court's views respecting the failure to evaluative the evidence of the complainant herself and the contrary direct evidence and the failure to explain why the contrary direct evidence was not accepted or preferred is sound. As noted, while hearsay evidence can be probative, it is considered dangerous to rely solely on it respecting material facts. It should not be used in preference over direct evidence nor should it be used to establish such facts in the face of direct evidence to the contrary without some explanation as to the weakness of the direct evidence or why the direct evidence was not preferred over the hearsay.

CONCERN II

*If the evidence is capable of supporting the necessary factual base, is there some other reason why it should it be rejected? Will its receipt lead to some greater social harm than the good likely to be done by the agency's decision?*

Sometimes a piece of evidence will be relevant and capable of proving an assertion, however, it may have been secured in such a way or it may have some characteristic that may lead one to reject it on the grounds of social harm. Under this concern one looks at whether the social good hoped to be accomplished through the process will be outweighed by some harm resulting from the admission and use of the evidence.

A number of cases citing this great societal harm vs. limited litigation advantage concern were noted by the Ontario Divisional Court in Liquor Control Board of Ontario v. Magnotta Winery Corporation (2009), 97 O.R. (3d) 665 (Ont. Div. Ct.) in the context of the non-disclosure privilege accorded settlement negotiations:

In 1988 the House of Lord concluded:

> In my view, this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties." *(Rush & Tompkins Ltd. v. Greater London Council, [1988] 3 All E.R. 737, [1989] 1 A.C. 1280 (H.L.) at p. 744 All E.R. . . .)*

In British Columbia, the Court of Appeal endorsed the public policy basis for non-disclosure of settlement discussions, McEachern C.J.B. said:

> . . .I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course settlement negotiations to be privileged. I would classify this as a "blanket", *prima facie* common law, or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanges in the course of that worthwhile endeavour.
>
> *(Middelkamp v. Fraser Valley Real Estate Board*, [1992] B.C.J. No. 1947, 96 D.L.R. (4th) 227 (C.A.), at pp. 232-33 D.L.R. . . .)
>
> . . .
>
> In 1992 the Supreme Court of Canada also stressed the public policy aspect of settlement negotiations in Kelvin Energy Ltd. v. Lee, [1992] 3 S.C.R. 235 . . . The Court quoted with approval the following statement from Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 . . (H.C.J.), at p. 230 O.R. . . .:
>
> > . . . the Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interest of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Courts system.

One illustration of the operation of this concern can be seen with respect to material which is subject to solicitor/client privilege. The courts have taken the position that the operation of the courts themselves, of the legal system, depends on the ability of individuals to seek legal advice. Thus, advice which is given by a solicitor, as a solicitor, to his client, is not admissible. It is open to you as an agency to take the same approach. You have to ask, what is the harm which will result from my admitting and using this evidence and then balance it against the social good in doing so. (Technically speaking, solicitor/client privilege is a matter of substantive law, not procedure. Consequently, absent a statutory direction to the contrary, an agency's power over its procedure would not extend to receiving evidence subject to a solicitor/client privilege.)

This concern can also arise with respect to information which was disclosed as part of settlement negotiations or with respect to evidence which a party claims is confidential and should not be made public.[13.01]

The social harm aspect of evidence was readily evident in Globe & Mail c. Canada (Procureur general), 2010 CarswellQue 10258, 2010 SCC 41

(S.C.C.) when the Supreme Court of Canada refused to recognize an across the board privilege respecting journalists' informants but did recognize a case-by-case privilege. That is to say the Court recognized that individual situations might attract a privilege protecting the journalist from having to disclose information. Whether or not the privilege should be recognized in any given case depended on the degree to which the public interest favoured confidentiality according to the application of the four Wigmore confidentiality criteria (named after the American jurist John Henry Wigmore who initially conceptualized the criteria):

(1) the relationship between the journalist and the source must originate in a confidence that the source's identity will not be disclosed;

(2) anonymity must be essential to the relationship in which the communication arises;

(3) the relationship must be one that should be sedulously fostered in the public interest; and

(4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth.

In the *Globe & Mail* case the Supreme Court of Canada noted that, in the context of a claimed journalist privilege, the brunt of the work in the application of these criteria will fall to be done under the fourth criteria which is basically just a balancing of the interests protected by confidentiality against those protected by disclosure. The Court provided a non-exhaustive list of considerations that would be relevant in determining whether the public interest in non-disclosure might outweigh the public interest in getting at the truth.

1. The stage of the proceedings at which the privilege is sought.

"58. „ On the one hand, the early stage of the proceedings — such as the examination for discovery stage in this case — might militate in favour of recognizing the privilege. The case will be at its preliminary stages only, and will yet to have reached the stage of determining the liability or the rights of the parties. . . . On the other hand, given the overall exploratory aims of examinations for discovery and the confidentiality with which they are cloaked, in principle, the testimony may be capable of providing a more complete picture of the case and have the potential to resolve certain issues prior to going to trial. This would militate in favour of not recognizing the privilege at this stage."

(With respect to the latter comment, the Court noted that should the opposing party seek to enter a transcript of the discovery at trial — thereby revealing the source — the privilege could then be asserted again by the journalist.)

2. The centrality of the issue to the dispute between the parties

"60 . . . While the identity of a confidential source may be relevant to the dispute, particularly given the broad definition of relevancy in civil proceedings, that fact may nevertheless be so peripheral to the actual legal and factual dispute between the parties that the journalist ought not to be required to disclose the source's identity.

61 Another consideration, related to the centrality of the question to the dispute, is whether the journalist is a party to the litigation, or simply an ordinary witness. For example, whether it is in the public interest to require a journalist to testify as to the identity of a confidential source will no doubt differ if the journalist is a defendant in a defamation action, for example, as opposed to a third party witness, compelled by subpoena to testify in a matter in which he or she has no personal stake in the outcome. In the former context, the identity of the source is more likely to be near the centre of the dispute between the parties. When a journalist is called as a third party witness, there is likely to be more of a question whether the source's identity is central to the dispute."

3. Whether this information sought is available from other sources.

"63 . . . If relevant information is available by other means and, therefore, could be obtained without requiring a journalist to break the undertaking of confidentiality, then those avenues ought to be exhausted. The necessity requirement, like the earlier threshold requirement of relevancy, acts as a further buffer against fishing expeditions and any unnecessary interference with the work of the media. Requiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort."

4. Other considerations which may be relevant in a particular case.

"64 Other considerations that may be relevant in a particular case include the degree of public importance of the journalist's story, and whether the story has been published and is therefore already in the public domain. This list is, of course, not comprehensive. In the end, context is critical."

While it appears evident from this judgment that journalist confidentiality is not to be broken easily but must be necessary and serve a real purpose the Court also made it clear that, once the party seeking disclosure has established the relevance of the information sought, the burden is on the journalist to establish the desirability of the recognition of confidentiality in each case.

"65 In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If the questions are irrelevant, that will end the inquiry and there will be no need to consider the issue of journalist-source privilege. However, if the questions are relevant, then the court must go on to consider the four Wigmore factors and determine whether the journalist-source privilege should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure that the law would normally require."

When faced with a social harm type of question ask yourself the following questions:

1. How necessary is the information in order for you to accomplish your statutory mandate?

2. How necessary is the evidence for one of the other parties to make his case? Can she do so by some other means?

3. Is the disputed evidence really of the nature claimed by the party disputing its admission? For example, is it really confidential? I have heard Margo Priest give the example of where city road maps were claimed as confidential material in proceedings before the Ontario Telephone Services Commission.

4. How much harm will result from its disclosure to the person opposing its use? Will there also be some harm to some public interest from its admission? If so, how does this harm compare to the value hoped to be achieved through your proceedings.[13.02]

5. Is there any way to minimize this harm? (disclosure only to counsel, in camera hearings, etc.)

I suggest that if one does this type of analysis (and assuming that there is no direct statutory compulsion on the agency to receive the evidence or statutory prohibition against doing so) the agency's decision is likely to be upheld by the courts.

This type of balancing of interests by a disciplinary panel of the Law Society of Manitoba was approved of by the Manitoba Court of Appeal in *Histed v. Law Society (Manitoba)* (2007), 2007 CarswellMan 504, 287 D.L.R. (4th) 577 (Man. C.A.), leave to appeal to S.C.C. refused (2008), 2008 CarswellMan 206, 2008 CarswellMan 207 (S.C.C.). The Court of Appeal held that even if a lawyer's letter was protected by settlement privilege, it was proper for a disciplinary committee of the Manitoba Law Society to receive the letter in evidence against the lawyer. The letter dealt with the choosing of a case management judge for proceedings in which the lawyer was involved. It was alleged that derogatory comments made by the lawyer in the letter about specific judges amounted to a breach of the Law Society's Rules.

The Court of Appeal found that the letter was not protected by the privilege. But even if it were, the Court said that it would have been proper to receive it in the disciplinary proceedings. The Court noted that the Legal Profession Act, S.M. 2002, c. 44, contained exceptions that permitted communications protected by solicitor-client privilege to be received by the disciplinary committee for the purposes of regulating the members of the profession.[13.1] Although the Act did not refer to settlement privilege, the protection afforded by settlement privilege was less stringent than that offered by solicitor-client privilege. But the case law settlement privilege could be set aside where necessary to avoid an abuse of the privilege or where there was another compelling or overriding interest of justice to be served.

After referring to the statutory exceptions respecting solicitor-client privilege the Court stated that:

> It seems to me that the same result should obtain, in most cases, a balancing of interests between the need to protect the public by allowing the Law Society the fullest opportunity to investigate the conduct of their members and the desire to encourage settlement.
>
> I agree with the panel when it concluded that "there is a greater public interest in the ethical practice of law than the public interest in encouraging settlement negotiations by protecting those negotiations from disclosure." In the situation at bar, where the disclosure does not compromise the interests of any party in the process of the main litigation (such as disclosing a settlement proposal might), but is extraneous to the main cause and only exposes a potentially unprofessional communication from counsel which may trigger a finding of professional misconduct, the panel's comments seem particularly apt.

CONCERN III

*Assuming that the evidence meets the first two concerns, is there anything about the way the evidence is coming in which threatens the fairness or the smooth operation of your hearing? And if so, is this threat of sufficient importance, in light of your mandate, to warrant its exclusion?*

Many of the judicial rules of evidence are aimed at ensuring the fairness of a proceeding and its smooth operation. Advance disclosure requirements, for example, fall under this heading.

Administrative agencies have to be concerned with the underlying problem of ensuring a process which is both fair and efficient. It is very difficult to separate fairness from smooth operation. The two are often interrelated, and sometimes conflicting. For example, to be fair, a party has the right to present his or her case fully. However, the admission of some evidence, without notice to the other side may lead that side to request an adjournment to secure the necessary evidence to meet what has been entered. What should the agency do? To grant the adjournment can delay your proceeding. Justice delayed is justice denied! Yet, to refuse the adjournment may mean denying that party the right to fully present his case.

Under this third concern one must address yourself to adopting rules which lead to the smooth and efficient operation of a hearing and which ensure its fairness as well.

### 17.1(d.1) Process Respecting Determining Admission of Evidence

The fact that an agency has the discretion to accept or reject evidence does not require that the agency open the question of admissibility to submissions automatically every time evidence is sought to be admitted. In the absence of any challenge or apparent concern, tendered information should be accepted in the ordinary course. That is the intent behind the informality and freedom from the rules of evidence. However, as noted above where the admission of evidence is challenged or the agency has a concern respecting its admission (as discussed earlier), the principles of fairness dictate that the participants have an opportunity to be heard respecting the matter and address the types of concerns noted in the earlier discussion. See, for example, the decision of the Alberta Court of Appeal in *Lavallee v. Alberta (Securities Commission)*, 2010 CarswellAlta 235, 2010 ABCA 48 (Alta. C.A.) where, in finding that a statutory direction that the Alberta Securities Commission "shall" receive relevant evidence, when read in the context of the entire statute, actually granted the Commission a discretion to receive evidence, the Alberta Court of Appeal stated:

> 17 It does not follow that Commission panels are required to hold a *voir dire* as a matter of course to determine the admissibility of evidence. That is not required by the legislation or by the principles of procedural fairness. As the chambers judge noted at para. 205 of his reasons, "in a regulatory context the admission of hearsay or compelled testimony or the lack of opportunity to cross-examine will not necessarily breach procedural fairness": see also *Alberta Securities Commission v. Brost*, 2008 ABCA 326, 2 Alta. L.R. (5th) 102 ("*Brost*"). It is clear from the *Securities Act* that panels are to employ less formal procedures than would be required in a court. It is therefore open to a panel to admit, for example, hearsay evidence without holding a *voir dire*. By the same token, a panel has the discretion to refuse evidence; for example, evidence that it considers to be inherently flawed. The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process.

### 17.1(e) Likely Not Free From All "Rules"

Notwithstanding that an agency may be free from the rules of evidence under the common law there are likely some "rules" which are imposed on it by statute.[13.2]

*17.1(e)(i) — Application of the Various Evidence Acts*

The Evidence Acts of most of the provinces apply to the agencies within the sphere of that jurisdiction.[13.3] In the federal sphere, all federal agencies are expressly made subject to the provisions of Part I of the Canada Evidence Act as section 2 of that statute provides that:

> This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

The Evidence Acts of Manitoba, British Columbia, and Saskatchewan contain a similar application clause (usually in s. 2 of the Act). Similar results occur respecting the Evidence Acts of Ontario, Nova Scotia, Alberta, Prince, Edward Island, and New Brunswick through either the definition of "court" or "action" which are defined sufficiently broadly to catch proceedings before an administrative agency. The application of the Newfoundland Evidence Act will depend on the wording of the particular provision of the Act in question. For example, section 18 of the statute refers to the evidence of a child in "any legal proceeding" while s. 20 applies to courts and to "persons having, by law or by consent of the parties, authority to hear, receive and examine evidence".

As a general principle (along with the Interpretation Act) the Evidence Act is a very useful tool in which one can find a lot of basic stuff that can be very valuable in the decision-making process. For example, the Canada Evidence Act provides that:

> 5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> ....
>
> 6. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible.
>
> ....
>
> 13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge, or person.
>
> 14. (1) Where a person called or desiring to give evidence objects, on grounds of conscientious scruples, to take an oath, that person may make the following solemn affirmation:
>
> I do solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.
>
> (2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.
>
> 15. (2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.
>
> ...
>
> 17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the Constitution Act, 1867.
>
> 18. Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded.

There are also restrictions on the receipt of evidence in the Act:

> 7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding. (Personally, I suspect that, even where applicable, this is one provision which is seldom applied in agency proceedings.)
>
> There are also advance notice provisions before being able to submit certain types of books or records into evidence (ss. 28, s. 30(7)).

Agencies which have an express statutory freedom from the legal and technical rules of evidence are likely free from many of these restrictive provisions. At least to the extent that the restrictive provisions are procedural in nature — and not substantive.[13.4]

Where an Evidence Act purports to apply to agencies contains a restrictive rule of evidence the agency is bound by the Evidence Act restriction. This is because the express statutory provisions overrules any common law freedom. However, I believe that, generally, an express statement in the agency's enabling statute that it is free from the rules of evidence will likely free it from the restrictive rules of the Evidence Act. I think this will generally be the result following the application of the rules of statutory interpretation — specific overrides general, more recent overrides earlier, etc.

However, when it comes to substantive aspects of the evidentiary rules one has to look at the statutory grant of freedom in the agency's enabling statute to determine whether or not it applies to those aspects. I suggest, as a matter of general interpretation, that they would not. I hazard this guess by analogy to the extent of the agency's common law freedom from the rules of evidence.

An agency's common law freedom from the rules of evidence is based on its mastery over *procedure*. As such the common law freedom of agencies from evidentiary rules does not free agencies from aspects of evidentiary rules which are not "procedural" in nature but which are substantive matters (matters such as solicitor/client privilege,[13.5] crown immunities, rules respecting weight of evidence, presumptions,

etc.[13.6]).

It appears to me that in attempting to determine whether or not a restrictive provision in an Evidence Act is ousted by an agency's express statutory freedom from the rules of evidence one has to first interpret the meaning of the express statutory grant of freedom (i.e., what did it purport to free the agency from) and then look at the provision of the Evidence Act to determine if it was the type of evidentiary matter that would fall under the freedom of the express grant.

In *Descôteaux v. Mierzwinski*[13.7] the Supreme Court of Canada (in the context of solicitor/client privilege) stated that statutory provisions which appeared to conflict with the substantive privilege should be read restrictively and that the privilege should not be interfered with except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation. In my view, directions of that nature indicate that if a court were to interpret the meaning of an express statutory freedom from the rules of evidence it would do so in light of the generally accepted common law freedom. This just makes sense to me as my experience as a government lawyers leads me to believe that legislatures in granting these evidentiary freedoms act under the general impression that they are simply reiterating the common law position.[13.8] They do not think that they are purporting to oust the various substantive rights. Support can also be found for this view in the judicial approach to statutory grants of authority to an agency to make rules respecting procedure — which the courts generally do not take to refer to substantive matters.[13.9]

If I am correct in the above, then once you determine that a restrictive rule in an Evidence Act goes to a matter of substance rather than procedure the express statutory freedom in the agency's enabling statute does not operate to exclude it.

