

Arbitration and The Rules of Evidence

By William G. Horton*

In the early nineteenth century, England abolished the “forms of action”, a very technical set of rules regarding the pleading of cases. In the first decade of the twentieth century, the legal historian F. W. Maitland wrote: “The forms of action we have buried, but they still rule us from their graves.”

As lawyers we are very reluctant to give up rules with which we are familiar. Rules are hardwired into our professional brains. Arguing cases within pre-existing sets of rules is how we define our professional identity and earn our living.

So what does it mean to us as lawyers when it is said: “The rules of evidence do not apply to arbitration.”? The first reaction is often a mild form of denial.

Lawyers speaking of this principle will often rephrase it to say: “The strict rules of evidence do not apply in arbitration.” But this is an odd way to describe the intended reform. Does it mean that the “strict” rules do not apply but the less strict rules do apply? Or does it mean that all the rules still apply but not as strictly? Or, perhaps, that the rules should still be considered and applied whenever it makes sense to do so? The latter two meanings seem reasonable, but not in light of any of the possible reasons for saying that the rules do not apply in the first place. Does it make sense to still have to argue points of evidence as if the rules and the case law in which they are to be found do actually apply, and then also have to make additional arguments about whether they should apply in case at hand? What guidance or efficiency does a rule provide if the need to apply it is itself a matter of discretion and therefore argument?

The Ontario Arbitration Act imports from the Statutory Powers Procedure Act the provision which says that the rules of evidence do not apply, except for relevance and privilege. The Alberta Arbitration Act says simply and directly “The arbitral tribunal is not bound by the rules of evidence...”. But the result under both Acts is the same.

Relevance is an inherent feature of any rational inquiry or investigation, not just legal proceedings. In legal proceedings, a fact is relevant if it could engage or affect the application of substantive principles of law. Issues of legal relevance are therefore unavoidable in arbitration, unless the parties have chosen to arbitrate their dispute on the basis of “business fairness” or “equity”.

Privilege is not actually a rule of evidence. It is a substantive right that protects a party from having to disclose that which procedural or evidentiary rules would otherwise require to be revealed. In legal systems (such as in continental Europe) that have little or no requirement for disclosure to be made in legal proceedings, the concept of privilege is similarly non-existent or weak.

With these limited qualifications, what we are really dealing with in arbitration is information that has been tendered in an adjudicative process. But it is not “evidence” in the sense that it has been passed through a filter of exclusionary rules.

Does this imply that the arbitration process is necessarily less rigorous than litigation in assessing information? I would suggest not.

The absence of the rules of evidence places a greater emphasis on the rational evaluation of information which is common to all truth seeking activities, and perhaps also on the rules of logical analysis which are often bent or broken in the cause of brilliant advocacy.

We do not need the rules of evidence to teach us that it is important to consider the reliability and objectivity of the source of any information, the presence or absence of corroborating facts, the proof of assumptions and whether the theory fits all of the known facts. Nor do we need them to understand that it is important to be on the alert for logical fallacies such as appeals to emotion, assuming unknowable facts in one’s favour or assuming causal links based on temporal sequence alone.

In the information age in which we live, these processing skills have become increasingly important, not just in legal proceedings, but in every aspect of public and private life as we are all inundated with unfiltered information from numberless sources.

The recent development (some would say the evisceration by the Courts themselves) of the hearsay rule can be seen as a product of this universal shift. The hearsay rule and other rules, such as the rule in *Brown v Dunn*, rules regarding the withdrawal of admissions or even the qualification of experts which continue to apply in Court proceedings are replaced in arbitration not by nothing but by a pragmatic evaluation of the situations that would have been covered by these rules.

Understanding and embracing this difference is a key to unlocking the full potential of arbitration as an alternative to court based litigation.

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