



When Is An Adverse Inverse Taken?

The principle of 'adverse inference' is relatively simple arising where a party fails to testify, or fails to lead evidence, the court may presume that the reason for absence is that such evidence would negatively affect the party in control of such evidence. The presumption is that *if you have it, you would use it; and if you don't use it, the only common sense reason is because it goes against you*; and from this presumption the court will infer accordingly. Per *Lane v. Kock*, [2015 ONSC 1972](#):

[3] The effect of the failure of a party to testify or to call a material witness or other evidence, is summarized as follows in Sydney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014) at p. 386:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

Of course, whether the court retains discretion as to whether to infer an adverse inference. This position was well articulated by the Court of Appeal in the case of *Parris v. Laidley*, [2012 ONCA 755](#) as follows:

[2] Drawing adverse inferences from failure to produce evidence is discretionary. The inference should not be drawn unless it is warranted in all the circumstances. What is required is a case-specific inquiry into the circumstances including, but not only, whether there was a legitimate explanation for failing to call the witness, whether the witness was within the exclusive control of the party against whom the adverse inference is sought to be drawn, or equally available to both parties, and whether the witness has key evidence to provide or is the best person to provide the evidence in issue.

In the case of *Hareychuk, et al v. Sunup Estates Services Corp. et al*, [SC-14-6583](#) (unreported) at paragraph 79, Deputy Justice Twohey accepted hearsay evidence of the Defendant on the basis that the testimony was credible, undisputed, and unchallenged by the Plaintiff whereas the Plaintiff failed to testify and thus it was inferred that the testimony of the Plaintiff would be unfavourable to the Plaintiff.

You've heard the expression, '*if you got it, flaunt it*'. Well, when it comes to evidence, '*if you got it, flaunt it*'; otherwise, the court will presume the evidence goes against you!