*17.1(e)(ii) — Specific Statutory Provisions in the Agency's Enabling Act*

Aside from the relevant Evidence Act, an agency's decision-making will likely also be affected by statutory directions in its own enabling statute.[14] An excellent example can be seen in section 5(3) of The Pension Act, R.S.C. 1985. This provision is illustrative of agencies' rules of evidence being adapted to the functions they are supposed to perform. The Pension Act (and the related veterans' legislation) are more than a simple income protection scheme for Canadian citizens. They are, as I understand, a recognition of the debt that the nation owes to those who serve in its armed forces and who fight in its defence. There is an obligation owed by the people and Government of Canada to those who served their country and to their dependents. The idea that veterans benefits are something more than a simple income protection plan but a repayment of an obligation owed to our veterans is reflected in the terms of section 5(3):

> 5. (3) In making a decision under this Act, the Minister shall
>
> (a) draw from all the circumstances of the case and all the evidence presented to the Minister every reasonable inference in favour of the applicant or pensioner;
>
> (b) accept any uncontradicted evidence presented to the Minister by the applicant or pensioner that the Minister considers to be credible in the circumstances; and
>
> (c) resolve in favour of the applicant or pensioner any doubt, in the weighing of evidence, as to whether the applicant or pensioner has established a case.[15]

Section 5(3)(a) goes to the ability of something to prove a fact. It is directed at the situation where there is some missing piece in a puzzle. The ordinary civil burden of proof (which generally applies to administrative agencies) requires that he who is to benefit from some assertion be able to prove that its truth is more likely than not. Section 5(3)(a) appears to go to the situation where, although there is no actual disproof of a point, the applicant, while not quite being able to prove something, has been able to bring sufficient evidence from which that something may be inferred.

For example, in *Moore v. Workers' Compensation Board* (1992), 101 Nfld. & P.E.I.R. 118, 321 A.P.R. 118 (P.E.I. C.A.), the Workers' Compensation had to determine if the applicant's medical problems had been brought about by his accident on the job. The Board had before it a medical report which indicated that the injury was "most likely" related to the accident in question and that it was not related to a previous existing medical condition. This report was not contradicted. Other medical reports considered the applicant's condition to be consistent with the accident. Even the Board's own medical consultant did not rule out the accident as the cause of the condition but merely said that it was difficult to say whether or not the medical condition would have developed without the accident. In that case, even though the applicant had not proven that his condition had resulted from the accident, the Prince Edward Island Court of Appeal held that the Board, taking into account all of the medical evidence to the effect that his injury *could* have been caused by the accident, and was not *inconsistent* with such a cause, and that there was no evidence that indicated otherwise, should have drawn the inference that it *was* the result of the accident. Taking a more simplistic example, if one sees a child crying in the street, with a burst balloon at his feet, and no other probable cause of his distress, section 5(3)(a) would direct that one draws the inference that the balloon belonged to the child and that it had burst (thereby entitling him to a new balloon) even though there may be other possible interpretations of the scene.

Section 5(3)(b) is aimed at alleviating technical concerns with evidence. It appears to be directed to the situation where the applicant has *uncontradicted* evidence which appears *believable* but which might have some technical inherent weakness which might make it inadmissible in a court of law. Hearsay evidence for example might be admitted under this rubric if it appeared believable that it was not contradicted. Another example might be an old document alleged to be from a World War I hospital unit, which could be accepted as being evidence of a some fact if it appears believable to the decision-maker (for example, because it looks to be about the right age and bears other signs that it is what it claims to be), be accepted as evidence notwithstanding that the document is undated or unsigned *provided* that there is no evidence contradicting it. Note the two criteria which must be met before section 5(3)(b) can be relied on. Firstly, the evidence tendered must, be uncontradicted. In other words, there cannot be other evidence refuting the fact it hopes to prove. Secondly, the evidence tendered has to be believable itself. Section 5(3)(b) does not appear to be a direction to accept anything, merely a direction to accept what is believable and uncontradicted even though, under the technical rules of evidence, it might be inadmissible. As a last point, it looks to me that section 5(3)(b) does not direct the decision-maker to accept the evidence as *proof* of a matter. It only, I think, directs the admission of the

document as evidence. The decision-maker would still have to be satisfied on the appropriate balance of the proof of the particular fact in question. The decision-maker might admit the document, that it finds it capable of being evidence, but find that it has actually very little weight to sufficiently prove a point. That is where section 5(3)(c) comes in.

Section 5(3)(c) goes to the burden of proof. After the decision-maker has admitted all of an applicant's, somewhat questionable, but nonetheless believable and uncontradicted evidence and has drawn all the inferences that can be drawn from that evidence, he or she then has to decide whether the applicant has proven her eligibility for the benefit in question.

Generally, in civil proceedings before agencies whoever will take the benefit of establishing a fact or case must satisfy the decision-maker that the fact or the case exists on the balance of probabilities.[16] This means the person who is going to benefit must satisfy the decision-maker that a particular fact is more likely than not. He does not have to prove it absolutely. The reader is also likely already familiar with the principle that in criminal proceedings, the burden of proof on the Crown who asserts the criminality of the accused is to prove that criminality beyond a reasonable doubt. The Crown does not have to prove something as being absolutely certain. But it must take the decision-maker's comfort level with the likelihood of a fact or as assertion up to the point where the decision-maker has no doubts which could be considered reasonable.

Both of these burdens are displaced by section 5(3)(c). Section 5(3)(c) directs that in determining whether a claimant has proven a fact (or her case) the decision-maker must find in favour of the applicant if the applicant "has produced credible evidence that raises at least a reasonable doubt that the fact is true".[17] The claimant does not have to prove his assertion conclusively or even satisfy the decision-maker that it is more likely than not. If at the end of the day the decision-maker can say, "Although I am not convinced that the claimant has proven her case, I must concede that it is reasonably possible" then the claimant must win. Note that the section does not direct that the applicant wins if he brings in ANY evidence. The evidence must be sufficiently strong that it at least raises a reasonable doubt that the fact it is intended to proof is true.

The reader can see that section 5(3) is really a statutory reflection of the approach to evidence which I suggested at the beginning of this presentation; that agencies should approach evidentiary questions, not from the perspective of the legal rules of evidence, but from the perspective of ensuring a sufficiently reliable factual base, which is fair and efficient as judged in the context of the mandate of the agency.

Before leaving this topic it should be noted that provisions like s. 5(3) of the Pension Act do not completely dispense with a requirement for proof. There must still be some evidence which, after any doubt has been resolved in favour of the applicant, is logically capable of establishing the fact in question.[17A]

### 17.1(f) Dealing With the Irrelevant or Weightless Submission

As noted earlier, the relevance of particular pieces of evidence is not always readily apparent. It is not uncommon for different small pieces of evidence to take on a particular significance when viewed together. Nor need every piece of evidence address all of the issues in a proceeding — some evidence will only address specific points, other evidence may be tendered to help explain or provide background against which other evidence may be better viewed.[17A.1] Thus a decision-maker should not be quick to decline to receive evidence unless it is evident that the information truly serves no purpose in the proceeding.

Frequently in administrative proceedings attempts are made to enter evidence which is irrelevant or without any value to the mandate of the agency. Absent some (truly unusual) legislative direction to admit such evidence there is no doubt that an agency has the discretion to refuse to allow the asking of questions or the tendering of evidence which is irrelevant (or unduly repetitious) to its proceedings and that such refusals do not offend the principles of fairness.[17B] And while it is equally clear that before exercising that authority an agency must make the necessary determination that the information is indeed irrelevant or unduly repetitious, there is also, surprisingly, some debate as to whether the agency should even exercise the authority.

It is common, in agency discussions, for some to argue that one of the purposes of agency hearings is to allow the affected parties an opportunity to "blow off steam" and that in this case it is a useful exercise to allow individuals to put anything into the record rather than attempting to restrict the record to matters which are relevant to the proceedings.

Another common approach on evidentiary disputes is for an agency member to allow the disputed material in with the statement that they will give it due weight.

This latter approach can be very useful in circumstances when the weight of the matter is truly in dispute. It permits the weight or the relevance of the matter to be determined in light of all of the evidence and avoids premature rulings.

I do not really recommend either approach simply as a method of moving the hearing along.

Firstly, it will be rather rare, I suggest, for an agency to have been created with a mandate of simply providing a sounding board for the disgruntled or upset. Presumably, one has some purpose to accomplish through your hearing process. Time taken on irrelevant matters is time taken away from relevant ones. It is inherent in the mandate of an agency conducting a hearing that the agency take the trouble of restricting the proceeding to the matters at hand.[17.1]

Secondly, an agency hearing is not generally an emotionally cleansing experience. A party who is allowed to whip themselves up into deep concern over a matter which is irrelevant to the proceeding is not likely to be satisfied with one speech. He or she may wish to speak again and again. The indulgence in letting him or her "blow off steam" may in fact be simply creating more "steam" to let off. Also, allowing a party to put evidence in simply to let off steam will create the, not unreasonable, expectation that the decision-maker will also let others have an opportunity for others to let off steam. This will make it difficult for you to control the proceedings or have them proceed at a reasonable rate.

Thirdly, when one allows irrelevant material into one's proceedings, an uncertainty is created in the minds of other parties as to whether they should introduce evidence to counter the material which is being admitted. Furthermore, if the irrelevant remarks become intemperate or if they contain allegations against another party (however irrelevant to your proceedings) the other party may wish to respond, leading to further delays.

Fourthly, allowing great amounts of irrelevant evidence in will clutter agency proceedings and make it difficult for the decision-maker and the other parties to focus on the matter at hand. It increases the likelihood of some substantive error being made. In *Kelly v. Nova Scotia (Police Commission)*, 2005 NSSC 142, [2005] N.S.J. No. 298 (QL) (N.S.S.C.) made a corollary point saying that allowing a significant amount of highly prejudicial evidence into the process sidetracked a five-day hearing from the main focus of the hearing which was not compensated by a simple statement by the Board at the conclusion that it was aware of the evidence's irrelevance and was giving it no weight. The Court held that the admission of the irrelevant evidence contributed to an unfair hearing. This trial level decision was reversed by the Court of Appeal *(Kelly v. Nova Scotia Police Commission*, 2006 CarswellNS 83 (N.S.C.A.)) which took into account the particular challenges facing the agency in question in determining exactly what issues were in dispute, the importance of not precluding evidence before its relevance could actually be determined, and the efforts of the agency throughout the proceeding to caution the participants about irrelevant evidence.[17.1.1] However, these decisions stand as a caution respecting the consequences of undue admission of irrelevant evidence and the care which must be taken with respect to it.[17.1.2]

Fifthly, by allowing the individual to put in irrelevant information you either build an expectation in that person's mind that you will be dealing with the matters he or she raises, an expectation which can lead to appeals or judicial reviews if you do not do so.

Lastly, if a decision-maker allows irrelevant evidence into its proceedings without making a ruling during the hearing it will likely have to expressly point out in its reasons that evidence which was found to be irrelevant lest a reviewing body assume that the decision-maker had based her its decision on irrelevant considerations.

On the other hand, it is also true that it is frequently easier and faster to allow some individuals to put irrelevant evidence than it is to attempt to stop them from doing so. Also, if you are too quick to leap in to cut someone off because it appears to you that the information is irrelevant you may fail to appreciate that in fact he or she is leading up to something that is very important.

Many decision-makers find it valuable when faced with what appear to be irrelevant evidence to allow the individual presenting it sufficient time to satisfy themselves that the material being put in is irrelevant (and to ensure that a reasonable person would believe that they have listened enough to be able to adequately judge its relevance). They then interject to attempt to control it. This usually involves explaining the purpose of the proceeding and an explanation as to why the evidence going in appears to be irrelevant. The person attempting to put the evidence in should then be allowed to argue why he or she thinks the material is relevant or sufficiently weighty. The ruling as to admissibility is then made and the hearing proceeds. Time taken up front in this exercise will save time in the long run as the decision-maker will have set the proper tone, be in control of the hearings (but fairly so), and be better positioned to control future diversions into irrelevancies.

### 17.1(g) Privilege

As discussed earlier in this chapter under heading 17.1(e) "Likely Not Free From All Rules" notwithstanding their freedom from the rules of evidence administrative agencies must still be aware of the principles respecting privilege. The protections from compulsion afforded information protected by privilege is a substantive, rather than a procedural, right. Consequently an agency's freedom from the rules of evidence, which flows from its power over its procedure, does not extend to dispensing with privilege, which is a substantive right. In the absence of a legislative grant of authority, either express of implied, information protected by privilege cannot be compelled by an agency. This common law restriction is reflected in the statutory grants of authority in sections 5.4(2) and 15 of Ontario's *Statutory Powers Procedure Act* and section 40 of B.C.'s *Administrative Tribunals Act*.[17.1.2.1]

There are a number of privileges. As this is not a text on the law of privilege I will not go into significant detail respecting each. Without attempting to be exhaustive or to explain the sometimes subtle operations of all recognized privileges the discussion under this heading touches on decisions respecting some of the various type of privileges recognized by the law: solicitor-client privilege, settlement privilege, journalist privilege, Parliamentary privilege and state privilege.

There may be cases where an agency subpoena may intrude upon solicitor-client privilege but clear and explicit language is necessary before a legislative grant of compulsion authority to a statutory official will be necessary for this. A simple reference to an agency having the powers of a superior court of record would not be sufficiently clear and explicit. (*Privacy Commissioner of Canada v. Blood Tribe Department of Health*, 2008 CarswellNat 2244, 2008 SCC 44, 294 D.L.R. (4th) 385 (S.C.C.)).

In *Society of Saskatchewan v. EM & M Law Group*, 2008 CarswellSask 655, 2008 SKCA 128 (Sask. C.A.) statutory grant of authority to Saskatchewan Law Society to require that a member lawyer produce his or her records for the examination of the Society where reasonably necessary for the purposes of an investigation by the Society found to be sufficient, clear and explicit language to allow Society to compel production of documents subject to solicitor-client privilege. In that case the Saskatchewan Court of Appeal also held that the privilege which exists between a solicitor and the solicitor's client does not include the solicitor's governing law society within its envelope. (The Court also stated that the Law Society would be expected to use its authority to hold hearings or parts of hearing in private to protect privileged information from being disclosed to a complainant.)

In *Newfoundland & Labrador (Attorney General) v. Newfoundland & Labrador (Information & Privacy Commissioner)* 2011 CarswellNfld 353, 2011 NLCA 69, 343 D.L.R. (4th) 57 (Nfld. C.A.), the Newfoundland and Labrador Court of Appeal held that the statutory authority of the Newfoundland Access Commissioner to examine any document "notwithstanding a privilege under the law of evidence" extended to documents that were potentially protected by solicitor-client privilege.

As noted above the Supreme Court of Canada has said that explicit language is required before a statutory power will be interpreted as authorizing an intrusion upon solicitor-client privilege (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (S.C.C.)). This decision of the Newfoundland and Labrador Court of Appeal stands for the proposition that it is sufficient for a provision to authorize intrusions upon "privilege" generally without having to expressly single out "solicitor-client privilege".

Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* provides an exemption from disclosure for documents protected by solicitor-client privilege. The Act also expressly provides that on a review by the province's Information and Privacy Commissioner as to whether the exemption applies a copy of the record for which the exemption is claimed shall be produced to the Commissioner notwithstanding another Act or regulation or a privilege under the law of evidence.

> 52. (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act*.
>
> (2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.
>
> (3) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, notwithstanding another Act or regulations or a privilege under the law of evidence.

It was argued that the statutory reference to "a privilege under the law of evidence" did not operate to require disclosure of documents for which solicitor-client privilege was claimed as solicitor-client privilege is both an evidentiary privilege and a matter of substantive law. Consequently, applying the Supreme Court direction that potential statutory incursions upon solicitor-client privilege were to be restrictively construed not to permit such incursions unless explicitly required, the reference did not extent to solicitor-client privilege.

The Newfoundland and Labrador Court of Appeal rejected that argument.

Notwithstanding its dual status, solicitor-client privilege was still a rule of evidence that could be relief on by parties as such where what is sought is to compel the tendering of documents into evidence. It was still a part of the body of law known as the law of evidence even though in other matters wholly unrelated to evidentiary matters it was also a substantive rule. The Court held that the statutory reference to "a privilege under the law of evidence" was broader than a simple reference to "the law of evidence" and encompassed substantive rules which were recognized as having application under the law of evidence. In the case in point the Department of Justice was relying on the privilege as a rule of evidence — objecting to the production of the records in a quasi-judicial, administrative proceeding held to determine whether an exemption was properly asserted. Thus, the statutory words "notwithstanding ... a privilege under the law of evidence" had to be interpreted to abrogate the privilege.

The Court felt this interpretation was supported by the legislative record of the passage of the Act and the purpose of the Act that indicated that the statute intended to provide for an independent review officer, as an alternative to the courts, to undertake a timely and affordable first level review of all information requests. Central to that review was the ability to examine all documents regardless as to whether any form of privilege attached to them. Read in that context, the Court stated, the statutory reference to a "privilege under the law of evidence" had to be read as extending to any privilege recognized in the law of evidence.

