FIELD ATKINSON PERRATON
BARRISTERS & SOLICITORS

THE ADVISOR

Legal Issues of General Interest to Individuals

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"But I Never Asked To Be A Litigant!"

No one wants to end up embroiled in a lawsuit but in truth, many of us at some point in our lives are going to be in a position where we must sue another or where we are being sued. There is an almost endless variety of civil actions which might bring an individual into contact with the civil justice system:

- if you lose your job you might have to sue your employer to get fairly compensated for wrongful dismissal;
- if a neighbour's child is hurt falling off the swing set you installed in your back yard, you might find yourself the defendant in an Occupier's Liability action;
- if the contractor that was supposed fix your roof completes the job and the next time it rains your attic floods, you might be suing him for negligence and breach of contract.

When such a thing happens non-lawyers may have little or no idea what to expect from the legal process involved. This can increase the frustration and stress of being caught up in a lawsuit. A little education can go a long way toward calming the first time litigant. With this in mind, we offer the following brief introduction to the civil justice system in Alberta.

The Courts

Where to start a lawsuit depends on the legal remedy the litigant is seeking. Any matter in which a sum of money over $7,500 is being claimed must go the Court of Queen's Bench. A suit for $7,500 or less will usually go through Small Claims Court. (At present, serious consideration is being given to raising the Small Claims Court monetary limit above $7,500.) There are limits to the remedies other than money that Small Claims Court judges can grant or the actions they can hear. For example, an action for defamation (libel or slander) cannot be brought in Small Claims Court, only in Queen's Bench. As well, Small Claims Court judges cannot grant what are known as "equitable" remedies, such as an injunction to make someone do or not do something. Actions for equitable remedies have to go before a Queen's Bench judge.

Small Claims Court is simpler and cheaper (starting an action costs only $25 as opposed to $200 in the Court of Queen's Bench). The rules of evidence are not usually as strictly applied in Small Claims Court as they are in Queen's Bench. Thus individuals without a lawyer often conduct their own Small Claims Court cases. (Even if you plan to appear without a lawyer in Small Claims Court it is a good idea to consult with one for advice well beforehand.)

Pleadings

Pleadings are the documents that are used to frame a legal dispute. A plaintiff starts an action by filing a **Statement of Claim** in Queen's Bench or a **Civil Claim** in Small Claims Court. This document consists of an account of the facts which, according to the Plaintiff, form the basis of the civil action, the type of legal breach or "cause of action" that justifies the Court granting a remedy to the Plaintiff, and the "prayer for relief" in which the Plaintiff states the nature and scope of relief that the claimant seeks.

Once the Statement of Claim is filed in Court, it is served on the Defendant or Defendants who have between 15 and 20 days (depending on the Court) to reply by filing a **Dispute Note** (in Small Claims Court) or a **Statement of Defence** (in Queen's Bench). This document normally consists of a denial of the Plaintiff's claim and may include the Defendant's version of the facts. If a Defendant does not reply in time the Plaintiff may get judgment against the Defendant by default. In that case the Plaintiff has won its case and can then take steps to enforce its judgment. Therefore it is extremely important when sued to act promptly and consult a lawyer without delay.

These are the only essential pleadings but there may be many others. For example, a Defendant will often have a **Counter-Claim** to the Plaintiff's claim that he or she will file along with the Statement of Defence.

Discovery

Once the parties have exchanged pleadings, the parties engage in the process of discovery in preparation for trial. Through the discovery process the civil justice system has largely eliminated the possibility of ambush during trial, which ensures that each side knows as much as possible about the other side's case and evidence. There is no formal discovery process in Small Claims Court, only in Queen's Bench.

Discovery consists of two procedures: documentary discovery (the exchange of records, including documents and electronic records that are "relevant and material" to the action) and examinations for discovery.

Parties have a specific period of time after the filing of the Statement of Defence to disclose to each other their lists of relevant records in the form of a sworn Affidavit. There are strict costs penalties that can be imposed on a party that fails to meet the deadline so it is important as a litigant to retain,

locate and hand over to your lawyer all potentially relevant documents.

In examinations for discovery, the parties are questioned by the lawyers for the other side in the presence of a court reporter. The evidence may be used at trial.

Pre-Trial

In a Small Claims Court action the parties may be ordered by the Court to attend a mediation or pre-trial conference in an attempt to settle the dispute without trial. In Queen's Bench the court may order a pre-trial conference to simplify issues, settle agreed facts, or otherwise streamline the trial. The parties may also agree to a Judicial Dispute Resolution meeting with a judge to try to resolve the claim before trial.

Trial

The first thing a first time litigant needs to know about trial is not to be in a hurry to get there. It is common for a matter to go to trial in Small Claims Court several months after the filing of the Civil Claim. In Queen's Bench a trial date 12 to 18 months after the proceedings were commenced is not unusual.

Most trials take place before a single judge. A party may apply to have a jury trial in Queen's Bench but must first pay to the Court the costs of empanelling a jury.

The rules of evidence are strictly enforced in Queen's Bench. This is a vast and intricate area of the law but there are a few general principles that arise most often. For example:

1. **The difference between expert and "lay" witnesses:** A non-expert or "lay" witness may only testify about facts. Only expert witnesses can give opinion evidence. An expert must be accepted by the Court as an expert in a certain area and may only give opinions within that area of expertise. An expert may appear as witness for either side or may be court appointed.

2. **The rule against hearsay evidence:** Normally, a witness cannot give hearsay or second hand evidence. For example, Bob cannot describe the scene of the accident based on what Joe told him about it. Bob can only testify about his personal knowledge of the accident.

At trial, the plaintiff starts by giving an opening address to the court outlining what they expect to prove, followed by the plaintiff's witnesses. Each witness is questioned by the plaintiff's counsel. Then the defence has an opportunity to cross-examine each witness. Once the plaintiff has finished its evidence the defence presents its case in the same manner. The court then hears each party summarize the evidence, explain the applicable legal principles, and reconcile the legal principles with the facts in a manner that hopefully will persuade the judge that that party's version of the facts is supported by the law.

Costs on Settlement

Normally, after judgment at trial the court will award the successful party an additional amount for its legal costs. The courts also use costs to encourage settlement by imposing costs consequences on parties that fail to accept a reasonable settlement offer made by the other side. If the successful party made a formal offer to settle to the other side on more modest terms than it won at trial, the award of costs will be increased. If the unsuccessful party offered to settle by paying the successful party more than the successful party won at trial, the unsuccessful party will get some of its costs paid.

Of the legion of civil actions commenced in Alberta each year, most never go to trial because they are settled out of court. A good litigation lawyer will not only address the legal issues that will decide the matter at trial, but also advise the client on the prospects for and merits of settlement. This way the client who never asked to be a litigant may have an early and satisfactory resolution to the claim.

Our experienced professionals are happy to meet with you at your convenience to discuss your individual circumstances. For further information on this topic please contact ***Ian MacDonald*** *or* ***Michael Doerksen*** *in* ***Calgary*** *at* ***(403)260-8500*** *or* ***Dan Carroll*** *or* ***Christine Pratt*** *in* ***Edmonton*** *at* ***(780)423-3003****.*

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