

The Reliability Factor under the Principled Approach to Hearsay: “Can you Trust the Dead Guy?”

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By Peter T. Linder, Q.C. and Elena Semenova

This section will explain the reliability factor; and if, when, and how to object.

THE PRINCIPLED APPROACH TO HEARSAY

Hearsay is an out-of-court statement that is being tendered for the truth of its contents. Hearsay is presumptively inadmissible, unless it can be shown that it falls under one of the recognized exceptions.

Since the Supreme Court of Canada decision of *R. v. Khan* and subsequently *R. v. Starr* and *R. v. Khelawon*, the ‘principled approach’ to hearsay has largely overtaken the traditional exceptions to hearsay. The principled approach can be summarized as follows: “where it is reasonably necessary that the hearsay statement be received and there is a basis for concluding that the evidence is reliable, a trial Judge may receive such evidence.”¹

The factor of necessity relates to relevance and availability of evidence. There are various degrees of necessity ranging from the fact that the declarant is deceased or ill, or incompetent to testify, or otherwise unavailable, to the fact that, although he or she is available to testify, little would be gained by the declarant’s attendance in court. At trial, if a hearsay statement is sought to be admitted for the truth of its contents, it is because it cannot be introduced by any other means. In such situations, the necessity factor will usually be made out and it is reliability that will be in issue.

In that regard, it should be kept in mind that the factors of necessity and reliability are not completely isolated from each other, but rather, are part of the same continuum. As stated by Sopinka in *The Law of Evidence in Canada*:

Accordingly, there may be instances where the necessity is so great – such as where the declarant is dead – that some elasticity on the issue of reliability may be given.²

¹ Justice Hawco in *Heritage Freehold Specialists & Co. v. Montreal Trust Co.* (1997), 208 A.R. 241 (Q.B.) at para. 8

² Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexisCanada Inc., 2014) at 266