> 65 Taken together, these sources help inform the background and purpose of the legislation, which is, inter alia, to provide for an independent review officer, as an alternative to the courts, who can undertake a timely and affordable first level review of all information request denials. A central aspect of this review is the ability to examine all documents, regardless of whether any form of privilege attaches to them. The legislative history clearly establishes an intent to eliminate any possible objections that might be raised to the delivery of documents to the Commissioner in the discharge of his statutory mandate. Read in that context, the words, "a privilege under the law of evidence" must be read as an attempt to expand the Commissioner's powers to compel the production of documents to remove not only those objections enumerated in the ATIPPA but also any privilege recognized in the law of evidence that might be raised. They cannot have been intended to differentiate between some of the privileges enumerated in the ATIPPA, as found by the applications judge.

The Court noted that its interpretation of the Newfoundland and Labrador statute was consistent with similar interpretations of the federal *Access to Information Act* (which also provided the Commissioner with the authority to examine documents notwithstanding "any privilege under the law of evidence". (*Canada (Information Comm.) v. Canada (Min. of Environment)* 2000 CarswellNat 633, 187 D.L.R. (4th) 127 (Fed. C.A.) and *Canada (Attorney General) v. Canada (Information Commissioner)* 2005 CarswellNat 1477, 253 D.L.R. (4th) 590 (Fed.C.A.)). And it distinguished the restrictive interpretation of the federal *Protection of Personal Information and Electronic Documents Act* by Supreme Court of Canada decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* 2008 SCC 44 (S.C.C.) by noting that the statutory right to examine in that statutory referred only to the Commissioner's right to "receive an accept any evidence and other information ... whether or not it is or would be admissible in a court of law" — a general wording found in many other federal statutes which the Supreme Court felt could not have been meant to intrude upon solicitor-client privilege. By contrast the provincial access act expressly referred to privilege and the Court held that it was satisfied that the words were not ambiguous and were sufficiently explicit to include solicitor-client privilege.

In closing the Court noted that while solicitor-client privilege was a fundamental right, it could bow to other interests and here the legislature sought to advance the public interest in access to information in the hands of government actors and privacy. The Court also noted that the Act sought to balance the intrusion by including various protections respecting privileged documents that had been disclosed to the Commissioner—the advisory nature of the Commissioner's opinion, the right of appeal to the courts, the non-disclosure directions and the testimonial immunity provided the Commissioner. As to the latter, the Court noted that while there were some cases in which the statute authorized the Commissioner to disclose documents (s. 56) that authorization would not extend to the disclosure of documents protected by solicitor-client privilege as it did not explicitly authorize the abrogate of the privilege — unlike the examination authority in section 52.

The Court concluded its analysis of the matter by stating that where an issue of solicitor-client privilege arose in a review by the Commissioner there was no necessity for the Commissioner to make applications to court compel the production of documents claimed to be protected by the privilege. Such production was required to be a routine aspect within a review conducted by the Commissioner. Nonetheless, the Court, expressly stating this to be *obiter*, suggested a pragmatic approach respecting documents for which the existence of

the exemption might be made without actual examination of the documents. In such cases the Court suggested that the Commissioner might reasonably rely on a letter or possibly an affidavit from a senior justice official indicating that all materials had been provided except for documents containing legal advice — identified by subject matter, date and solicitor.

In *British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)*, 2009 CarswellBC 1922, 2009 BCCA 337, 308 D.L.R. (4th) 477 (B.C.C.A.) the British Columbia Court of Appeal held that material generated in B.C. by the internal "charge approval process" (whereby the Assistant Attorney General exercises the authority to approve or revoke a lower Crown official's decision to charge an individual) is not protected by solicitor client privilege.

> 101 In examining relevant information and documents and deciding whether or not to approve a prosecution, Crown counsel is neither a client of another lawyer, nor a solicitor advising more senior officers in the Criminal Justice Branch. He or she is an officer of the Crown, independently exercising prosecutorial discretion. While he or she may well consult with and obtain information from others, he or she does not take legal advice from them.
>
> 102 The fact that the Assistant Deputy Attorney General is able to review a subordinate's decision and override it does not convert the earlier decision into legal advice. The Commissioner was correct in finding that charging decisions made by Crown counsel are not covered by solicitor-client privilege, because they are not made within any solicitor-client relationship.
>
> 103 In holding that solicitor-client privilege is inapplicable to the functions of Crown counsel in the charge approval process, we have carefully considered the rationale for solicitor-client privilege. In *R. v. Shirose*, at para. 49, Binnie J. recalled Lamer C.J.C.'s comment in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) at 289:
>
> > The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication ...
>
> 104 For the substantive conditions precedent to the right of the "lawyer's client to confidentiality" he recalled the Supreme Court's adoption in *Descoteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.) at 873 of Wigmore's formulation:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the adviser, except the protection be waived.
>
> 105 Solicitor-client privilege is designed primarily as a means to ensure that clients are not reluctant to obtain legal advice, or reticent in discussing their situations with their solicitors. It is a means to foster the proper taking and giving of legal advice. These considerations are not germane to the situation of Crown counsel in charge approval decisions.

The Ontario Divisional Court in *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (2009), 97 O.R. (3d) 665 (Ont. Div. Ct.) provides instruction with respect to three privileges: solicitor-client privilege, litigation privilege and settlement privilege.

Solicitor-client privilege is discussed elsewhere in this text — notably in chapter 10 (Bias, The Role of Counsel And the Agency) under heading 10.4 "Solicitor-Client Privilege"; chapter 12 (Conduct of the Hearing) under heading 12.12 "Background Briefing Material" and heading 12.10(e) "Limits on Use of Subpoena"; chapter 25 (Canada's Access and Privacy Legislation) under heading 25.9(c) "Access Exceptions (Exemptions)"; and chapter 29 (Implied Powers of an Agency) under heading 29.2 "Determining an Implied Grant of Authority".

The settlement privilege provides that information disclosed in pursuit of negotiations to settle a matter are not admissible in proceedings. In *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 CarswellNS 428, 2013 SCC 37 (S.C.C.) the Supreme Court of Canada explained a number of points respecting the operation of this privilege which attaches to settlement negotiations.

> 1. It is in the public interest for parties to reach a mutually acceptable resolution to their disputes without prolonging the personal and public expense and time involved in litigation.
>
> 2. Settlement privilege promotes settlements. Parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. It is a class privilege and operates as a *prima facie* presumption of inadmissibility subject to exceptions where the justice of the case requires it.
>
> 3. The privilege attaches to any settlement negotiations, whether or not marked "without prejudice", and applies both to successful and unsuccessful settlement negotiations.
>
> 4. To come within the exception to the privilege it must be shown that "a competing public interst outweighs the public interest in encouraging settlement" (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54 (B.C. C.A.). Exceptions have been found to include allegations of misrepresentation, fraud, undue influence, and preventing a plaintiff from being overcompensated.

The case in point involved a number of defendants. Settlements for set, undisclosed amounts, were reached with some of the defendants and the trial judge provided that the amounts of those settlements were not disclosable until the end of the trial. The Supreme Court of Canada upheld that decision noting that the settlement amounts were part of the settlement negotiations and that the failure to disclose that information did not unduly prejudice the remaining defendants who had not settled. They had access to all of the relevant documents that were in the settling defendants' possession, had assurances that they would not be held liable for more than their share of the damages, and the disclosure at the end of the proceedings would ensure that the trial judge could adjust any liability to avoid overcompensating the plaintiff. They were fully aware of the claims they had to defend against and of the overall amount that was being sought. Knowing the settlement amounts might allow them to revise their estimate of how much they wanted to invest in their defences but that did not rise to a sufficient level of importance to displace the public interest in promoting settlements.

In *Ontario (Ministry of Correctional Services) v. McKinnon* 2010 CarswellOnt 5123, 2010 ONSC 3896 (Ont. Div. Ct.) the Ontario Divisional Court upheld an Ontario Human Rights Tribunal decision requiring the Ministry of Correctional Services to disclose documentation respecting settlements reached by the Minister in earlier cases. The Court declined to decide whether there was a *prima facie* class privilege applying to

settlement proceedings as a whole or whether the privilege applied on a case-by-case basis according to the circumstances because that issue was before the Court of Appeal and because the Court agreed with the Tribunal that either way it was proper to order the disclosure of the settlements in the particulars of the cases as all privileges are subject to exceptions one of which is where the settlement documents is necessary for the proper disposition of a proceeding.

> 4 ... [W]e agree with the adjudicator that on either test the material was properly ordered to be produced. Any privilege is not absolute. It is subject to exceptions. One of these exceptions is where the settlement documentation is necessary for the proper disposition of a proceeding. As was said in *Inter-Leasing Inc. v. Ontario (Minister of Finance)* [2009] O.J. No. 4714 (Div. Ct.), at para. 11:
>
> > A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice.

In addition, the Divisional Court held that it was not necessary that the disclosure of the settlement documentation be the only means available to dispose of the proceeding. It was sufficient if there is a compelling or overriding interest of justice achieved through production (which interest the Court proceeded to determine existed).

The Court also observed that there did not appear to be any harm that would result from the disclosure of the settlement documentation insofar as the union which had been involved in some of those cases was consenting to their release and had stated that the release would not dissuade it from engaging in future negotiations, nor would the disclosure appear in any way to undermine the enforceability of the settlements or otherwise adversely affect the persons involved.

In *R. v. National Post* 2010 CarswellOnt 2776, 2010 SCC 16 (S.C.C.) the Supreme Court of Canada (majority decision — Abella J. dissenting and LeBel J. partially dissenting on the issue of notice only) ruled that a confidentiality privilege may, in certain circumstances, exist under the common law to protect a journalist from having to disclose a secret source. The existence of the privilege must be determined on a case-by-case basis applying the traditional Wigmore criteria for the recognition of confidentiality. The Court rejected the argument that section 2(b) of the Charter (freedom of expression) contained a privilege against the disclosure of secret sources as "the history of journalism in this country shows that the purpose of s. 2(b) can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source would not in general violate s. 2(b)." Similarly, the Court rejected the establishment of an across the board class privilege (such as solicitor-client privilege) for journalists. A number of reasons were cited for that rejection: a class privilege would be, in the opinion of the Court, too rigid and could not be tailored to the circumstances; journalists are not a regulated profession; the creation of a class privilege would raise too many questions as to who possess it (journalist or source); and there was no agreement as to the criteria which would trigger the privilege.

Whether a privilege existed in a particular instance to refuse to disclose a source must be considered by the decision-maker against the four traditional Wigmore criteria for the recognition of confidentiality:

i. The communication must be made explicitly in return for promise of confidentiality;

ii. The confidence must be essential to the relationship in which the communication arises;

iii. The source-journalist relationship should be one that should sedulously be fostered in the public good. This criteria distinguishes between the professional journalist and the amateur blogger on the web.

> 57 . . . . The relationship between the source and a blogger might be weighed differently than in the case of a professional journalist like Mr. McIntosh, who is subject to much greater institutional accountability within his or her own news organization. These distinctions need not be canvassed in detail here since the appellants have made out on their evidence, in my opinion, that in general the relationship between professional journalists and their secret sources is a relationship that ought to be "sedulously" fostered and no persuasive reason has been offered to discount the value to the public of the relationship between Mr. McIntosh and his source(s) in this particular case.

iv. And lastly, where the other three criteria have been met, it must be determined whether the public interest served by protecting the identity of the informant from disclosure outweigh the public interest in getting at the truth. Under this criterion one must "weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good)."

> 61 The weighing up will include (but of course is not restricted to) the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality. The Crown argues that the existence of any crime is sufficient to vitiate a privilege but that is too broad a generalization. The *Pentagon Papers* case originated in circumstances amounting to an offence, yet few would now argue that the publication of the true facts in that situation was not in the greater public interest.

The burden of persuasion rests with the media claiming the privilege. And it can be waived by either the source or the journalist.

With respect to procedure, in the case of the request for a search warrant, the media should be given the chance "at the earliest opportunity" to be heard on the issue but this need not necessarily be given prior to the issuance of the warrant. The warrant could be issued without hearing from the media if necessary to ensure that evidence not disappear in the meantime. However, where this is done sufficient terms must be imposed to protect the position of the media and to permit the media ample time and opportunity to point out why the warrant should be set aside.

The Court expressly pointed out that it was addressing only the issue of the compelled disclosure of secret sources and not the suppression by the media of relevant physical evidence.

> 65 At this point it is important to remind ourselves that there is a significant difference between testimonial immunity against compelled disclosure of secret sources and the suppression by the media of relevant physical evidence. If a client walks into a lawyer's office and leaves a murder weapon covered with fingerprints and DNA evidence on the lawyer's desk the law would not allow the lawyer to withhold production of the gun on the basis of solicitor-client confidentiality, notwithstanding the thoroughgoing protection that the law affords that relationship. In *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.), the

court affirmed this principle in the case of a lawyer charged with suppressing sexual abuse tapes. Journalists, too, have no blanket right to suppress physical evidence of a crime, even where its production may disclose the identity of a confidential source. The immunity, where it exists, is situation specific.

*National Post* arose in the context of criminal proceedings. The Supreme Court of Canada re-affirmed the existence of a case-by-case journalist privilege in the context of testimonial compulsion in civil proceedings and the Quebec *Charter* in *Globe & Mail c. Canada (Procureur general)*, 2010 CarswellQue 10258, 2010 SCC 41 (S.C.C.)). The Court affirmed that this is a case-by-case, rather than an across the board, type of privilege because once the party seeking disclosure has established the relevance of the information sought, the burden is on the journalist to establish the desirability of the recognition of confidentiality in each particular case.

65 In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If the questions are irrelevant, that will end the inquiry and there will be no need to consider the issue of journalist-source privilege. However, if the questions are relevant, then the court must go on to consider the four Wigmore factors and determine whether the journalist-source privilege should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure that the law would normally require.

66 The relevant considerations at this stage of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and, perhaps most importantly, whether the information is available through any other means . . . .

Aspects of Parliamentary privilege are discussed elsewhere in the text in chapter 5B (Discretion) under heading 5B.6(a)(ii) "Parliamentary Privilege"; chapter 29A (Contempt) under heading 29A.3(b) "Matters Which Are Not Criminal Contempts" under the italicized heading "Parliamentary and Related Privileges"; in chapter 12 (The Conduct of the Hearing) under heading 12.10(e) "Limits on the Use of Subpoena"; and in case comment 8 "*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*" (the seminal Supreme Court of Canada decision respecting Parliamentary privilege and the role of the courts in defining it) under the Cases and Comments tab in volume 1).

In *Page v. Mulclair*, 2013 FC 402 (Fed. Ct.) stated that Parliamentary privilege is the "sum of privileges, immunities and powers without which the Houses and their members could not discharge their functions. Privilege includes such immunity as is necessary so that they may do their legislative work." And the underpinning of privilege is necessity — a matter falls within privilege if it amounts to a matter which could not be dealt with under the ordinary law of the law without interfering with Parliament's ability to fulfill its constitutional functions (citing *Canada (House of Commons) v. Vaid*, 2005 CarswellNat 1272, 2005 SCC 30, 252 D.L.R. (4th) 529 (S.C.C.)). The courts have the jurisdiction to determine whether a matter falls within Parliamentary privilege (i.e. whether it exits) and its scope but Parliament, not the courts, have the jurisdiction to determine whether the exercise of privilege is necessary or appropriate in any given case. The Court also held that Parliament may elect to waive one of its privileges. Thus, if the ability of the Parliamentary Budget Officer to require information from government departments respecting government plans infringed Parliamentary privilege (which the Federal Court held it did not) Parliament, by expressly setting out the Officer's mandate in legislation intended to waive that privilege. (In *Page* the Court also rejected the argument that simply being able to apply to court to interpret legislation respecting the extent of the Parliamentary Budget Officer's statutory authority "would render the Houses of Parliament unable to discharge their functions." The Court held that the courts had the jurisdiction to interpret legislation — even legislation dealing with Parliament and an application to court to interpret a Parliamentary statute did not breach article 9 of the *Bill of Rights, 1689* (which provides that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament"). Further, any expression of opinion on the interpretation of a statute — whether in or out of Parliament — was not binding on a court. In the context of the extent of the authority of the Parliamentary Budget Officer the Court stated that "If the majority wants to abolish the position of the Parliamentary Budget Officer, or define his or her mandate somewhat differently, so be it! However, it must do so by legislation. Having made that law by statute, it must unmake it by statute. In the meantime, Parliament has no right to ignore its own legislation.")

Notwithstanding having held that that Parliament cannot alter the meaning of legislation or prohibit the right of the courts to review legislation affecting Parliament, the Federal Court in *Page* held that Parliament "has greater powers when it comes to restricting remedies of its own members or its officers." The Court noted the decision 1884 decision of the U.K. Court of Queen's Bench in *Bradlaugh v. Gossett* (1884), 12 QBD 271 where the Court of Queen's Bench stated that "the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute which has relation to its own internal proceedings". (The question in *Bradlaugh* was whether the British House of Commons "could forbid a member to do what the *Parliamentary Oaths Act* required him to do, *i.e.* to take an oath.") (The Court of Queen's Bench, however, proceeded to raise one of those judicial fictions that the House of Commons would not be deliberately defying and breaking statute law but rather that it was to be supposed that the House considered that there was no inconsistency between the statute and its actions.)

