

## Relying Upon Hearsay Evidence Is Risky Strategy

One of the best examples of 'hearsay', and multiple layered hearsay at that, involves the character Simone reciting details of the whereabouts of Ferris Bueller as occurs within the movie Ferris Bueller's Day Off. In the scene, Simone speaks of hearing, via a lengthy chain of rumour, that Ferris, "... *passed out at 51 Flavours last night*". While humorous, and of little concern whereas the information is merely tendered during high school roll call for attendance purposes, this example does provide a humorous example of what hearsay is, and how hearsay may be unreliable information.

Documents and testimony containing hearsay are, generally, admissible within the Small Claims Court; however, the weight (meaning strength) that hearsay will receive is commonly diminished if any weight is even given at all. For the same reason that the information of 'Simone' within the Ferris Bueller movie lacks strong reliability, the Small Claims Court may accept hearsay evidence while giving the evidence little credence. Of course, this lack of credence given to hearsay is without suggesting that the witness lacks credibility and is acting deceptively. Just as Simone speaking of Ferris Bueller it quite likely what Simone believes is true, a witness testifying in court may genuinely be what the witness believes from hearsay is true; however, belief in truth, without greater support, is rarely sufficient for a 'court level' assurance of truth. Courts, and for good reason, will usually expect information regarding evidence of substance to come directly from the person who saw or heard what the testimony relates to.

The Law, statutorily admissible

The granting of admissibility is provided by the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which states:

**Evidence**

27(1) Subject to subsections (3) and (4), the Small Claims Court may admit as evidence at a hearing and act upon any oral testimony and any document or other thing so long as the evidence is relevant to the subject-matter of the proceeding, but the court may exclude anything unduly repetitious.

**Same**

(2) Subsection (1) applies whether or not the evidence is given or proven under oath or affirmation or admissible as evidence in any other court.

**Same**

(3) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible by reason of any privilege under the law of evidence; or

(b) that is inadmissible by any Act.

**Conflicts**

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

**Copies**

(5) A copy of a document or any other thing may be admitted as evidence at a hearing if the presiding judge is satisfied as to its authenticity.

Furthermore, the [Rules of the Small Claims Court](#), regarding admissibility of evidence at Trial, provide direction regarding the admissibility of documents, which without direct testimony may be, subject to discretion of the Judge, admitted into evidence:

18.02 (1) A document or written statement or an audio or visual record that has been served, at least 30 days before the trial date, on all parties who were served with the notice of trial, shall be received in evidence, unless the trial judge orders otherwise.

(2) Subrule (1) applies to the following written statements and documents:

1. The signed written statement of any witness, including the written report of an expert, to the extent that the statement relates to facts and opinions to which the witness would be permitted to testify in person.

2. Any other document, including but not limited to a hospital record or medical report made in the course of care and treatment, a financial record, a receipt, a bill, documentary evidence of loss of income or property damage, and a repair estimate.

## The Law, jurisprudence

The point that hearsay may be admitted, "but is generally entitled to reduced weight" was stated in the recent case of *Canadian Imperial Bank of Commerce v. Wiedemann*, [2019 CanLII 10131](#) ("*CIBC*") where it was said:

8. Hearsay may be admitted in Small Claims Court but is generally entitled to reduced weight because it is hearsay and therefore less reliable than direct evidence: *Central Burner Service Inc. v. Texaco Canada Inc.* (1989), 36 O.A.C. 239 (Div. Ct.).

....

14. Despite this court's broad discretion over the admissibility of evidence under section 27 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court is not prepared to act on such low-quality information as this when the potential unintended consequence is the enforcement of a judgment debt against parties other than the debtor.

The discretion of the court as to whether to admit evidence into court, hearsay or otherwise, was confirmed within the case of *Prohaska v. Howe*, [2016 ONSC 48](#), wherein the Divisional Court stated, among other things:

[29] First, Deputy Judges must have the authority to exercise a gatekeeping function to determine whether evidence should be admissible. If they did not have this power, then parties in small claims court actions would have the right to call opinion evidence, unlimited character evidence, similar fact evidence, and irrelevant evidence. Cases could go on forever if they were not controlled. The importance of the trial judge's gatekeeper function has been discussed in many cases (see, for example, *Tosti*, supra at paragraphs 40 to 46). Adopting the Appellant's interpretation would not give effect to the gatekeeper function and I accordingly reject it.