

## Making Tough Credibility Findings

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One of the most difficult tasks for members of discipline hearing panels is to make credibility findings. Such findings are particularly challenging in sexual abuse matters. So it is helpful when a court provides specific guidance on how hearing panels can properly make such determinations. Earlier this month the Divisional Court did just that in *Takashima v. Ontario College of Teachers*, 2015 ONSC 3125.

In *Takashima* the issue was whether the teacher and a student engaged in a sex act. Both the teacher and the student testified. They both denied that a sex act had taken place. The only eye witness was the school caretaker who testified that he had observed what appeared to be a sex act occurring when he walked into a staff room. The school secretary also testified about entering the room afterwards, where the other three witnesses remained, and observing an awkwardness in the room and that the student was red faced and teary. Video evidence confirmed that the teacher and the student entered the staff room together prior to being discovered.

The hearing panel found that the sex act had taken place. On appeal there were three issues. The first one was whether the hearing panel had properly addressed the inconsistencies in the caretaker's evidence. The Court said:

With respect to the alleged inconsistencies, the Panel was not required to resolve every alleged inconsistency in the evidence when making its credibility findings.... Further, in

our view, the alleged inconsistencies either did not exist or were not material. For example, the appellant alleges that the caretaker first testified that when he entered the staffroom he did not see the computer screen. Later he stated that he thought the computer was on. In our view, it is not inconsistent that the caretaker did not see the computer screen, but that he thought the computer was on. This was a legitimate inference to draw since when he entered the staffroom both the appellant and the student were looking at the computer screen. An example of an alleged inconsistency that was not material is the fact that the caretaker and the secretary gave different accounts as to how the student and the appellant exited the school after the events occurred.

This single paragraph provides good suggestions for assessing inconsistencies in a witness' testimony. Determining whether there really is an inconsistency in the evidence is a useful starting point. Then the hearing panel can consider whether any actual inconsistency is material.

The second issue was whether the hearing panel had disregarded the evidence of the teacher and the student. The Court said:

It is true that there was no one who corroborated the crucial aspect of the caretaker's account as to what he saw and heard in the staffroom. It is also true that the caretaker did not actually see [actual sexual contact]. However, the Panel was entitled to accept the evidence of the caretaker as to what he saw and heard in the staffroom even if it

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was not corroborated by any other evidence. In its reasons the Panel detailed why it accepted the caretaker's evidence and among other things, pointed to the fact that the caretaker had no motive to lie and that some aspects of the caretaker's account were confirmed by other evidence. From the evidence that the caretaker gave... the inference that the student and the appellant were engaged in [actual sexual contact] was an inference the Panel was entitled to draw.

We found no merit to the appellant's submission that the Panel disregarded the evidence of the student or the appellant. The Panel did not disregard the student's or the appellant's evidence. It reviewed it in detail, weighed it and found that it did not accept it. In doing so it made the credibility findings it was entitled to make and to which we owe considerable deference.

The comments by the Court that there is no need for corroboration and about the ability to make appropriate inferences are useful. In addition, the Court's comments reinforce the value in addressing the evidence of the witnesses that are not believed and not relying just on the evidence of the witnesses who were believed.

The third issue was whether the hearing panel could draw an adverse inference from the teacher's lack of cooperation with his employer's investigation into the matter. The Court said:

On the question of the Panel's drawing an adverse inference from the appellant's failure to co-operate with the Board's investigation,

we accept that the appellant may have had a legitimate reason for wanting to consult with a lawyer before he co-operated in an investigation concerning an allegation that he sexually assaulted a student. At the same time, the Board was not engaged in a criminal investigation and thus the appellant did not have the right to silence that he would have in a criminal proceeding. In any event, we find that even if the Panel erred in drawing such an inference (which is not a finding we are making) this formed a minor part of their reasoning. Reading the Panel's reasons as a whole, it is clear that even without the use of any adverse inference the Panel would have come to the conclusion it did, a conclusion that we find was reasonable based on the evidence it heard and the credibility assessment it made.

This discussion, while helpful, does not resolve the recurring issue of how a practitioner's lack of cooperation can properly be considered by the hearing panel. In credibility cases there is a natural tendency by hearing panels to view a lack of cooperation as an indication that the practitioner has something to hide. Analogies to the criminal process, however, suggest that this inference could be inappropriate. The Divisional Court seems to say that it depends on the circumstances. For example, no inference should be made where a practitioner takes time to consult with legal counsel. However, any form of active obstruction could lead to an adverse inference.

Reviewing these sorts of court decisions can help hearing panel members make their own credibility findings.