The Federal Court also cited the decision of the Supreme Court of Canada in *Temple v. Bulmer*, 1943 CarswellOnt 86, [1943], [1943] SCR 265, [1943] 3 D.L.R. 649 (S.C.C.) where the Supreme Court of Canada held that it would be an intrusion upon the privileges of the legislative assembly for the courts to intervene to require the Clerk of the House to issue a writ for the election of a member to fill a vacancy created by the death of a member as the Clerk's duties were imposed upon him in his capacity as an officer under the control and answerable to the Legislative Assembly.

The determinative factor, however, was whether the matter at hand deals solely with the internal matters of the House. In the case of the authority of the Parliamentary Budget Officer to require information from government departments the issue was not restricted solely to the internal matters of the House but deals with the obligation of third parties (i.e. the government departments, or the executive) to comply with the Officer's order.

Furthermore, the Court also held that the legislation in question did not intend to oust the enforcement of the legislation through the courts. Parliament had not expressly by legislation provided for alternative routes to enforce the Officer's request (as had been done in *Canada*

*(Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CarswellNat 593, [1989] 2 SCR 49, 61 D.L.R. (4th) 604 (S.C.C.)) and the case of the Parliamentary Budget Officer was different from the situation in the *Auditor General* case. The latter dealt with the rights of Parliament through its officer, the Auditor General to secure information. The Parliamentary Budget Officer when acting on a request of an individual member of the House, however, also served the ability of an individual member of the House to secure information. In the view of the Federal Court, by establishing the mandate of the Parliamentary Budget Officer in legislation Parliament intended that independent analysis "should be available to any member of Parliament, given the possibility that the Government of the day may be a majority government with strong party discipline."

In *Guergis v. Novak*, 2013 CarswellOnt 8858, 2013 ONCA 449 (Ont. C.A.) the Ontario Court of Appeal held that an absolute privilege (which precludes tort claims) applies to certain statements made by one officer of state to another officer of state where specific conditions are met:

1. the statement must have been made by one officer of state to another officer of state;
2. it must relate to state matters; and
3. it must be made by an officer of state in the course of his or her official duty.

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**NOTES DE BAS DE PAGE**

1 The discussion in c. 17.1 is based extensively on presentations which I have delivered in various administrative law seminars and a short paper I published in the Canadian Journal of Administrative Law and Practice.

1.01 In illustration of the indirect establishment of facts see *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 CarswellAlta 710, 2009 ABCA 186 (Alta. C.A.) where the Alberta Court of Appeal held that a panel of the Alberta Securities Commission did not err in establishing the identity of authors of various statements by looking at such things as signatures, corporate references and title, fax numbers and so forth.

> The panel very carefully scrutinized this evidence, conscious of its limitations: 2007 ABASC 357 (Alta. Securities Comm.) paras. 170-174. In our view, the panel could reasonably draw inferences from this evidence. The identity of the author speaker of a statement even in a criminal context can be established by both direct and circumstantial evidence: *R. v. Evans*, [1993] 3 S.C.R. 653, [1993] S.C.J. No. 115 (S.C.C.), at paras. 26-31. More specifically, similarity of nomenclature is some evidence of identification and authorship: see e.g. *R. v. Nicholson* (1984), 52 A.R. 132, [1984] A.J. No. 2522 (Alta. C.A.), leave denied (1984), 55 A.R. 240n (S.C.C.), at paras. 31-33; *R. v. Ouellette* (2005), 371 A.R. 190, 2005 ABCA 282 (Alta. C.A.) at paras. 29-35. In this context, it should be noted that we speak here not merely about similarity of "Al Grossman", but also about the corporate reference, his title therewith, and such items as the fax number set out in the letter which are part of the overall nomenclature. These items of identity proliferate throughout the documentary evidence properly before the panel. The appellants cannot complain of injustice arising from an inference that the false statements in the June 6, 2005, are attributable to them.

Similarly see *Cambie Malone's Corp. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2009 CarswellBC 1995, 2009 BCSC 987 (B.C. S.C.) where the B.C. Supreme Court affirmed that it was open to an agency to make rational inferences from the evidence before it. The issue in question was whether the management of a hotel knew of various drug deals that were taking place on the premises.

> The notes of the investigating police officers provide an adequate basis for the finding that there was illegal drug dealing on the premises. These notes suggest that the transactions were obvious and frequent. At times, one or even two staff members stood near the doorway beside a particular dealer. Numerous transactions took place in full view of staff. The Adjudicator was entitled to infer from this evidence that multiple staff members had actual or imputed knowledge of the illegal activity.

See also *Torres v. Laundry Industries Ltd.*, 2009 CarswellBC 2113, 2009 BCSC 1091 (B.C. S.C.). In that case the B.C. Supreme Court held that it was open to a Human Rights Tribunal member to draw upon her own expertise to draw factual inferences from the circumstantial evidence submitted to her.

> The respondents are correct in highlighting that findings of discrimination must often be made in the context of circumstantial evidence: see, *for example, Troy v. Kemmis Enterprises Inc.*, 2003 BCSC 1947, 22 B.C.L.R. (4th) 240 (B.C. S.C.) at para. 25. The Tribunal member was entitled to draw on her expertise to conclude that race and family and marital status were factors in the terminations and resignation of the respondents based on the evidence before her, much of which was circumstantial.

1.1 Legal interpretation and policy usually comes from "argument" and logical reasoning comes from the agency's sweat and god.

1.1A See, in illustration, *Imperial Oil Ltd. v. C.E.P., Local 900*, 2009CarswellOnt 2763, 2009ONCA 420 (Ont. C.A.) where the Ontario Court of Appeal referred to the necessity for an evidentiary basis established during the proceedings to any factual findings of a board of arbitration.

> Boards of arbitration, like other tribunals and, indeed, the courts, are required to base their findings of fact exclusively on evidence that is admissible before them. They enjoy no authority to base their decision on information and material not contained in the evidence before them: *see Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.), at paras. 15-16; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105, at pp. 1113-14; *Mucesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paras. 41-43. Brown and Beatty put the proposition this way, at p. 3-59:
>
> > Apart from circumstances in which he may take a view, or take "judicial notice" of certain facts, *an arbitrator cannot gather evidence himself or make any assumptions of fact except through evidence properly put before him.*
> >
> > ...
> >
> > Accordingly, *apart from agreed statements of facts and decisions of other competent tribunals*, and possibly in those instances where issue estoppel might apply, *all other facts must be proved through documentary evidence or through the oral testimony of witnesses.* [Citations omitted; emphasis added.]

> The issue in this case was whether an Arbitration Panel had improperly relied on evidence set out in other arbitration decisions to which it had been referred by the parties during the proceedings. The Ontario Court of Appeal found that it had not and that, read in context, its references reflected "its appreciation of the factual and legal framework in play in the arbitration cases supplied by the parties. I also see the comments in question as indicative of the Majority's attempt to synthesize the underlying basis for the approach taken by other arbitrators to random alcohol or drug testing, as revealed by the arbitration cases cited to the Board.

Similarly, see *Gulick v. Ottawa Police Service*, 2012 CarswellOnt 12232, 2012 ONSC 5536 (Ont. Div. Ct.) where the Ontario Divisional Court noted the difference between a counsel's submissions and evidence. While evidence may establish facts submission are not evidence. The Court noted that submissions inviting a decision-maker to consider an issue cannot provide a factual basis for a finding in the absence of any evidence on that point. Submissions without supporting evidence are simply submissions.

> 17 Submissions of counsel are not evidence. Closing submissions inviting the Hearing Officer to consider an issue for which there is no supporting evidence are simply submissions. There was no evidence that the applicant was disabled. In those circumstances, the Hearing Officer had no obligation to consider a duty on the Ottawa Police Service to accommodate the applicant.

1.2 *Rhéaume v. Canada* (Attorney General), [2002] F.C.J. No. 128, 2002 FCT 98 (Fed. T.D.).

Similarly see *Canbie Malone's Corp. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2009 CarswellBC 1995, 2009 BCSC 982 (B.C. S.C.) where the B.C. Supreme Court affirmed the traditional view of the broad authority of agencies to accept evidence

> An administrative decision-maker is entitled to consider any evidence it deems relevant, reject some evidence and accept other evidence, weigh the evidence that it accepts, and come to a reasonable conclusion on that evidence. The duty of the decision-maker is simply to listen and act fairly to both sides, giving the parties a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views: *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), at 1113, (1980), 110 D.L.R. (3d) 311 (S.C.C.).
>
> An administrative decision-maker is not bound by the strict rules of evidence: "[t]hey are not fettered by strict evidential and other rules applicable to proceedings before courts of law. It is sufficient that the case has been heard in a judicial spirit and in accordance with principles of substantial justice": see Kane, *supra*, at 1112-13.
>
> As will be discussed shortly the freedom from the rules of evidence is an aspect of an agency's power over its own procedure. While that freedom is subject to contrary legislative direction (express of implied) no express legislative exemption is necessary.

1.3 Lord Denning in *T.A. Miller Ltd. v. Minister of Housing and Local Government*, [1968] 1 W.L.R. 992 (C.A.) said at p. 995, "A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law . . . ." There are many, many other decisions to the same effect. For example see *Canadian National Railways Co. v. Bell Telephone Co. of Canada and the Montreal Light, Heat and Power Consolidated*, [1939] S.C.R. 308, *Bortolotti v. Ontario (Ministry of Housing)* (1977), 76 D.L.R. (3d) 408 (Ont. C.A.), and the cases cited by Reid and David in *Administrative Law and Practice* (2d ed.) (Butterworths, Toronto, 1978) at pp. 72-74.

Notwithstanding the foregoing, in *Murray v. Veterinary Medical Assn. (Saskatchewan)*, 2008 CarswellSask 685, 2008 SKQB 424 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench, following the decision of the Ontario Court of Appeal in *Khan v. College of Physicians and Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193, 1992 CarswellOnt 914, 11 Admin. L.R. (2d) 147 (Ont. C.A.), held that the proceedings of the discipline committee of the Saskatchewan Veterinary Medical Association were subject to the civil rules of evidence. As such the Court held that the discipline committee must follow the criteria of the civil courts, which are set out in the Supreme Court of Canada decision in *R. v. Khelawon*, [2006] 2 S.C.R. 787, 2006 CarswellOnt 7825, 274 D.L.R. (4th) 385 (S.C.C.), in determining whether to admit hearsay evidence in its proceedings. In the case in point the Court held that the discipline committee, composed of three non-lawyers:

> did not exhibit an understanding that hearsay statements are presumptively inadmissible. Nor did the committee record the relevant factors it was relying upon to find that it has no concerns regarding the credibility of the statement. Finally, the committee appeared to be operating under the mistaken belief that cross-examination [did] not apply in this situation.

This latter point was of particular concern to the Court insofar as section 22(7) of the Act expressly provided that there was to be a "full right to examine, cross-examine and re-examine."

In following the Ontario decision in *Khan* respecting the applicability of the civil rules of evidence, the Saskatchewan Court did not appear to be aware that while the proceedings in *Khan* were expressly made subject to the civil evidence rules by statute, Saskatchewan's *Veterinarians Act, 1987*, S.S. 1986-87-88, expressly provides in section 22(4) that: "The discipline committee may accept any evidence that it considers appropriate and is not bound by rules of law concerning evidence." It is not evident whether this freedom from the rules of evidence was argued before the Court, and certainly no analysis by the Court of its relationship with the statutory right of cross-examination. For this reason the precedential value of this decision respecting the admissibility of hearsay is problematic.

On a related note respecting the relaxed rules of evidence, In *Harkat, Re*, 2014 CarswellNat 1463, 2014 SCC 37 (S.C.C.) the Supreme Court of Canada held that the constitutional right to fundamental justice as encompassed in section 7 of the *Charter* does not require that the strict rules of evidence apply in a proceeding affecting the liberty of an individual. Section 7 guarantees only a fundamentally fair process.

*Harkat* considered the statutory scheme established under the *Immigration and Refugee Act*, respecting Federal Court proceedings to determine the reasonableness of a security certificate issued as the basis for the deportation of a non-citizen on the grounds of connections with terrorist activities. Those rules expressly provided that the strict rules of evidence do not apply to the proceedings. Instead the statute provides that the judge may receive any information that he or she determines to be "reliable and appropriate". This includes hearsay evidence — which by its nature cannot be tested through cross-examination. The Supreme Court held that the non-application of the strict rules of evidence did not in itself breach section 7 *Charter* rights. The rule against hearsay evidence and the right to cross-examination are simply tools used to ensure a fair process by screening out unreliable evidence. The *Immigration and Refugee Protection Act* process accomplishes the same end by giving the presiding judge the discretion to exclude evidence that is not "reliable and appropriate". "This broad discretion allows the judge to exclude not only evidence that he or she finds, after a searching review, to be unreliable, but also evidence whose probative value is outweighed by its prejudicial effect against the named person."

1.1 *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 CarswellBC 548 (B.C.C.A.); *Wildman v. R.* (1984), 14 C.C.C. (3d) 321 (S.C.C.); *R. v. Bickford* (1990) 51 C.C.C. (3d) 181 (C.A.). See also the comments of the Supreme Court of Canada in *R. v. Basi* (2004), 240 D.L.R. (4th) 81 (S.C.C.):

> Driedger and Sullivan generally describe procedural law as "law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings". . .Within this rubric, rules of evidence are usually considered to be procedural, and thus to presumptively apply immediately pending actions upon coming into force. . . . However, where a rule of evidence either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect. . . . Examples of such rules include solicitor-client privilege and legal presumptions arising out of particular facts.

See the later discussion in c. 17.1(e), "Likely Not Free From All "Rules", respecting the application of evidentiary rules respecting substantive matters (such as privilege).

1.5 See *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2006 CarswellBC 548 (B.C.C.A.) (While statute may displace common law freedom from rules of evidence, mere direction in statute for enforcement proceedings by agency does not amount to such a direction.)

2 In *Bortolotti v. Ontario (Ministry of Housing)* (1977), 76 D.L.R. (3d) 408 (Ont. C.A.) the Ontario Court of Appeal stated that: "The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties. . . It is quite clear that a commission appointed under the Public Inquiries Act, 1971 is not bound by the rules of evidence as applied traditionally in the Court, with the exception of the exclusionary rule as to privilege (s. 11). . . The approach of the Commission should not be technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject matter of the inquiry. In *Canada (Attorney General) v. Merrick*, [1996] 1 F.C. 204 (T.D.) Justice MacKay stated that "it would seem inappropriate in my opinion, in light of the standards evolving for deference to tribunals, for this Court to impose standards [upon the Human Rights Commission] which it has developed for considering extensions of time in proceedings before this Court. Here the Commission has developed standards or guidelines of its own for considering an extension of time. The exercise of the Commission's discretion should be judged against those guidelines and other circumstances applicable to a given case."

2.01 See, in illustration, the Federal Court of Appeal decision in *Canadian Recording Industry Assn. v. Society of Composers, Authors & Music Publishers of Canada*, 2010 CarswellNat 4687, 2010 FCA 322 (Fed. C.A.):

> "20 In any event, the Board is not a court; it is an administrative tribunal. While many tribunals have specific exemptions from the obligation to comply with the rules of evidence, there is authority that even in the absence of such a provision, they are not bound, for example, to comply with the rule against hearsay evidence. The Alberta Court of Appeal put the matter as follows in *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276, [2005] A.J. No. 1012, at paras. 63-64:
>
> > This argument departs from established principles of administrative law. As a general rule, strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed. *Toronto (City) v. CUPE, Local 79* (1982), 35 O.R. (2d) 545 at 556 (C.A.). See also *Principles of Administrative Law* at 289-90; Sara Blake, *Administrative Law in Canada*, 3rd ed., (Markham, Ont.: Butterworths, 2001) at 56-57; Robert W. MacAulay, Q.C. & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, loose-leaf (Toronto: Carswell, 2004) at 17-2. While rules relating to the inadmissibility of evidence (such as the Mohan test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever, required to apply those strict rules: *Practice and Procedure before Administrative Tribunals* at 17-11. "Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law": *T.A. Miller Ltd. v. Minister of Housing and Local Government*, [1968] 1 W.L.R. 992 at 995 (C.A.); *Trenchard v. Secretary of State for the Environment*, [1997] E.W.J. No. 1118at para. 28 (C.A.). See also *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (C.A.).
>
> > This general rule applies even in the absence of a specific legislative direction to that effect. While many statutes stipulate that a particular tribunal is not constrained by the rules of evidence applicable to courts of civil and criminal jurisdiction, "these various provisions do not however alter the common law; rather they reflect the common law position: in general, the normal rules of evidence do not apply to administrative tribunals and agencies": *Administrative Law*, supra, at 279-80.
>
> 21 This principle has been a feature of Canadian jurisprudence for some time. In *Canadian National Railways Co. v. Bell Telephone Co. of Canada*, 1939 S.C.R. 308, at p. 317, 59 C.R.T.C. 10, *(Canadian National Railways)* a case dealing with the Board of Railway Commissioners, the Supreme Court described the powers of that Board in the following terms:
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> > The Board is not bound by the ordinary rules of evidence. In deciding upon questions of fact, it must inevitably draw upon its experience in respect of the matters in the vast number of cases which come before it as well as upon the experience o its technical number of cases which come before it as well as upon the experience of its technical advisers. Thus, the Board may be in a position in passing upon questions of fact in the course of dealing with for example, an administrative matter, to act with a sure judgment on facts and circumstances which to a tribunal not possessing the Board's equipment and advantages might yield only a vague o ambiguous impression.
>
> *Cambie Hotel*, cited above, at paras. 28-36, is to the same effect. In my view, even in the absence of a specific exemption, the Board was not bound by the rules of evidence."

