



## Credibility Assessments

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## Making Effective Submissions on Credibility and Reliability

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### Legal principles for the assessment of credibility

When dealing with witnesses whose credibility and/or reliability may be in question, it is important throughout the trial to bear in mind the principles upon which our courts will evaluate their evidence.

The court will first consider the witness's testimony on a stand-alone basis, then analyse whether their story is believable in the context of the facts of the case. It will then turn to an evaluation of the testimony based on its consistency with evidence of other witnesses and documentary evidence. Testimony of non-party, disinterested witnesses is particularly instructive. The court will determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: [\*Youyi Group Holdings \(Canada\) Ltd. v. Brentwood Lanes Canada Ltd.\*, 2019 BCSC 739](#), at paragraph 91, appeal dismissed [2020 BCCA 130](#), leave to SCC refused 2021-01-21, SCC 39246.

The Court will assess a witness's evidence with the probabilities that surround existing conditions. The real test of the truth of the story of a witness is its harmony with the "preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": [\*Faryna v. Chorny\*, 1951 CanLII 252 \(BC CA\)](#), at page 357.

An important factor in assessing credibility is whether a witness's evidence harmonizes with independent evidence that has been accepted. Ultimately, the validity of the evidence depends on whether it is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: [\*Bradshaw v. Stenner\*, 2010 BCSC 1398](#), at paragraph 186, aff'd [2012 BCCA 296](#).

The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. The court should determine which version of events is the most consistent with the evidence: [\*Bradshaw\*](#), at paragraph 187.

Documents created at the time of events will often provide an accurate reflection of what occurred, rather than memories that have weakened with the passage of time, hardened through litigation, or been reconstructed: [\*Bradshaw\*](#), at paragraph 188.

An inability to produce relevant documents is a factor that may, in appropriate cases, negatively affect credibility: [\*Bradshaw\*](#), at paragraph 188.

Credibility will be called into question if a witness's story has changed over time; if a witness has produced false documents regarding the issues at trial; if a witness (or party) has failed to produce documents; if a witness's explanation defies business logic or common sense; and when a witness has a propensity to blame others people when confronted with damaging evidence, including blaming lawyers and others who are not in the courtroom or who remain unnamed: [\*R. v. Malik\*](#), 2005 BCSC 350, at paragraph 1197; [\*Clock Holdings Ltd. v. Braich Estate\*](#), 2008 BCSC 1697, at paragraphs 45-46; [\*Osayande v. Canada \(Minister of Citizenship And Immigration\)\*](#), 2002 FCT 368, at paragraphs 19-21; [\*Pacific West Systems Supply Ltd. v. Vossenaar\*](#), 2012 BCSC 1610, at paragraphs 84 to 86; [\*R. v. Storey\*](#), 2010 NBQB 86, at paragraph 78; [\*Wang v. Wang\*](#), 2017 BCSC 2395, at paragraphs 45-46 and 89-90.

Interestingly, the fact that a witness has previously lied, even under oath, does not require a finding that she lacks credibility generally, or that her evidence is necessarily unreliable: [\*Virk v. Singh\*](#), 2020 BCSC 225, at paragraph 67.

Where an oral agreement is alleged, the evidence must be tested against those facts that are not seriously in dispute and with the preponderance of the evidence and the probabilities surrounding the events: [\*Piga v. Uffelman\*](#), 2022 BCSC 983, at paragraph 14.

While demeanour plays a role, it should not be the sole deciding factor in credibility assessments; it can be affected by a witness's lack of familiarity with judicial proceedings and culture: [\*R. v. N.S.\*, 2012 SCC 72](#), at paragraphs 99–107, per Justice Abella's dissent, cited with approval in [\*L.C.T. v. R.K.\*, 2017 BCCA 64](#), at paragraph 65. As our Court of Appeal mentioned in [\*Faryna v. Chorny\*, 1951 CanLII 252 \(BCCA\)](#) at page 356-357:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth.

#### Credibility and Reliability are not all-or-nothing Propositions

A court may believe all, part, or none of a witness's evidence and can attach different weight to different parts of that evidence: [\*Radacina v. Aquino\*, 2020 BCSC 1143](#), at paragraph 96. Credibility relates to honesty while reliability relates to accuracy: [\*Sojka v. Sojka\*, 2023 BCSC 52](#), at paragraph 55.

As Justice Girn recently mentioned in [\*Pellerin v. Balfour\*, 2024 BCSC 2135](#), at paragraph 13, a credible witness is not necessarily a reliable witness.

Credibility and reliability are different. Credibility has to do with a witness's veracity, while reliability concerns the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events. A witness whose evidence is not credible cannot give reliable evidence on the same point: [\*R. v. H.C.\*, 2009 ONCA 56](#), at paragraph 41.

