

Steps Prior to Trial

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Running Your First Trial

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INTRODUCTION

Using the Court of Queen's Bench example case of *Lee Michel v Canless Housing Corporation, et al*, we invite you to put yourself in the shoes of counsel for the Plaintiff or Defendants.

Questioning (previously called discovery) of all parties is complete, and all Undertakings have been answered from Questioning. Your Action is now ready to be set down for trial. There are some procedural steps which you will need to complete, and you will need to give some consideration to whether experts will be required and what your general trial strategy will be. It will be important to meet the deadlines set out in the Alberta *Rules of Court*, AR 124/2010 (**Rules**) for each of the preparatory steps which lead to trial.

BEFORE SETTING DOWN FOR TRIAL

Preparation and Review

Matters of evidence and proof will be dealt with fully by other speakers today, but trial preparation begins with how to prove the causes of action pleaded, so a brief word about evidence is necessary.

Before any of the procedural steps for setting down for trial are started, you should thoroughly review all of the pleadings, and file materials in order to make sure that each of the causes of action in the pleadings can be proved or answered by the evidence that you have. If you discover at this point that the evidence is lacking in some way, this is the time (before the trial date is set) to decide whether further documents are needed, Questioning should take place, whether you require more information from your client, more witnesses to testify, or an expert report.

After accumulating information, research, statements, physical evidence and facts, you should begin the process of whittling the collected information into a focussed and cohesive presentation which will persuade the Court that each cause of action pleaded is supported or answered by clear and convincing evidence. Unhelpful, marginally relevant and distracting information must be discarded in favour of strong and cogent proof.

Experts and Expert Reports

Experts and expert reports are governed by Part 5 Division 2 of the *Rules*. Experts are engaged to provide opinion evidence on matters that often involve some complexity, and they must be chosen

with care. Importantly, all expert reports must ordinarily be exchanged before the trial date is set pursuant to Rule 8.4.

No more than one expert is allowed to give opinion evidence on any one subject for a party.¹ Further, if there are two or more corporate parties who are affiliated, the Court may direct which of the affiliates may call the expert witness if the affiliates cannot agree.²

Pursuant to Rules 5.34 and 5.35, expert reports must be in Form 25 – Expert’s Report, and must contain at a minimum the expert’s name and qualifications; the information and assumptions which form the basis of the expert’s opinion; and a summary of the expert’s opinion. There is some authority that suggests that the expert report will still be received as evidence even if not in the proper form,³ but it is best not to tempt the litigation gods.⁴ The parties’ expert reports are not filed with the Court,⁵ but must be served pursuant to the sequence contained in Rule 5.35(2)⁶:

- a) the party who bears the primary onus of proof must serve on each of the other parties the report of that party’s expert;
- b) the other party or parties must serve their expert’s rebuttal report, if any, and may include in the report issues not raised in the initial expert’s report;
- c) the party who served the initial expert’s report may serve a surrebuttal expert’s report that responds only to the new issues raised in the rebuttal report

An expert report only becomes part of the record if both parties consent to its addition, or the Court so orders.⁷ The party receiving the expert report may object to the admissibility of the report pursuant to Rule 5.36, and must notify the party serving the report: that they will be objecting to the report’s use at trial, and the basis for the objection. The objector must have given reasonable notice of the objection in order for the objection to stand.⁸

Experts may be questioned on their reports before trial pursuant to Rule 5.37 by agreement, or in exceptional circumstances by Court Order.⁹ In practice this rarely happens in Alberta, and is likely to

¹ Rule 8.16(1)

² Rule 8.16(2)

³ *Wilde v Langton*, 2012 ABQB 742

⁴ *Guay Estate*, 2013 ABQB 58; *Alberta (Minister of Justice and Attorney General) v Kouch*, 2014 ABCA 215

⁵ *Henderson Estate v Arnett*, 2011 ABQB 198

⁶ *Erketu v Wilson*, 2012 ABQB 748

⁷ *Henderson Estate v Arnett*, 2011 ABQB 198

⁸ Rule 5.36(2) and *Stewart Estate v Taqa North Limited*, 2012 ABQB 87

⁹ *Grammer v Langpap*, 2014 ABQB 74