2.1 In *Westfair Food Ltd. v. U.F.C.W., Local 1400*, 2009 CarswellSask 299, 2008 SKCA 60 (Sask. C.A.), the statutory authority of an arbitration board under s. 25(2)(c) of the Saskatchewan Trade Union Act to "accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in his or its discretion considers proper, whether admissible in a court of law or not" means that an arbitration Board was not bound by the strict evidentiary rules as to when extrinsic evidence could be resorted to in order to interpret a provision in an agreement. For that reason the Board did not have to concern itself with the legal debate extrinsic evidence could be resorted to in the case of latent, as opposed to evident, ambiguity. The Board had the discretion to look at extrinsic evidence as it felt proper in interpreting a collective agreement. After reviewing a number of judicial decisions to the effect that an arbitrator could look to extrinsic evidence in determining whether there was any ambiguity in an agreement, the Court of Appeal stated.

> The foregoing cases, and the legislative intent clearly spelled out in s. 25(2)(c) of the Trade Union Act, fortify our conclusion that the Board here was not unreasonable in arriving at its cardinal and supervening determination, namely that the reference in Article 15.8 of the Collective Agreement to a "past practice" was intended to be a reference to a two step call-in process. The fact that it resorted to extrinsic evidence to do so was, likewise, perfectly reasonable.

3 In some ways Ontario's *Statutory Powers Procedure Act* is not a "user-friendly" statute. It does not, for example, indicate exactly what the privileges exempted in section 15 might be. Various privileges and their operation are touched on later in this chapter under heading 17.1(g) "Privilege"

[4] For other examples, see the Canadian International Trade Tribunal Act, R.S.C. 1985, c. C-18.3, s. 34; the Aeronautics Act, R.S.C. 1985, c. A-2, ss. 37(1) and (5); the Canada Labour Code R.S.C. 1985, c. L-2, S. 16, the Cultural Property Export and Import Act, R.S.C. 1985, c. C-51, s. 25; and the Immigration Act, R.S.C. c. I-2, s. 68(3). In *Canada (Attorney General) v. Merrick*, [1996] 1 F.C. 704 (T.D.), Justice MacKay stated that "it would seem inappropriate in my opinion, in light of the standards evolving for deference to tribunals, for this Court to impose standards [upon the Human Rights Commission] which it has developed for considering extensions of time in proceedings before this Court. Here the Commission has developed standards or guidelines of its own for considering an extension of time. The exercise of the Commission's discretion should be judged against those guidelines and other circumstances applicable to a given case."

[4.1] In its evidentiary aspects *EllisDon Corp.* is illustrative of consequences that can flow the unfortunate tendency of agencies to "ape" the courts in their approach to proceedings rather than simply adopting the broad agency powers and approaches granted them as agencies by statute and the common law. Likely significant time would have been saved if the Labour Relations Board in this case had approached the admissibility of the document in question from its broad admissibility powers rather than trying to apply formalistic legal rules that the agency had been created to avoid.

Having embarked upon approaching the issue from the perspective of being a junior "court" the agency should not have been surprised when the Divisional Court took it at its word and reviewed its application of the legal principles in question according to the law (*EllisDon Corp. v. Ontario Sheet Metal Workers and Roofers' Conference*, 2013 CarswellOnt 13127, 2013 ONSC 5808, 368 D.L.R. (4th) 136 (Ont. Div. Ct.)). The Divisional Court had held that it would not be proper for it to rely on the Board's statutory authority to admit documents as the Board in the absence of any analysis as to why the document could be receivable under that general authority. The Divisional Court noted that the power existed, that the Board had to be presumed to be aware of it, and that it would not necessary to specifically refer to it in order to rely on it. However, the Court felt, the Board had to articulate some basis for admitting a document whose admissibility is contested, particularly one that was determinative of an issue, and in the case in point the Board had only given reasons respecting the admissibility of the document as a business record or under the ancient document rule.

[4.1] In *Lavallee v. Alberta (Securities Commission)*, 2009 CarswellAlta 73, 2009 ABQB 17 (Alta. Q.B.), affirmed 2010 CarswellAlta 235, 2010 ABCA 48 (Alta. C.A.), leave to appeal to S.C.C. refused 2010 CarswellAlta 1382 (S.C.C.), the Alberta Court of Queen's Bench held that this exercise is an aspect of fairness. On appeal, in holding that the statutory direction that the agency shall receive all evidence that is relevant when read in the context of the statute amounted to a discretion in the agency to receive evidence, the Alberta Court of Appeal stated that: "The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process."

[4.2] In the absence of a legislative direction to an agency to accept all evidence, the courts are tending to treat decisions respecting the admission of evidence by agencies as matters of discretion subject to a reasonableness standard of review. See *Mauland Capital Ltd. v. Alberta (Securities Commission)*, 2009 CarswellAlta 710, 2009 ABCA 186 (Alta. C.A.) where the Alberta Court of Appeal held that, given that the Alberta Securities Commission had the statutory discretion to admit hearsay evidence, the standard of review respecting the admission of such evidence was reasonableness:

> In sum, the appellants suggest that the panel improperly admitted and considered hearsay evidence in a manner which constituted a denial of natural justice. The appellants submit that the standard of review of this complaint must be correctness as the question raises natural justice. We reject this position. The panel was entitled by the *Act* to admit and consider hearsay evidence: s. 29(f) of the *Securities Act* ("the laws of evidence applicable to judicial proceedings do not apply"). This was not a criminal trial, but even in a criminal trial hearsay is not necessarily forbidden. Moreover, the law of criminal evidence also recognizes the crucial distinction between hearsay and documents as physical objects or part of the *actus reus* noted in *R. v. Khelawon*, [2006] 2 S.C.R. 787, [2006] S.C.J. No. 57, 2006 SCC 57 (S.C.C.) at para. 35. Indeed, documents like ordinary course business records or corporate registry searches might be said to have both hearsay and non-hearsay characteristics, depending on the situation. Absent unusual circumstances, the established standard of review for exercise of the panel's statutory discretion as to the admission of evidence is reasonableness: *Alberta (Securities Commission) v. Brost* (2008), 440 A.R. 7, 2008 ABCA 326 (Alta. C.A.), at paras. 28 - 30; *Alberta (Securities Commission) v. Lavallee*, 2009 ABCA 52 (Alta. C.A.) at para. 8; *Ironside, Re*, 2009 ABCA 134 (Alta. C.A.), at paras. 26 - 28.
>
> To the same effect see the Nova Scotia Court of Appeal in *Allstate Insurance Co. of Canada v. Nova Scotia (Insurance Review Board)*, 2009 CarswellNS 399, 2009 NSCA 75 (N.S. C.A.). In that case, after considering its policy guidelines respecting the admissibility of new evidence on appeal, an appeal panel of the Nova Scotia Insurance Review Board refused to permit an appellant to introduce new evidence on an appeal. On appeal from that decision the Nova Scotia Court of Appeal held that the standard of review of that decision was reasonableness, as the decision to admit new evidence was either a discretionary decision over its procedure or a mixed question of fact and law from which the legal issues cannot be readily extracted.
>
> > The admissibility of evidence at one of its hearings is not a legal issue outside the Board's specialized expertise or a question of jurisdiction or *vires* which would attract a correctness standard. It is an issue of discretion or policy, or mixed question of fact and law, from which the legal issue cannot be readily extracted.

[5] This paragraph of the text was cited with approval by the Newfoundland and Labrador Supreme Court in *Gillis v. Newfoundland & Labrador (Licensed Practical Nurses Council)*, 2004 CarswellNfld 150, 2004 NLSCTD 96 (N.L.S.C.). To the same effect see *Moorcraft v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, [1996] 3 W.W.R. 305, 192 N.R. 161.

[6] (1993), 19 Admin. L.R. (2d) 172 (Alta. Q.B.).

[6.1] See also *Fetherston v. College of Veterinarians (Ont.)* (1999), 117 O.A.C. 334 (Div. Ct.). In that case it was alleged that the Discipline Committee of the Ontario College of Veterinarians made an error in relying on evidence supplied by an accomplice without explicitly directing itself as to the dangers of relying on such evidence in the absence of confirmatory evidence (as set out in *R. v. Vetrovec*, [1982] 1 S.C.R. 193). The Ontario Divisional Court rejected that allegation. As stated by Justice Archie Campbell (in dissent but with the agreement of the rest of the court on this issue):

> The question . . . is not whether the lay tribunal recited legal principles in the same way as a court or a tribunal of lawyers. The question is whether the decision of the tribunal, in light of the evidence and the reasons taken together, discloses reviewable error.

The Court noted that the frailties of the evidence were put vigorously and repeatedly to the agency; that the agency had addressed itself to reliable, independent, confirmatory evidence; and that there were sufficient implausibilities in the evidence of the appellant that the agency was justified in preferring the evidence of the accomplice to that of the appellant. The agency was not found to have committed any error in this regard.

See also *Calgary (City) Police Service v. Alberta (Judge appointed under the Fatality Inquiries Act)* (1998), 17 Admin. L.R. (3d) 256 (Alta. Q.B.). Although this case deals with a fatalities inquiry judge exceeding his jurisdiction by going beyond determining facts the Court's comments are instructive as to ability of one's approach to procedure and evidence to impact on the accomplishment of that particular agency's mandate.

> It may be argued that it is artificial not to come to the conclusion that the police bear some responsibility. I disagree. As happened in this very case, the judge made his findings of fact based only upon the evidence which was before him which we now know was incomplete. Outside the parameters of a criminal trial which has all of the protections and procedures set out in the Criminal Code or a civil trial which applies all the rules of procedure and evidence which govern civil trials, findings of actual or potential responsibility such as those made by the inquiry judge here may be made in the absence of all the relevant evidence. To create another forum where fault or responsibility is found particularly in light of s. 47 of the Fatality Inquiries Act, does not advance the administration of justice in this province.
>
> One of the arguments made by counsel for the police was that if a judge is permitted to make findings of legal responsibility, then a fatality inquiry will be turned into a more adversarial process. The respondent replies by saying that that is not necessarily a bad thing. Rather than finding that the adversarial process in the fatality inquiry is good or bad, it is more appropriate to determine whether or not it achieves the purposes of the Act. It does not. An adversarial process by definition means that there are sides. That in turn begs the issue of fault and blame. Rather than promote an open and complete airing of the facts surrounding a death, a more adversarial process may inhibit such exposure.

6.2 See, in illustration, the Federal Court of Appeal decision in *Canadian Recording Industry Assn. v. Society of Composers, Authors & Music Publishers of Canada*, 2010 CarswellNat 4687, 2010 FCA 337 (Fed. C.A.) where it was noted that even though an agency may not be bound by the rules of evidence it must still have some evidence upon which to base a decision.

Similarly, in *Ecole St. Margaret School v. Priscjak*, 2013 CarswellSask 556, 2013 SKCA 87 (Sask. C.A.) the Saskatchewan Court of Appeal stated that whether the standard of review is correctness or reasonableness an essential finding made without evidence must result in an agency's decision being set aside.

> "37 In this case, however, I find it is not necessary to decide whether the applicable standard of review is correctness or reasonableness. This is so because this appeal can be resolved by answering this question: did the Tribunal err when it found that the Commissioner's decision did not meet the test for reasonableness on the basis of "no evidence?" Whether the standard of review is correctness or reasonableness, an essential finding made without evidence must result in the tribunal's decision being set aside. (See: Donald J.M. Brown, *Civil Appeals*, looseleaf, vol. 2, (Toronto: Canvasback Publishing, 2013) at topic 13.2210.)"

7 [1996] 1 S.C.R. 75, [1996] 3 W.W.R. 305, 192 N.R. 161.

7A The Queen's Bench decision dealt with both fairness and the Alberta Bill of Rights. On appeal, the Court of Appeal did not have to deal with the Bill of Rights but made the following statement in finding that the Securities Commission had the discretion to admit evidence:

> 15 As was noted by the chambers judge, Commission panels have seemingly taken the position that they have a discretion as to what evidence they will admit in a hearing. In Sentinel Financial Management Corp., 2008 ABASC 427, at para. 10, the panel made the following statements with respect to its understanding of ss. 29(e) and (f):
>
> > Sections 29(e) and (f), respectively, of the Act provide that in a hearing the Commission "shall receive that evidence that is relevant to the matter being heard" and that "the laws of evidence applicable to judicial proceedings do not apply". This provision gives the Commission considerable latitude in determining what evidence to admit and, if admitted, the weight to assign to that evidence. As part of that assessment, we consider the policy and legal requirements of evidentiary rules.
>
> 16 The discretion inherent in this approach to the provisions is, in my view, essential to the efficient and effective conduct of Commission hearings. Sub-section 29(f) says that the Commission is not bound by the rules of evidence; it does not say that it is obliged to ignore them entirely and I would not read s. 29(e) so as to compel that result.
>
> 17 . . . It is clear from the *Securities Act* that panels are to employ less formal procedures than would be required in a court. It is therefore open to a panel to admit, for example, hearsay evidence without holding a *voir dire*. By the same token, a panel has the discretion to refuse evidence, for example, evidence that it considers to be inherently flawed. The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process.

7.1 In *Diakow v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2010 CarswellBC 2390, 2010 BCSC 1279 (B.C.S.C.) the B.C. Supreme Court held that the failure to consider relevant evidence can be considered either to be a breach of fairness or it can be a breach of jurisdiction as an unreasonable finding of fact.

It will be interesting to see the impact of the recent line of cases dealing with standard of review issued by the Supreme Court of Canada starting with its decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 CarswellNB 124, 2008 SCC 9, 291 D.L.R. (4th) 577 (S.C.C.) will have on this issue. In *Dunsmuir*, in the context of how one determines the appropriate standard of review, the Supreme Court of Canada directed that the correctness standard of review was to applied to jurisdictional issues in the narrow sense — that is the ability of the agency to enter into the inquiry rather than questions going to how the agency carried out its inquiry. Evidential concerns as discussed herein are not likely to go to this narrow concept of jurisdiction. However, they would remain an error in law and subject to review either on the reasonableness or correctness standard depending on the particular facts and how they define the nature of that error of law. (Standard of review is discussed later in chapter 28.)

8 The Federal Court Trial Division held in *Puxley v Canada (Treasury Board)* (1994), 24 Admin. L.R. (2d) 43 (Fed. T.D.) that the statutory authority of an adjudicator under the Public Service Staff Relations Act to receive and accept such evidence and information as he or she sees fit, whether admissible in a court of law or not, and to refuse to accept any evidence that is not presented in the form and within the time prescribed, did not authorize the adjudicator to exclude relevant evidence, documentary or oral, or cross-examination on evidence offered where the line of questioning seeks to establish the case of one party or to weaken the case of the other by questions that are not clearly irrelevant to matters before the adjudicator. See also *Universite du Quebec a Trois-Rivieres v. Larocque* (1993), 161 D.L.R. (4th) 494 (S.C.C.) for the proposition that the failure to admit relevant evidence which is not material to the decision made will not amount to a denial of natural justice.

8.0.1 It should goes without saying that these concerns should be shared with the parties who should be given an opportunity to make submissions before any evidence whose receipt

is in question is accepted or rejected. In illustration see *Potecho v. Red Door Housing Society*, 2014 CarswellBC 42, 2014 BCSC 36 (B.C.S.C.).

The *Rules of Procedure for Dispute Resolution Proceedings* made under B.C.'s *Residential Tenancy Act* provide that evidence must be filed by a set time in advance of a hearing but the rules also provide for the means for a tenant to request a dispute resolution officer to receive late filed evidence when certain criteria are met. In *Potecho* a Dispute Resolution Officer was found to have breached the principles of fairness when in his reasons he rejected material evidence filed late by a tenant without having given the tenant any notice in the hearing that there was an issue with the late filing or giving the tenant an opportunity to address the issue of receiving the material notwithstanding its late filing. The B.C. Supreme Court held that the failure of the Dispute Resolution Officer to hear from the parties before excluding a substantial submissions from the tenant constituted a fundamental breach of procedural fairness.

[8A] The Alberta Court of Appeal affirmed the decision of the Queen's Bench in *Lavallee (Lavallee v. Alberta (Securities Commission)*, 2010 CarswellAlta 235, 2010 ABCA 48 (Alta. C.A.), leave to appeal to S.C.C. refused 2010 CarswellAlta 1382 (S.C.C.)) but expressly noted that the Queen's Bench's ruling respecting the operation of the Alberta Bill of Rights had not been appealed. The Appeal instead focused on and affirmed the related findings of the Court of Queen's Bench that the operation of the evidentiary provision did not offend the Charter protections in sections 7 (because the proceedings in question did not affect life, liberty and the security of the person) and 11 (because these were regulatory proceedings without true penal consequences.). The Court of Appeal disagreed with the Queen's Bench as to the mandatory nature of the statutory evidence direction and held that, when read in the context of the entire statute, the "shall receive" retained a discretion in the Commission to reject evidence where appropriate.

