Common Objections: Trial Reference Binder

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COMMON OBJECTIONS: TRIAL REFERENCE BINDER

THE BASIC RULE OF ADMISSIBILITY: RELEVANCE AND MATERIALITY

Rule:

"Information can be admitted as evidence only where it is relevant to a material issue in the case."[1]

It may therefore be a valid objection that a question should not be permitted, a witness should not be entitled to give evidence or a document should not be entered on the basis of irrelevance or immateriality. Note this is not to say that all relevant and material evidence will be admitted – that evidence might still be excluded on the basis of either an exclusionary rule or the discretion of the judge.[2]

The Ontario Court of Appeal defined relevance and materiality as follows in *R. v. Collins* (2001), 160 C.C.C. (3d) 85 (ONCA) at para. 18:

> A witness' testimony as to observed facts is, of course, subject to the general principles governing the admissibility of any evidence: relevance and materiality. *Relevance* is established at law if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced. The evidence is *material* if it is directed at a matter in issue in the case. [1] Hence, evidence that is relevant to an issue in the case will generally be admitted. Indeed, it is a fundamental principle of our law of evidence that any information that has any tendency to prove a fact in issue should be admitted in evidence unless its exclusion is justified on some other grounds: see *R. v. Corbett*, 1988 CanLII 80 (SCC), [1988] 1 S.C.R. 670 at 715; *Morris v. R.*, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190 at 201; and *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577 at 609.
>
> [Emphasis Added]

Evidence is relevant "where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence."[3] The Supreme Court of Canada commented on the relatively low standard for establishing relevance in *R. v. Arp,* [1998] 3 S.C.R. 339 at para. 38:

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue"…As a consequence, there is no minimum probative value required for evidence to be relevant.

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1 David M. Paciocco and Lee Stuesser, The Law of Evidence, 7th ed (Toronto: Irwin Law Inc., 2015) at p. 27 ["Paciocco"]

2 Paciocco at p. 27

3 Paciocco at p. 30

[Citations Omitted]

Civil Disclosure Standard:

The standard of disclosure in civil proceedings also references relevance and materiality (see Rule 5.6 of the Alberta *Rules of Court*). Rule 5.2 addresses the determination of when something is relevant and material. These rules have been the subject of considerable jurisprudence (see, for example, *Canadian Natural Resources Ltd. V. ShawCor Ltd.,* 2013 ABQB 230).

Note that just because a record has been disclosed or produced this does not amount to an admission that it is relevant and material (Rule 5.2(2))

Strategic Considerations:

- While evidence must be relevant and material to be admissible, it may not be immediately obvious why a line of questioning meets this standard. While it may be appropriate to object eventually when it is clear a line of questioning is going nowhere, early or frequent objections are not likely to win the favour of the judge.
- The rule can be somewhat more strictly applied when opposing counsel seeks to enter an exhibit. If it is not apparent why the exhibit has any relevance, it may be appropriate to rise and indicate this to the court. Opposing counsel may then be asked to articulate the basis for entering the exhibit. The standard of relevance and materiality that the court applies is likely to be low – therefore, when relevance is truly unclear, a "soft" objection (ie: "the relevance of this document isn't clear to me Your Honour") is more appropriate than a vehement objection (ie: "this document should not be admitted").
- It is a good exercise to ensure that you, yourself, know the purpose and are able to articulate the relevance of all the evidence that you are putting forward. This seems like a basic consideration, but it is something that can occasionally get lost in the flurry to prepare for trial.

Relevant Case Law:

- *R. v. Arp*, [1998] 3 S.C.R. 339
- Contains a discussion of relevance at para. 38

- *R. v. Collins* (2001), 160 C.C.C. (3d) 85 (ONCA)

- Contains a discussion of the principles of relevance and materiality at para. 18; see also the Supreme Court cases cited therein for the principle that any information with a tendency to prove a fact in issue should be admitted unless exclusion is justified on another ground.

LEADING QUESTIONS

Rule:

In Examination in Chief, the "most important rule" is the prohibition against leading questions.[4] Leading questions are explained as follows in the Canadian Encyclopedic Digest ["CED"]:[5]

> **Leading questions** normally suggest to the witness what his or her answer should be. Another type of **leading question** is one that assumes the existence of a disputed fact. Thus, in a tort case, if counsel for the plaintiff asked the witness where he was standing when the accident occurred before proof had been tendered showing that there was, in fact, an accident, it would be regarded as a **leading question**. The reason for the prohibition is that a party who calls a witness has a good idea of what the evidence is likely to be, and there is a danger that the examiner will curtail the witness from giving a balanced version of the evidence. Moreover, the witness may have a tendency to assent to what is suggested rather than give the actual version of events.

Exceptions:[6]

- Preliminary Matters
- Non-Contentious matters
- Directing to a new area of inquiry
- With leave when necessary because of difficulty testifying (youth, mental disability)
- Hostile or adverse witnesses (following declaration by court)

Strategic Considerations:

- Opposing counsel should be shown some latitude especially when dealing with non-controversial areas, but leading during material areas warrants an objection.

4 CED 4th (online), Evidence, at s. 231 ["CED"]

5 CED at s. 231

6 CED at s. 232