The evidence of a credible, honest witness, may still be unreliable: [\*R. v. Morrissey\*, 1995 CanLII 3498 \(ON CA\)](#) at pages 16-17.

Courts are free to reject some aspects of a witness's evidence while accepting others and can assign different weight to different parts of witness evidence: [\*Moinzadeh v. Loblaw's Inc.\*, 2021 BCSC 793](#) at paragraph 15.

A credible witness can make honest mistakes. There is no requirement that a court believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier of fact may believe none, part or all of the witness's evidence and may attach different weight to different parts of a witness's evidence; see [\*Mancinelli v. Mancinelli\*, 2021 BCSC 94](#), at paragraphs 26 to 29.

### Witnesses from other Cultures

The courts have cautioned that cultural and linguistic considerations may affect the assessment of a witness's credibility, in appropriate respects.

In [\*Fu v. Zhu\* 2018 BCSC 9](#), Madam Justice Griffin, as she then was, considered credibility of witnesses of another country or culture who did not speak English:

39. Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.

40. I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.

41. As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.

42. On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.

### Witness preparation

It can sometimes be useful to discuss credibility in the course of witness preparation. Your trial witnesses might be interested to learn about credibility and reliability, such as the following factors that tend to enhance credibility :

- attending court dressed appropriately (business casual for a lay witness, suit & tie for any expert);
- answering questions directly;
- remaining calm during questioning;
- sticking to facts and refraining from making speeches;
- not arguing with opposing counsel;
- not attempting to argue the law;
- admitting if they are unable to answer a question or cannot recall a detail;
- providing evidence that is consistent throughout (be it affidavit evidence or discovery/trial testimony)
- providing evidence that accords with the pleadings, or being prepared to explain any material divergence from the pleadings;
- being resolute but not dogmatic during cross-examination (firmness of memory communicated in a respectful manner);
- ensuring that document production is made diligently, authentically and in a timely fashion;
- providing evidence that accords with common sense;
- providing evidence that harmonizes with independent evidence/documents;
- not blaming others for mistakes or omissions;
- admitting obvious truths; and
- not minimizing their involvement in relevant events.

Communicating these factors to a witness at all stages of the proceedings, and particularly during trial preparation, may assist in bringing out a more compelling narrative and in minimizing the impact of otherwise distasteful traits.

### Arguing Credibility

In closing submissions, counsel are often tasked with trying to convince the Court that a witness(s) for the opposing party was not credible while at the same time defending one's own client's credibility and reliability.

The approach we have taken in several long civil trials is to subject each key witness to analysis using factors derived from the above caselaw. We have found it useful to address any issues regarding the credibility and reliability of our own witnesses head-on, potentially minimizing the impact of our opponent's inevitable attacks in their closing.

Attached at **Tab 1** is a sample of a chart we have used to argue both for and against the credibility of witnesses at trial.

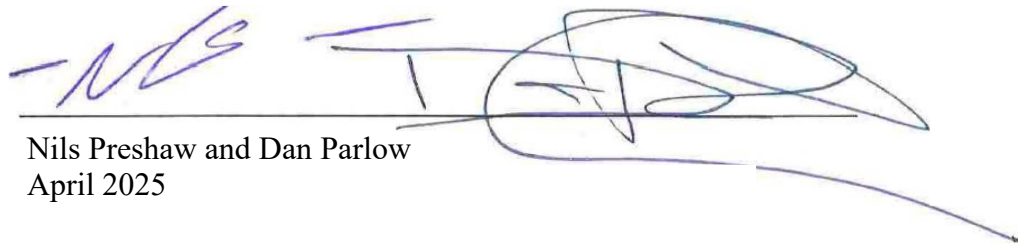
### Relying on Evidence of a Witness Lacking in Credibility

While it is all well and good to argue that a particular witness was not credible and that the Court should reject his or her evidence, trials often require counsel to rely on *some* aspects of a witness's testimony (e.g. as support for a particular event or document) even while arguing that the witness's credibility was lacking generally.

For example, even where counsel feel they will be successful in convincing the court that an opposing party's witness was not credible, there is often a need to rely on at least *some* of that witness's evidence to establish or corroborate particular evidence (e.g. the date of a critical meeting, the date document was signed, or the contents of a particularly important discussion). Simply arguing that a witness was not credible and that as a result *all* of their evidence should be rejected can be counter-productive.

Arguing that a witness’s testimony should be rejected “but for” discrete aspects of their testimony may well be persuasive where counsel is able to point to admissions against interest, uncontroversial matters, or where the witness’s evidence has been corroborated by a credible source of reliable evidence: see for example [J.A.A. v C.G.A., 2024 BCSC 1817](#), at paragraph 34. By so focusing one’s submissions, counsel can benefit from certain evidence given by even the most problematic witnesses.

We hope that this paper assists you in arguing credibility and reliability at trial.



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