> 15 As was noted by the chambers judge, Commission panels have seemingly taken the position that they have a discretion as to what evidence they will admit in a hearing. In Sentinel Financial Management Corp., 2008 ABASC 477, at para. 10, the panel made the following statements with respect to its understanding of ss. 29(e) and (f):
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> > Sections 29(e) and (f), respectively, of the Act provide that in a hearing the Commission "shall receive that evidence that is relevant to the matter being heard" and that "the laws of evidence applicable to judicial proceedings do not apply". This provision gives the Commission considerable latitude in determining what evidence to admit and, if admitted, the weight to assign to that evidence. As part of that assessment, we consider the policy and legal requirements of evidentiary rules.
>
> 16 The discretion inherent in this approach to the provisions is, in my view, essential to the efficient and effective conduct of Commission hearings. Sub-section 29(f) says that the Commission is not bound by the rules of evidence; it does not say that it is obliged to ignore them entirely and I would not read s. 29(e) so as to compel that result.
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> 17 . . . It is clear from the *Securities Act* that panels are to employ less formal procedures than would be required in a court. It is therefore open to a panel to admit, for example, hearsay evidence without holding a *voir dire*. By the same token, a panel has the discretion to refuse evidence, for example, evidence that it considers to be inherently flawed. The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process.
>
> 18 In my view, the Commission retains a discretion under s. 29(e) as to the relevant evidence it will admit in a hearing. On that basis, the appeal is dismissed.

[8.1] (1999), 117 O.A.C. 339 (Div. Ct.).

[8.2] See, for example, *Serebrova v. British Columbia (Employment & Assistance Appeal Tribunal)*, 2006 CarswellBC 486 (B.C.S.C.). That case dealt with a hearing of the Employment and Assistance Appeal Tribunal in British Columbia in which the issue was whether money in a bank account which was in the name of a refugee claimant belonged to the claimant. If it did, the claimant did not qualify for monetary assistance. The claimant stated that the money in the American account belonged to her mother and had been given to the claimant to hold in trust for the mother. The claimant produced a letter purportedly signed by her mother to that effect. No other evidence was tendered on the issue. The Board did not believe the claimant and held on the evidence that the money belonged to the claimant. On judicial review the B.C. Supreme Court, upholding the decision of the Tribunal made the following comments:

> The petitioner submits that the "letter" was "some" evidence of a trust. It is obviously not a document that would be admissible under the rules of evidence applied in courts. It is hearsay, as to its contents, and unauthenticated as to its origin and authorship. The tribunal would have to accept that the document was made by Galina Ivanoushko [the mother] and that she was the petitioner's mother, to begin with, to give it any consideration. While the tribunal is not bound by the rules of evidence, the cautions underlying the conventional rules of evidence operate on a common sense basis. It is not quite accurate to say there was "some" evidence of a trust. The petitioner did not provide material to which the tribunal was obliged to give any weight. It was entitled to take the view that it was not persuasive or reliable.

The required factual basis may also be drawn inferentially from the evidence presented to the agency. See, in illustration, *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 CarswellAlta 710, 2009 ABCA 186 (Alta. C.A.) where the Alberta Court of Appeal held that a panel of the Alberta Securities Commission did not err in establishing the identity of authors of various statements by looking at such things as signatures, corporate references and title, fax numbers and so forth.

> The panel very carefully scrutinized this evidence, conscious of its limitations: 2007 ABASC 357 (Alta. Securities Comm.) paras. 170 - 174. In our view, the panel could reasonably draw inferences from this evidence. The identity of the author speaker of a statement even in a criminal context can be established by both direct and circumstantial evidence: *R. v. Evans*, [1993] 3 S.C.R. 653, [1993] S.C.J. No. 115 (S.C.C.), at paras. 26 - 31. More specifically, similarity of nomenclature is some evidence of identification and authorship: see e.g. *R. v. Nicholson* (1984), 52 A.R. 132, [1984] A.J. No. 2522 (Alta. C.A.), leave denied (1984), 55 A.R. 240n (S.C.C.), at paras. 31 - 33; *R. v. Ouellette* (2005), 371 A.R. 190, 2005 ABCA 282 (Alta. C.A.) at paras. 29 - 35. In this context, it should be noted that we speak here not merely about similarity of "Al Grossman", but also about the corporate reference, his title therewith, and such items as the fax number set out in the letter which are part of the overall nomenclature. Those items of identity proliferate throughout the documentary evidence properly before the panel. The appellants cannot complain of injustice arising from an inference that the false statements in the June 6, 2005, are attributable to them.

[8.2.1] In *Teganya v. Canada (Minister of Citizenship & Immigration)*, 2012 CarswellNat 62, 2012 FC 42 the Federal Court noted that every piece of evidence tendered in an administrative proceeding need not itself address all of the specific issues before the agency. Some evidence may address only specific points, other evidence may provide necessary background to the facts, other evidence may be tendered to fill in gaps. In reaching a decision the evidence should be considered as a whole:

> "24 The last significant piece of evidence from an individual is an affidavit from a Rwandan lawyer, Eric Cyaga. That affidavit speaks to the trial of the Applicant's father, his prolonged detention before trial (10 years) and that contact now with the father is impossible. The Officer dismisses the affidavit on the basis that it does not address certain issues specific to the Applicant:
>
> > De plus, bien que ce document en question mentionne que le père de monsieur a été condamné a 22 ans de prison, il ne permet pas de conclure à la présence de risques

pour le demandeur.

Ce dernier rapporte des frères et soeurs au Rwanda pour lesquels il ne précise ni incarcération, ni arrestation. Il n'explique pas non plus en quoi le fait d'être le fils de son père pourrait lui causer des risques au Rwanda étant donné le défaut de monsieur de démontrer que sa fratrie aurait, depuis cette condamnation, rencontré des difficultés de la part des autorités qui pourraient conduire à une incarcération.

Je considère, donc, que ce document ne permet pas de conclure que le demandeur pourrait être incarcéré ou accusé advenant un retour au Rwanda, ni qu'il pourrait être à risque dans son pays d'origine

25 This dismissal is unreasonable. The affidavit must be considered for what it does say. Not every piece of evidence must be directed to every specific point in issue. A party must be allowed to build its case, certain parts are background, other parts fill in gaps. The evidence as a whole is to be considered. No piece should be dismissed simply because it is a piece."

In *Barua v. Canada (Minister of Citizenship & Immigration)*, 2012 CarswellNat 95, 2012 FC 59 the Federal Court stated in the context of a decision by the Immigration and Refugee Board:

"1 This Court has stated in a number of cases that the Refugee Protection Division of the Immigration and Refugee Board [Board] must not ignore relevant evidence nor should it "dissect" the documentary evidence and use only specific portions in isolation to confirm one's point of view. Instead, the evidence must read as a whole, in context, and weighed accordingly (*King v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 774; *Bacchus v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 616; *Mete v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 871, 296 FTR 307)."

8.3 In *Pridgen v. University of Calgary*, 2012 CarswellAlta 797, 2012 ABCA 139 (Alta. C.A.) the Alberta Court of Appeal affirmed that while an agency may receive hearsay evidence, in order to establish a finding of fact there must still be a sufficient logical and reliable connection the hearsay evidence and the fact sought to be established. In the case in point a university student disciplinary committee concluded that a university professor had suffered some harm from student postings on a social media blog. There was no evidence of any sort before the committee on this point other than for the statement of the university Dean that the professor had told him that she had been alerted to the existence of the social media site by some colleagues and associates. The Court of Appeal held that the ability to receive hearsay evidence did not relieve a decision-maker from the responsibility of assessing the quality of the evidence received in order to determine whether it can support the decision being made. In this case the Court of Appeal concluded that it was not reasonable for the committee to base a finding of injury on such vague information from an unnamed source.

In *Canada (Attorney General) v. Gentles Inquest (Coroner of)* (1998), 116 O.A.C. 70 (Ont. Div. Ct.) the Ontario Divisional Court approved the following statement on the meaning of "relevant" by Watt J. in *Regina v. Gilbert Ho*:

"Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the prosecution more or less probable than it would be liwithout the evidence. See 1 McCormick on Evidence (4th) ed., para. 185, pp. 773-5; *Morris v. The Queen* (1983), 7 C.C.C. (3d) 97, 103-5 (S.C.C.), per Lamer J. (dissenting on another ground)."

In *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner*, 2008 CarswellOnt 191, 2008 ONCA 33 (Ont. C.A.), the Ontario Court of Appeal undertook to consider whether it was appropriate for a Commission of Inquiry to hear evidence of an incident that the Court of Appeal had already concluded fell outside the scope of the Commission's mandate on the grounds that it might be "reasonably relevant" to the inquiry. The Court of Appeal cited with approval the following from a 1977 decision of the Court in *Re Bortolotti et al. & Ministry of Housing* (1977), 15 O.R. (2d) 617 (C.A.):

". . .any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the Public Inquiries Act, 1971.

. . .

The definition of "relevant" which has been commonly cited with approval by the Courts is that in Stephen's Digest of the Law of Evidence, 12th ed., art. 1. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probably the past, present or future existence or non-existence of the other" In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed. at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value. . ."

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document. . ."

In considering the evidence in question before it, the Court of Appeal concluded that it should not be admitted as being reasonably relevant according to the *Bortolotti* standard. It had no probative value as it did not speak to systemic problems that could shed light on similar problems in the specific subject matter of the Commission. Furthermore, if it was "a prelude to an avalanche of similar evidence — the reception of which is likely to be very time-consuming, hotly contested and liable to deflect the Commissioner from the task at hand — any marginal probative value that such evidence might have would . . . be greatly outweighed by its prejudicial effect.

9 In *United Wings Enterprise Inc. v. Qiu*, 2012 CarswellNat 1467, 2012 FCA 111 (Fed. C.A.) the Federal Court of Appeal stated that no breach of fairness results from refusing to admit evidence that was largely irrelevant.

See *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner*, 2008 CarswellOnt 191, 2008 ONCA 33 (Ont. C.A.), where the Ontario Court of Appeal stated that: "*Bortolotti [Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617 (C.A.)], thus directs that an error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the Inquiry." Caution should be applied in the application of this assertion. An error of jurisdiction will not result if the agency realizes the error subsequently and acts to either exclude the evidence or make it clear that it did not base its decision on it.

The converse of the rule is true too, that you should not reject relevant and material evidence. However, that fact that you admit irrelevant evidence, or reject relevant evidence, will

not itself amount to a reversible error by the courts. It will come down to how important a role the evidence in question played (or failed to play) in your decision. If irrelevant evidence played a major role when admitted (or if the rejected relevant evidence would have played if admitted) then you likely have a reversible error on your hands. If, however, the impact was minimal, you do not. (*Université du Québec à Trois-Rivières v. Larocque* (1993), 101 D.L.R. (4th) 494 (S.C.C.))

For a potentially problematic decision in this area see *Interlink Business Management Inc. v. Bennett Environmental Inc.*, 2008 CarswellBC 496, 2008 BCCA 104 (B.C.C.A.). That case involved section 6(2) of the B.C. Commercial Arbitration Act, R.S.B.C. 1996, c. 55. That section gives arbitrators the authority to admit evidence which is relevant to their proceedings even though that evidence may not be admissible in court.

> 6(2) In an arbitration, the arbitrator
>
> (a) must admit all evidence that would be admissible in a court,
>
> (b) may admit in addition other evidence that the arbitrator considers relevant to the issues in dispute, and
>
> (c) may determine, subject to the rules of natural justice, how evidence is to be admitted.

In *Interlink* the B.C. Court of Appeal stated that the decision to admit evidence under section 6(2)(b) is a discretionary decision and thus subject to a reasonableness standard of review. In the case in point evidence, otherwise not admissible in court, was admitted by an arbitrator respecting the meaning of ambiguities in a contract. The Court held that it was evident from the arbitrator's reasons that he considered the evidence in dispute to be relevant and that the arbitrator's resulting interpretation of the contract, relying in part on that evidence, was not unreasonable.

It should be taken as implicit in this decision that the evidence in question was in fact relevant to the issues at hand and not merely considered as such by the arbitrator. Otherwise, this decision alters the effect of evidentiary provisions such as s. 6(2). These provisions are clearly intended to reflect the common law authority of agencies to rely on evidence which would otherwise not be admissible in judicial proceedings. They are not intended to alter the nature of relevancy and to permit agencies to make decisions based on evidence which is not in fact relevant notwithstanding the belief of the agencies.

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9 *Forrest v. Canada (Attorney General)*, 2002 CarswellNat 1081, 2002 FCT 539, 219 F.T.R. 82 (Fed. T.D.):

> I am also satisfied, from reviewing the transcript, that the Disciplinary Court acted without bias in the conduct of the hearing. The Independent Chairperson of the Disciplinary Court has the duty to conduct the disciplinary hearing in a fair and expeditious manner. Restricting the hearing to relevant evidence is an important and necessary part of the Chair's job. The fact that the relevancy rulings were contrary to the wishes of the applicant does not constitute bias. An informed person, viewing the matter realistically and practically would not sense any apprehension of bias.

There is no requirement that an agency receive information which is not relevant to the issues before it. Fairness does not dictate that an agency to have before it a document which is not relevant, probative or material to the proceeding before it. *Jones v. UWA Canada, Local 1-3567*, 2011 CarswellBC 1834, 2011 BCSC 929 (B.C.S.C.)).

9.1 Another illustration can be seen in self-serving statements. Technically, an assertion by a party as to a fact in his or her favour is evidence and it is relevant. But the self-serving nature of the statement may require corroboration in the event the statement is made to establish some material fact in question. (Ancillary facts which do not play a significant role or which are not seriously contested may more easily be established through oral assertions from a party.) See, for example, *L.(J.) v. Canada (Minister of Citizenship & Immigration)*, 2009 CarswellNat 2799, 2009 FC 892 (Fed. Ct.). In that case the Federal Court upheld as reasonable a Visa Officer's finding of fact rejecting the contention by an applicant that he was homosexual. Notwithstanding that the applicant had given a sworn statement attesting to his sexual status the Court stated that it was open to the Officer to also look to the other factors in the case — including the applicant's immigration history (in which he had twice made applications for family status based on successive marriages to different women), his relationships while in Canada (including a common law relationship maintained with a third woman) and the applicant's previous statements made in immigration interviews (where he indicated he wanted to stay in Canada to support his wife and have a child by her). The Court noted that evidence tendered by a witness with a personal interest in the case usually requires corroboration.

> Evidence tendered by a witness with a personal interest in the case can be evaluated based on the weight that it will be given and typically will require corroborative evidence to have probative value (*Ferguson* at paragraph 27). It is open to the PRRA officer to require such corroborative evidence to satisfy the legal burden; particularly when the fact is one that is central to the application (*Ferguson* at paragraph 32). In *Ferguson*, it is suggested that such corroborative evidence could include a sworn statement by a partner and evidence of public statements (at paragraph 32). One must remember that evidence must have sufficient probative value. It will have sufficient probative value when "it convinces the trier of fact" (*Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636 at paragraph 30). Furthermore, the officer had to consider all of the other factors in the case in making the determination (*Parchment* at paragraph 28).
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> The statement in this case was sworn, unlike those in *Parchment* and *Ferguson*, which does give it more weight. However, no other evidence was provided by the Applicant. It is obvious, in reading the reasons, that the PRRA officer was not convinced by the evidence presented that the Applicant is homosexual. The PRRA officer had to consider the other factors in the case including the Applicant's immigration history, his relationships while in Canada and the previous statements made in immigration interviews.

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10 There are numerous cases dealing with an agency's ability to assign weight to evidence according to its strengths and nature. For example, in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 CarswellAlta 710, 2009 ABCA 186 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that a panel was required to assign equal weight to all hearsay evidence.

> The appellants also suggest that the panel failed to take an even-handed approach to hearsay, in that it did not choose to assign much weight to the appellants' self-serving assertions in the letter of November 16, 2006. Once again we consider this assessment a matter governed by reasonableness. The panel was not obliged to treat all hearsay equally.

*Qureshi v. Canada (Minister of Citizenship & Immigration)*, 2009 CarswellNat 3328, 2009 FC 1081 (Fed. Ct.) dealt with the issue of anonymous communications. In that case the Federal Court held that an anonymous communication should not be given much weight in a decision-maker's deliberations.

> It should be noted, however, that Federal Court jurisprudence has viewed anonymous communications as innately suspect. In *D'Souza*, above, the court also noted at paragraph 15 that anonymous letters are "inherently unreliable." The court relied on holdings in both *Canada (Minister of Citizenship and Immigration) v. Navarrete*, 2006 FC 691, 149

A.C.W.S. (3d) 315, and Ray v. Canada (Minister of Citizenship and Immigration), 2006 FC 731, 149 A.C.W.S. (3d) 292. In reaching this conclusion. In *Navarette*, above, Justice Michel Shore at paragraph 27 held that "[t]he source and the motives as well as the information provided by this type of letter cannot always be verified. Therefore, the information is not necessarily trustworthy." In that case, the court found that it was reasonable for the Immigration and Refugee Board to refuse to give weight to the information provided in anonymous letters.

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10A See, in illustration, Cambie Malone's Corp. v. British Columbia (General Manager, Liquor Control & Licensing Branch), 2009 CarswellBC 1995, 2009 BCSC 987 (B.C. S.C.) where the B.C. Supreme Court declined to intervene respecting a decision by an adjudicator to prefer the oral evidence of various witnesses over the written evidence of others.

The court is not entitled to review the manner in which the evidence was weighed by the decision-maker. The Adjudicator was entitled to prefer the oral evidence of the police officers and liquor inspectors over the written evidence of the petitioner. The petitioner had a full opportunity to challenge the respondent's evidence in cross-examination and in argument. The petitioner's arguments on these grounds must fail.

10.01 That is why it is generally a good idea to try to decide at the beginning of a proceeding whether testimony is to come to one under oath or affirmation or not. I suggest that it is prudent to attempt to avoid the situation, in a proceeding where considerable evidence has come in not under oath, a party requests particular testimony to be received in this way. There are a number of ways to deal with this situation if it arises. Simply rejecting the request out of hand is not one of them. One must have a reason going to the fairness of the procedure or the substance of the matter before rejecting evidence. In any event one should invite submissions from the parties on the issue. The purpose is to determine whether any unfairness will result from receiving the evidence in different formats. Depending on the circumstances, one will be looking at issues such as whether the other side was misled or would suffer any harm from the different treatment? What are the consequences of the different treatment? Is there a potential conflict that will be resolved in favor of the sworn/affirmed evidence by reason of its being sworn or affirmed? Is there any way to offset any potential unfairness? The issue is fairness and the balance of the fairness in receiving the evidence under oath against any possible unfairness resulting to others from that reception. If admitted, the sworn testimony should be considered in the context of all of the other evidence, with weight assigned according to all of the circumstances.

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10.1 See for example, Canada (Minister of Public Safety and Emergency Preparedness) v. Gunasingam, 2008 CarswellNat 346, 2008 FC 181 (Fed. Ct.). In that case an application was made to the Immigration and Refugee Board of Canada to vacate an earlier decision to grant a person refugee status on the basis that the earlier decision had been secured through the misrepresentation of material facts relating to a relevant matter (in this case it was alleged that the translator had omitted specific facts and changed relevant dates to hide that omission). The statute provided for the refusal of an application to vacate if there was other sufficient evidence at the time of the first determination to justify refugee determination. In refusing the application the Board member concluded that the misrepresentation would not have changed the decision of the original panel and stated that the original panel would not have taken into account the particular facts which had been omitted. The Federal Court quashed the Board's refusal for, among other things, taking into account pure conjecture.

> Furthermore, it was outright conjecture, and not inference, which led the member to conclude that the original panel would not have taken into account the fact that Mr. Gunasingam did not claim refugee status in Malaysia. The original panel could not have taken that fact into consideration because it did not know he was there for several months. It is patently unreasonable to base a decision on conjecture and speculation *(Canada (Minister of Employment and Immigration) v Satiacum*, [1989] F.C.J. No. 505, 99 N.R. 171).

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10.2 See, for example, Karbalaeiali v. British Columbia (Human Rights Tribunal), 2010 CarswellBC 2171, 2010 BCSC 1130 (B.C.S.C.) where the B.C. Supreme Court noted that, in itself, the fact that an agency may prefer the evidence over one party over that of another does not mean that the agency failed to take into account the latter's evidence

> "49 I cannot find that the Tribunal's decisions are patently unreasonable on the basis that it failed to consider Mr. Karbalaeiali's evidence. The factual issues before it were not complex. The Tribunal indicated that it considered all of the evidence and specifically referred to Mr. Karbalaeiali's evidence. There is no basis to conclude that the Tribunal failed to consider any relevant evidence or that it based its decision entirely or predominantly on irrelevant evidence. There was evidence before the Tribunal on which it could conclude as a matter of fact that the Company adequately responded to Mr. Karbalaeiali's complaint of discrimination. The fact that the Tribunal preferred the evidence of the employer on certain matters does not suggest that it failed to take into account Mr. Karbalaeiali's evidence."

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10.3 See P.S.A.C. v. Canada Post, 2011 CarswellNat 1581, 2011 SCC where the Supreme Court adopted the below quotations from Justice Evans' reasons in the Court of Appeal decision (P.S.A.C. v. Canada Post Corp., 2010 CarswellNat 416, 2010 FCA 56).

> "209 Facts in issue should be distinguished from the evidence or intermediate facts on which findings of the facts in issue are based. It is unnecessary and, in my view, unhelpful for an adjudicator to introduce the notion of a balance of probabilities when weighing items of evidence to determine their probative value. "Balance of probabilities" is best reserved as the standard to be used by a fact-finder when determining whether, when all the evidence is weighed, a fact in issue has been proved.
>
> 210 However, this is not to say that the weight attached to evidence is unrelated to the question of whether a fact in issue has been proved on a balance of probabilities. An adjudicator cannot conclude that a fact in issue has been proved on a balance of probabilities if the only evidence is unreliable. Conversely, I cannot imagine that an adjudicator would describe evidence as reliable unless it was more likely than not to be true, or would describe evidence as "reasonably reliable" that she thought was no more likely to be correct than to be wrong.
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> ...
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> 213 In the course of its reasons, the Tribunal did at times refer to a balance of probabilities or its equivalent, "more likely than not", when assessing the reliability of items of evidence. To ask, as it did, whether it is more likely than not that certain evidence was reasonably reliable may be redundant. It does not in my view, however, amount to an error of law by demonstrating that the Tribunal deviated from the task that it had set itself: to assess the reliability of each of these items of evidence and to ask whether, taken as a whole, they established on a balance of probabilities that the Professional Team had properly evaluated the work."

11 Sopinka, Lederman and Bryant *Law of Evidence in Canada* (Butterworths, 1992) at p. 156.

The prime difficulty with hearsay evidence is the inability to directly test the accuracy of the statement insofar as its source is not present at the hearing. This issue is also pursued earlier in chapter 12 under heading 12.28 "Cross-Examination and Hearsay Evidence".

11.1 As a quick example of a document as hearsay see *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*, 2007 CarswellAlta 839, 2007 ABCA 217 (Alta. C.A.). In that case the Alberta Court of Appeal held that the Alberta Municipal Government Board did not err in receiving an expert report written by a team of individuals into evidence in a proceeding where only some of the authors were present at the hearing. The Board recognized that portions of the report written by individuals who were in present at the hearing would amount to hearsay and took that fact into account in the weight granted the report.

11.2 In illustration see *Gidda v. Manitoba (Taxicab Board)*, 2014 CarswellMan 262, 2014 MBCA 58 (Man. C.A.). In that case the Manitoba Court of Appeal held that the Manitoba Taxicab Board did not err in admitting and relying on hearsay evidence. The Court stated that "it is well established that administrative tribunals may admit and rely on hearsay evidence "unless its receipt would amount to a clear denial of natural justice" (*I.B.E.W., Local 435 v. Manitoba Telecom Services Inc.*, 2002 MBQB 284 (Man. Q.B.) at para. 6, (2002), 169 Man. R. (2d) 290 (Man. Q.B.)).

In *Gidda* the Court of Appeal noted that the appellant had had a full opportunity to cross-examine the person giving the hearsay evidence and was not denied the right to call any witness in reply but chose neither to object to the introduction of the hearsay or request that any other witnesses be called.

12 Something that may look like hearsay, yet not be so. Remember that hearsay is the repetition by a witness of something someone else said in order to establish the matter asserted in the statement was true. If the evidence is not tendered to prove the truth of the matter asserted in the second hand statement it is not hearsay. Here's an example: Mr. Brown is on trial for assaulting Mr. Jones. He claims in his defence that it was an act of self-defence as he believed Mr. Jones was a gangster who had been hired to get him for his unpaid gambling debts. When asked why he thought this Mr. Brown's response is that "Mrs. Smith told me that Jones had been hired by a loan shark to get me."

Although Mr. Brown is repeating a statement made to him by another who is not present at the hearing to be tested, his evidence is not hearsay. It is being tendered to prove, not that Mr. Jones was a hired gangster, but that Mr. Brown had been told this fact and that it created a belief in his mind which led him to take defensive action. The statement is not tendered to prove the truth of the matter contained in the statement (Mr. Jones was a gangster) but to prove that something had happened (Mrs. Smith had told him something) and that this created a belief in his mind. In the defence raised by Mr. Brown, it does not matter if Mr. Jones was a gangster. It only matters that Mr. Brown thought he was. The statement is tendered as evidence supporting the fact of this belief and its reasonableness.

12.01 There is no obligation to accord all evidence of the same nature the same weight. As noted by the Alberta Court of Appeal in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 CarswellAlta 710, 2009 ABCA 186 (Alta. C.A.) the different circumstances surrounding even evidence of the same basic nature may give rise to different weight being accorded each. In that case the Court rejected an argument that a panel was obliged to accord the same weight to all hearsay evidence.

> The appellants also suggest that the panel failed to take an even-handed approach to hearsay, in that it did not choose to assign much weight to the appellants' self-serving assertions in the letter of November 16, 2006. Once again we consider this assessment a matter governed by reasonableness. The panel was not obliged to treat all hearsay equally.

12a Adopting the approach suggested in this text might avoid the problems which arose in *Murray v. Veterinary Medical Assn. (Saskatchewan)*, 2008 CarswellSask 665, 2008 SKQB 424 (Sask. Q.B.). In that case the Saskatchewan Court of Queen's Bench, following the decision of the Ontario Court of Appeal in *Khan v. College of Physicians and Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193, 11 Admin. L.R. (2d) 147, 1992 CarswellOnt 914 (Ont. C.A.), held that the proceedings of the discipline committee of the Saskatchewan Veterinary Medical Association are subject to the civil rules of evidence. As such the Court held that the discipline committee must follow the criteria of the civil courts, which are set out in the Supreme Court of Canada decision in *R. v. Khelawon*, [2006] 2 S.C.R. 787, 2006 CarswellOnt 7825, 274 D.L.R. (4th) 385 (S.C.C.), in determining whether to admit hearsay evidence in its proceedings.

In the case in point, where an important witness was not available to give evidence at the discipline proceedings, the discipline committee allowed in a videotape of the evidence given by the individual for criminal proceedings against the subject of the hearing. That evidence had been given under oath at that time, voluntarily, and the individual had been warned of the implications of his statement. The committee felt it had no concerns respecting the individual's credibility. After noting that the essential weakness of hearsay evidence is that it cannot be tested by cross-examination, the Court held that essentially the discipline committee should have adopted the position that hearsay is presumptively inadmissible but can be admitted when it can be shown that the hearsay is necessary in order not to lose the evidence in question and the particular hearsay evidence is sufficiently trustworthy, in the absence of cross-examination, for its purpose. As set out in *Khelawon* this can be done in two ways. First the circumstances in which the hearsay came about may result in the contents of the hearsay being so reliable that contemporaneous cross-examination would add little, if anything, to the process. Alternatively, the circumstances may allow for sufficient testing of the evidence by means other than contemporaneous cross-examination. However, even when it is shown that the hearsay evidence is both necessary and sufficiently trustworthy, the decision-maker retains the discretion to exclude it where its probative value is outweighed by its prejudicial effect.

The Court held that the discipline committee, composed of three non-lawyers:

> did not exhibit an understanding that hearsay statements are presumptively inadmissible. Nor did the committee record the relevant factors it was relying upon to find that it has no concerns regarding the credibility of the statement. Finally, the committee appeared to be operating under the mistaken belief that cross-examination [did] not apply in this situation.This latter point was of particular concern to the Court insofar as section 22(7) of the Act expressly provided that there was to be a "full right to examine, cross-examine and re-examine."

In following the Ontario decision in *Khan* respecting the applicability of the civil rules of evidence, the Saskatchewan Court does not appear aware that while the proceedings in *Khan* were expressly made subject to the civil evidence rules by statute, Saskatchewan's *Veterinarians Act, 1987*, S.S. 1986-87-88, expressly provides in section 22(4) that: "The discipline committee may accept any evidence that it considers appropriate and is not bound by rules of law concerning evidence." It is not evident whether this freedom from the rules of evidence was argued before the Court, and certainly no analysis by the Court of its relationship with the statutory right of cross-examination. For this reason the precedential value of this decision respecting the admissibility of hearsay is problematic.

It is evident that that the discipline committee was aware of the potential weaknesses of hearsay evidence and that it had, because of the factors recited by it, concluded that the evidence in question was sufficiently reliable. The application of the rules of evidence results in the exclusion of hearsay except in the restrictive circumstances admitted by those rules a not wholly desirable thing. For example, the imposition of the requirement for necessity may result in increased costs and delays to administrative proceedings even where there may be no real necessity for cross-examination. Insofar as the approach suggested in this book is aimed at identifying the weakness of tendered evidence and the value or need for its admission, it goes to the essence of the rules of evidence and thus should enable non legally trained agencies to meet the substance of the concerns raised in this case without

becoming bogged down in the technical details.

12.1 See, in illustration, *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*, 2007 CarswellAlta 839, 2007 ABCA 217 (Alta. C.A.). In that case the Alberta Court of Appeal held that the Alberta Municipal Government Board did not err in receiving an expert report written by a team of individuals into evidence in a proceeding where only some of the authors were present at the hearing. The Board recognized that portions of the report would amount to hearsay and took that fact into account in the weight granted the report.

> There is also an allegation of a breach of the rules of natural justice because the Board considered hearsay evidence. The Board is not bound by the rules of evidence, and did consider one expert report which was arguably hearsay in some respects. This report was prepared by a team at Corridor Pipeline, and the witnesses who testified had not drafted all of it. The Board indicated that it would give less weight to the hearsay portions of the report. This is an approach to the admissibility of such evidence that the Board was entitled to adopt in the circumstances.

12.0.1 In *Anten v. Bhalerao*, 2013 CarswellOnt 10349, 2013 ONCA 499, 228 A.C.W.S. (3d) 870 (Ont. C.A.), in the context of a hearing by the Ontario Consent and Capacity Board to determine where a patient lacked capacity, the Ontario Court of Appeal noted that while hearsay was admissible on this type of hearing pursuant to section 15 of the *SPPA* there still had to be some basis for finding that the evidence was sufficiently reliable. In the case in point the Court of Appeal found that the hearsay evidence from one of the parties was so entirely lacking in detail that it provided no basis upon which the Board could make a reasonable decision.

The reliability of hearsay evidence is frequently achieved through corroboration of that evidence by other information that has come before the agency. The Ontario Superior Court of Justice provided an explanation as to when evidence could be considered to be corroborative in *Puri v. Papatheodorou*, 2013 CarswellOnt 5913, 2013 ONSC 2537 (Ont. S.C.J.). The Court in that case was dealing with section 14 of the Ontario *Evidence Act* which provided that in an action by or against an incapable person a decision cannot be based on the party's own evidence but must be corroborated by other material evidence. As to what constitutes "corroboration" the Court stated that at both common law and under statute:

> "62 ... corroborative evidence is evidence from a source extraneous to the witness whose evidence is to be corroborated that is relevant to a material fact in issue, and that tends to show that the witness whose evidence needs corroboration is telling the truth: *Pepe v. State Farm Mutual Automobile Insurance Co.*, 2011 ONCA 341 (Ont. C.A.) (Can LII). Corroboration is not a term of art, but a matter of common sense: *R. v. Warkentin* (1976), [1977] 2 S.C.R. 355 (S.C.C.). In the context of Board hearings, a treating physician's evidence may be corroborated by the patient's evidence: *T. (J.), Re*, 2004 CarswellOnt 6331 (Ont. Cons. & Capacity Bd.)."

In the case in point (a proceeding before the Ontario Consent and Capacity Board) the Court held that as the Board had the authority to accept hearsay evidence it was not improper for the Board to rely on hearsay in corroboration of a doctor's evidence.

12.2 This contrast in trustworthiness and use was repeated in the Saskatchewan Court of Queen's Bench decision in *Michayluk v. Menke Holdings Ltd.* (1998), 169 Sask. R. 39 (Q.B.). There, in the context of a Saskatchewan Rentalsman's hearing the Court said that there was seldom a rational basis for accepting hearsay evidence over a first person denial of the facts alleged. "In informal hearings, hearsay evidence is often expedient for matters which are not controversial. However, if the hearsay evidence is being put forward as proof of a fact(s) which is controversial and denied by first party evidence, it would seem as a minimum that before a hearing officer accepts the hearsay evidence, some opportunity be provided to the party affected to rebut that evidence by third party evidence including the source of the hearsay."

13 For an example, see *L.B. v. Catholic Children's Aid Society of Metropolitan Toronto* (1987), 27 Admin. L.R. 295 (Ont. Div. Ct.).

See also the earlier discussion in chapter 12: 28, "Cross-examination and Hearsay Evidence", respecting the interaction between the ability of agencies to receive hearsay evidence and the right of a party to cross-examine witnesses.

13.01 In *Histed v. Law Society (Manitoba)* (2007), 2007 CarswellMan 504, 287 D.L.R. (4th) 577 (Man. C.A.), leave to appeal to S.C.C. refused (2008), 2008 CarswellMan 206, 2008 CarswellMan 207 (S.C.C.), the Manitoba Court of Appeal held that a lawyer's letter respecting the choosing of a case management judge in legal proceedings was not protected by settlement privilege. The letter dealt with the choosing of a case management judge. The role of that judge would be to facilitate the progress of the proceedings (give directions, hear motions, set dates etc.), not to assist in the settlement of the case.

The fact that the phrase "Strictly Confidential and Without Prejudice" was written at the top of the letter does not attach privilege to the letter if, in fact, the letter was not as part of a settlement negotiation. The substance of the letter had to be considered. ... It is sufficient for our purposes to confirm that the facts in this case support the finding that the parties contemplated the role of this judge as one of case management and thus procedural only. Therefore, the purpose of this communication was not an attempt to effect a settlement. As such, the panel held, and I agree, that settlement privilege does not apply.

13.02 The Ontario Court of Appeal (in obiter statements) also looked to the harmful effect on the proceedings themselves of the admission of evidence which was only marginally probative. The Court of Appeal was considering whether it would be appropriate for a Commission of Inquiry to admit evidence of an incident that was outside of the subject matter of the Commission's inquiry could be admitted as being "reasonably relevant" to the proceedings. In holding that it should not be admitted, the Court felt that if the evidence in question was "a prelude to an avalanche of similar evidence — the reception of which is likely to be very time-consuming, hotly contested and liable to deflect the Commissioner from the task at hand — any marginal probative value that such evidence might have would ... be greatly outweighed by its prejudicial effect."

13.1 See ss. 67 and 77 of the Legal Profession Act, S.M. 2002, c. 44:

> 67 For the purposes of conducting an investigation of a member under this Division, the chief executive officer, the complaints investigation committee or any person designated by either of them may request, and is entitled to obtain, any file or record regarding a client or former client of the member that is reasonably required to further the investigation, whether or not the file or record of any part of it is
>
> (a) subject to solicitor-client privilege; or
>
> (b) the subject of a charge or complaint.

77. A person who, in exercising a power of performing a duty under this Act or the rules, obtains information that is subject to solicitor-client privilege claimed by a member has the same obligation respecting the information as the member. But the person obtaining the information may disclose it for the purpose of an investigation, hearing or appeal under this Part.

13.2 Legislatures, of course, have the authority to displace the common law authority of agencies by providing for the application of specific evidentiary rules to any proceeding. See *Cambie Hotel (Nanaimo) Ltd. (c.o.b. Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch)* 2006 CarswellBC 548 (B.C.C.A.).

13.3 See for example, *Toronto (City) v. C.U.P.E., Local 79* (2000), 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72 (Ont. Div. Ct.) (Ontario arbitrator entitled to rely on s. 22.1 of the Ontario Evidence Act).

13.4 See the discussion earlier in c. 9.2 "What is Procedure". In an earlier article *(Evidence Before Administrative Agencies: Let's All forget the "Rules" and Just Concentrate on What We're Doing"* (1995), 8 C.J.A.L.P. 263) I had expressed a more general assertion that agencies with express statutory provisions freeing them from the technical rules of evidence were likely not subject to the restrictive provisions of the various *Evidence Acts*. Prof. Bernard Adell, in his later article *Evidence in Labour Arbitration: Is There Too Much Pressure To Admit Almost Everything?* (1997), 23 Queen's L.J. 67 commented on this general assertion: "I would venture to suggest that insofar as labour arbitration is concerned, Mr. Sprague's assertion is true with respect to any [of] the exclusionary provisions of the Evidence Acts which are based on considerations of process or on concerns about the trustworthiness of the evidence in question — for example, limitations on the use of prior inconsistent statements. Such provisions are in my view unlikely to bind arbitrators. However, I do not think that is so with respect to provisions designed to protect a relationship or designed to protect a witness's fundamental rights — in other words, provisions which create a privilege or some sort." For the reasons which may be found in the main text discussion on this point I generally agree with the suggested parameter laid down by Prof. Adell on the extent of the freedom granted by express statutory grants of freedom from the rules of evidence.

13.5 Solicitor/client privilege was recognized as a substantive right rather than a procedural one, by the Supreme Court of Canada in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590 (S.C.C.). To the same effect see *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (2009), 97 O.R. (3d) 665 (Ont. Div. Ct.) ("Solicitor-client privilege is no longer considered to be a rule of evidence, but a substantive rules that has evolved into a fundamental civil and constitutional right."). See also *Canadian Broadcasting Corp. v. Paul*, [2001] F.C.J. No. 542 (Fed. C.A.) where the Federal Court of Appeal held that an agency was also bound the non-disclosure privilege accorded negotiations aimed at settlement.

See also the comments in *R. v. Mercure*, 1988 CarswellSask 251, 48 D.L.R. (4th) 1, [1988] 1 S.C.R. 234 (S.C.C.) respecting rules which appeared to be process oriented but which are really substantive rights.

> I should observe here that, while s. 110 governs procedural matters, it does not serve merely procedural ends. It em procedural rules that give rights to individuals and, in fact, those rules are to some extent framed in terms of rights. "Either the English or French language", s. 110 reads, *"may be used by any person* in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts" (emphasis added). As well, the printing of the records and the enactment, printing and publishing of the statutes in both languages are not purely mechanical rules of procedure but are obviously intended for the benefit of the individuals who use these languages. As this court noted in *Ref. re Man. Language Rights*, supra, at p. 744, in speaking of the duty imposed by the similarly worded s. 23 of the Manitoba Act, 1870:
>
> > This duty protects the substantive rights of all Manitobans to equal access to the law in either the French or the English language. They are language rights or language guarantees as all the cases in this court from *Jones v. A.G.N.B.*, [1975] 2 S.C.R. 182, (sub nom. Jones v. A.G. Can.) 16 C.C.C. (2d) 297, 45 D.L.R. (3d) 583, (sub nom. Re Official Languages Act) 2 N.B.R. (2d) 526, 1 N.R. 582, to *Soc. des Acadiens du N.B. Inc. v. Assn. of Parents for Fairness in Educ.*, [1986] 1 S.C.R. 549, 19 Admin. L.R. 211, 27 D.L.R. (4th) 406, 23 C.R.R. 119, 69 N.B.R. (2d) 271, 122 A.P.R. 271, (sub nom. Soc. des Acadiens du) 66 N.R. 173 *N.B. Inc. v. Minority Language (Sch. Bd. 50)*, make clear. A parallel situation exists in other areas of procedural law. Thus most of the rules of evidence are directed at purely procedural purposes, but others are aimed at protecting certain institutions; for example, the rule against compelling spouses from testifying against one another serves no procedural end but is grounded in the desire to protect the marital relationship: see *Hoskyn v. Metro. Police Commr.*, [1979] A.C. 474, [1978] 2 W.L.R. 695, 67 Cr. App. R. 88, [1978] 2 All E.R. 136 (H.L.), per Viscount Dilhorne, at p. 494, and Lord Salmon, at p. 495.

Notwithstanding the last sentence of the foregoing quotation, the Supreme Court had already earlier ruled that the privilege against spousal compulsion was a procedural matter — not a substantive right as: "Spouses do not have a substantive right to the confidentiality as to what either was seen doing by the other or to the confidentiality of what was to the other communicated by either" *(Wildman v. R.*, [1984] 2 S.C.R. 311, 12 D.L.R. (4th) 641 (S.C.C.)).

13.6 Nor can an agency draw an adverse inference from the fact that a party relies on a privilege which is granted by the law *(Fortis Properties Corp. v. United Steelworkers of America, Local 1-306*, 2006 CarswellNB 434 (N.B.Q.B.))

13.7 [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590 (S.C.C.)

13.8 This is evident, for example, in s. 15(2) of Ontario's Statutory Powers Procedure Act where the general freedom from the rules of evidence in s. 15(1) is made subject to things protected by a privilege under the laws of evidence.

13.9 Again, see the discussion in c. 9.2.

14 It is likely unnecessary to remind decision-makers that these statutory provisions override the common law freedom of agencies from evidentiary rules. There is, for example, case law to the effect that the failure to follow a statutory evidentiary provision can lead to a loss of jurisdiction *(Hubley v. Workers' Compensation Board (N.S.)* (1992), 111 N.S.R. (2d) 295, 303 A.P.R. 295 (N.S.C.A.); *Moore v. Workers' Compensation Board* (P.E.I.) (1992), 101 Nfld. & P.E.I.R. 119, 321 A.P.R. 119 (P.E.I. C.A.); *Burgess v. Workers' Compensation Board (N.S.)* (1994), 130 N.S.R. (2d) 32, 367 A.P.R. 32 (N.S. S.C.); *Paulson v. Canada (Canadian Pension Commission* (March 27, 1985) Doc. A-367-84 (Fed. C.A.)). The Manitoba Court of Appeal concluded otherwise, however, in *Bouchard v. Manitoba (Workers Compensation Board)* (1997), 48 Admin. L.R. (2d) 61 (Man. C.A.) where it held that the standard of review in such cases was patent unreasonableness, not correctness.

15 A similar provision exists in s. 39 respecting proceedings before the Veterans Review and Appeal Board. Both provisions are similar to the current s. 10(5) of the Pension Act.

16 *Nand v. Board of Education Public School District No. 7* (1995), 157 A.R. 123 (C.A.) *British Columbia (Superintendent of Brokers) v. Rak* (1990), 74 D.L.R. (4th) 725, 47 Admin. L.R. 243 (B.C. C.A.) *Flynn v. Nova Scotia (Criminal Injuries Compensation Board)* (1988), 49 D.L.R. (4th) 619 (N.S. C.A.) *Gillen v. College of Physicians & Surgeons (Ont.)* (1989), 68 O.R. 278 (Div. Ct.).

17 Teitelbaum J. in *Tonner v. Canada (Minister of Veterans Affairs)* (1995), 94 F.T.R. 146 (Fed. T.D.). To the same effect see *Paulson v. Canada (Canadian Pension Commission)* (1985), 62 N.R. 75 (Fed. C.A.); *Burgess v. Workers' Compensation Board* (N.S.) (1994), 130 N.S.R. (2d) 32, 367 A.P.R. 32 (S.C.).

17A In illustration, see *Anderson v. Canada (Attorney General)*, 2009 CarswellNat 3426, 2009 FC 1122 (Fed. Ct.) which dealt with similar evidentiary directions in the Veterans Review and Appeal Board Act.

Sections 3 and 39 of the Veterans Review and Appeal Board Act effectively reduce the standard of proof usually imposed on an applicant. However, the Federal Court has affirmed that while an applicant does not need to establish his or her on the balance of probabilities he or she must still show more than a mere possibility

> 3 The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.
>
> 39. In all proceedings under this Act, the Board shall
>
> *(a)* draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;
>
> *(b)* accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
>
> (c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

The Court stated that that it was not unreasonable for the Board to reject a request for reconsideration on the basis that new tendered evidence both had little weight and was unpersuasive.

> Sections 3 and 39 of the *VRAB Act* do not relieve the applicant of his burden of establishing a causal link between the injuries he suffered in 1955 and the condition under review.
>
> Although the Court does not agree with the respondent's view that this must be done on a balance of probability, Mr. Anderson still had to establish more than a mere possibility.

17A.1 In *Tegunya v. Canada (Minister of Citizenship & Immigration)*, 2012 CarswellNat 62, 2012 FC 42 the Federal Court noted that every piece of evidence tendered in an administrative proceeding need not itself address all of the specific issues before the agency. Some evidence may address only specific points, other evidence may provide necessary background to the facts, other evidence may be tendered to fill in gaps. In reaching a decision the evidence should be considered as a whole:

> "24 The last significant piece of evidence from an individual is an affidavit from a Rwandan lawyer, Eric Cyaga. That affidavit speaks to the trial of the Applicant's father, his prolonged detention before trial (10 years) and that contact now with the father is impossible. The Officer dismisses the affidavit on the basis that it does not address certain issues specific to the Applicant:
>
> De plus, bien que ce document en question mentionne que le père de monsieur a été condamné à 22 ans de prison, il ne permet pas de conclure à la présence de risques pour le demandeur.
>
> Ce dernier rapporte des frères et soeurs au Rwanda pour lesquels il ne précise ni incarcération, ni arrestation. Il n'explique pas non plus en quoi le fait d'être le fils de son père pourrait lui causer des risques au Rwanda étant donné le défaut de monsieur de démontrer que sa fratrie aurait, depuis cette condamnation, rencontré des difficultés de la part des autorités qui pourraient conduire à une incarcération
>
> Je considère, donc, que ce document ne permet pas de conclure que le demandeur pourrait être incarcéré ou accusé advenant un retour au Rwanda, ni qu'il pourrait être à risque dans son pays d'origine.
>
> 25 This dismissal is unreasonable. The affidavit must be considered for what it does say. Not every piece of evidence must be directed to every specific point in issue. A party must be allowed to build its case, certain parts are background, other parts fill in gaps. The evidence as a whole is to be considered. No piece should be dismissed simply because it is a piece."

17B See, in illustration the decision of the Australian Federal Court — Full Court in *Kowalski v. Repatriation Commission* 2010 WL 780208, [2010] FCAFC 19 (Aust. Fed. Ct. — Full Ct.) where the Court held that it was proper for the Australian Administrative Appeals Tribunal to refuse to allow a party to ask questions that were irrelevant or otherwise objectionable.

> 17 In oral argument, Mr Kowalski sought to make good the claim of bias in yet another way. He argued that the Deputy President was biased because he did not permit Mr Kowalski to ask certain questions of witnesses who gave evidence before the Tribunal. That complaint was also the basis for an assertion of denial of procedural fairness.
>
> 18 Mr Kowalski took us to a large number of transcript references to support his argument. However, rather than supporting his claim, the numerous passages of the transcript to which we were referred merely made good the finding of the primary judge at [80]. As his Honour said, an applicant is not entitled to ask whatever question he or she thinks appropriate; the Deputy President had the power to disallow irrelevant, or otherwise objectionable, questions and:
>
> "... the Deputy President did no more than exercise appropriate control in respect of the conduct of the application for review."

See also *Innes v. IWA Canada, Local 1-2567*, 2011 CarswellBC 1831, 2011 BCSC 939 (B.C.S.C.). (There is no requirement that an agency receive information which is not relevant to the issues before it. Fairness does not dictate that an agency to have before it a document which is not relevant, probative or material to the proceeding before it.)

17.1 See, in illustration, *Forrest v. Canada (Attorney General)* (2002), F.T.R. 82 (Fed. T.D.), where the Federal Court Trial Division held that a prison Disciplinary Court did not err in refusing to allow an inmate to introduce evidence to establish a claim that was irrelevant to the issue before the Court. The Federal Court Trial Division stated that "Restricting the hearing to relevant evidence is an important and necessary part of the Chair's job. The fact that the relevancy rulings were contrary to the wishes of the applicant does not indicate bias."

There is no requirement that an agency receive information which is not relevant to the issues before it. Fairness does not dictate that an agency to have before it a document which is not relevant, probative or material to the proceeding before it. *Jones v. IWA-Canada, Local 1-2567*, 2011 CarswellBC 1834, 2011 BCSC 979 (B.C.S.C.)).

17.1.1 The Court of Appeal noted that it was very difficult to determine what was relevant to the case as what was in issue was not easy to determine. Between the broad scope of the evidence called by the unrepresented litigant bringing the complaint in question and the counsel for the respondent who assured the Board that his evidence was relevant and that this would become apparent as the hearing progressed the Board was faced with a difficult task.

> Hindsight is always 20:20. With the benefit of hindsight, a different and better approach might have been taken. However, the fairness of what the Board did must be assessed in the context of how the hearing unfolded and with the Board's considerable procedural discretion in mind. In all of the circumstances, I cannot fault the Board for failing to have exerted more control sooner. It would not have been easy to disallow evidence on the grounds of irrelevance for the simple reason that it was hard to say at the early stages of the hearing what was and was not relevant. .
>
> The Board had considerable discretion as to its procedure. It was not obliged to follow the strict rules of evidence that apply in court. In the context of this hearing, I respectfully cannot agree with the judge that the Board committed reviewable error by permitting evidence to be called which, in retrospect and with the benefit of hindsight, might better have not been received. The Board's reception of some irrelevant evidence on the first day of a five day hearing — evidence which the Board repeatedly indicated was not relevant or helpful and which clearly played no part in the decision — did not so seriously compromise the fairness of the hearing that the Board's decision must be quashed. In my respectful opinion, the judge erred in doing so.

17.1.2 In *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner*, 2008 CarswellOnt 191, 2008 ONCA 33 (Ont. C.A.), the Ontario Court of Appeal (in obiter) considered whether evidence respecting an incident that was outside of the subject matter of a Commission of Inquiry could be admitted before the Commission as being "reasonably relevant" to the inquiry. In considering the evidence in question before it, the Court of Appeal concluded that it should not be admitted as being reasonably relevant. The evidence had no probative value as it did not speak to systemic problems that could shed light on similar problems in the specific subject matter of the Commission. Furthermore, the Court stated that if the evidence was "a prelude to an avalanche of similar evidence — the reception of which is likely to be very time-consuming, hotly contested and liable to deflect the Commissioner from the task at hand — any marginal probative value that such evidence might have would . be greatly outweighed by its prejudicial effect."

17.1.2.1 *Statutory Powers Procedure Act (Ontario)*

> 5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,
>
> (a) the exchange of documents;
>
> (b) the oral or written examination of a party;
>
> (c) the exchange of witness statements and reports of expert witnesses;
>
> (d) the provision of particulars;
>
> (e) any other form of disclosure.
>
> (1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.
>
> (2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.
>
> 15.(2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) that is inadmissible by the statute under which the proceeding arises or any other statute.
>
> *Administrative Tribunals Act (B.C.)*
>
> 40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.
>
> (2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.
>
> (3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.
>
> (4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.
>
> (5) Notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application are inadmissible in tribunal proceedings.