THE EVIDENCE PRIMER

HOW TO PRESENT YOUR EVIDENCE AT TRIAL

The National Self-Represented Litigants Project

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Primer on Evidence Law:
How to Present Your Evidence at Trial

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HOW TO USE THIS GUIDE

We hear frequently at NSRLP from self-represented litigants (SRLs) who are trying to prepare their evidence to make the strongest possible case. Evidence law is a discrete area of law and legal practice, and is often complex and far from intuitive for people without legal training. We asked the authors of this guide, lawyer Martha Campbell and Justice Conrad Conlan, to write an introduction to the law of evidence that would help SRLs to do the best possible job as they brought their arguments to court. We appreciate their work on this "Primer" very much and we hope that it will help you!

Within the general structure of evidence law, presented here, each province has its own specific rules of civil procedure. The rules of civil procedure lay out what can be done, and what cannot be done: these rules vary from province to province. A complete list where you can find all the different provincial rules of civil procedure is provided at the end of this Primer.

This Primer provides a basic overview of the provincial rules of evidence for civil cases (including family cases). It does not cover rules in relation to federal or criminal law cases. In common with all our Primers, it focuses on practical knowledge and tips that are important for you, and does not offer a comprehensive examination of all the issues that may arise in the application of evidence law.

Good luck!

Julie Macfarlane

A) OVERVIEW OF A CIVIL LAWSUIT

In civil law matters, including family law matters such as divorce, the "Plaintiff" is the party who brings a lawsuit against a Defendant. The "Defendant" is the party that needs to defend themself from the Plaintiff's allegations. During a legal case, the Plaintiff and the Defendant exchange materials, in the form of evidence, regarding the Plaintiff's claims. The Plaintiff's evidence attempts to prove their position, while the Defendant's attempts to disprove it.

The Plaintiff and the Defendant are together referred to as "the Parties."

1) Exchanging pleadings

Before everything starts, each Party files a Pleading with the Court. Pleadings are documents containing the issues, claims, and/or facts that each side intends to prove later. This may include affidavit evidence (see below).

2) Opening arguments

At trial, or when there is a hearing of the case, the Plaintiff puts forward an opening argument. This is where the Plaintiff presents their claims and outlines what evidence will be used to support those claims. This is not yet the moment where facts are proved: they are just being laid out as a roadmap for later. After the Plaintiff's opening argument, it is the Defendant's turn to set out the claims they intend to prove. Like the Plaintiff, the Defendant makes an opening argument outlining the evidence that will be used in support of their claims, without actually trying to prove those facts yet.

Now that the opening arguments are done, the case moves on to the task of proving facts. This is where the Parties explain how the evidence that was outlined in their opening arguments supports their claims.

3) Evidence

Evidence is defined as anything that is submitted to the Court to prove the truth of the facts claimed by either Party.

During trial, the evidence is examined against the claims made by each side.

There are three main types of evidence that the Court will accept: oral evidence, evidence by affidavit, and expert evidence.

B) EVIDENCE

Evidence is a crucial, complicated part of any civil lawsuit. In what follows, you will see a breakdown of the types of evidence, when evidence is admissible and when it not.

1) Types of evidence

a) Oral evidence

Oral evidence is evidence that is given in person as witness testimony at a hearing.

Here (for example) is what the Ontario Rules of Civil procedure say about oral evidence. You can find the rule for your hearing by going to your provincial Rules of Civil Procedure (see the list at the end of this Primer).

> **53.01** (1) Unless these rules provide otherwise, witnesses at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination and re-examination. R.R.O. 1990, Reg. 194, r. 53.01 (1).

b) Evidence by affidavit

Evidence by affidavit is evidence that is presented in writing. The court can allow evidence to be presented in a written form only when it is in the format of an affidavit.

Here (for example) is what the Ontario Rules of Civil procedure say about written evidence. You can find the rule for your hearing by going to your provincial Rules of Civil Procedure.

> ***With Leave of Court***
>
> **53.02** (1) Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination. R.R.O. 1990, Reg. 194, r. 53.02 (1).

c) Expert evidence

Sometimes a Party may want to introduce expert evidence: this is evidence that is given by a person who is **an expert in the issues raised by the evidence** (for example, medicine,

child welfare). If you wish to do this, your province's Rules of Civil Procedure will have requirements about giving notice to the other Party and about the qualifications of your expert.

- An example of an expert in a family law case is a psychologist who, on issues of custody and access, provides opinion evidence on a party's personality and behaviour, and how those impact on their parenting capacity.
- An example of an expert in a motor vehicle accident case is an engineer who, on the issue of liability, provides opinion evidence on how the accident occurred, such as the speeds of the two vehicles that collided with each other.

Here (for example) is what the Ontario Rules of Civil procedure say about expert evidence. You can find the rule for your hearing by going to your provincial Rules of Civil Procedure.

Experts' Reports
53.03
(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.
(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.
(2.1) a report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based; ii. a description of any research conducted by the expert that led him or her to form the opinion; iii. a list of every document, if any, relied on by the expert in forming the opinion

7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

2) The rules of evidence

While gathering evidence, you want to find the best evidence possible to support your case. However, it is very important that you carefully follow the rules of evidence. If a piece of evidence brought by a Party does not follow the rules of evidence, the Court will not admit that piece of evidence, and the Party will not be able to use that evidence in the trial.

Rules of evidence are a combination of: legislation, common law rules created by past legal decisions, and the Rules of Civil Procedure of the appropriate jurisdiction (your province or territory).

a) Admissible evidence

Generally, evidence will be "admissible" (accepted) by the Court if:

It is **relevant**

a. Does it help to prove a fact you're claiming?
b. Does it help to disprove a fact you're claiming?

It is **material**

c. Was it laid out in the pleadings?

However (you probably know by now that there are always exceptions to legal rules) you must also ensure that the evidence you want to present is not **excluded** by a legal rule.

b) Rules of inadmissibility

Evidence is not admissible according to these rules

i) Evidence thresholds

The judge has a "general discretion" (can decide whether) to exclude evidence. In making this decision, the judge has to balance the "probative value" with the "prejudicial effect" of evidence:

"probative value" means the value and importance of the evidence in relation to a fact.
"prejudicial effect" refers to the possibility that the evidence may be used for an improper or generally unfair or unreasonable purpose.

Here is an example of how a judge may consider both the probative value and prejudicial effect of the same piece of evidence in a family law case:

- At trial, the father claims that the mother is an unfit parent. To support his claim, he wants to present evidence that the mother had a serious drug problem when the child was very young. The child is now much older.
- The trial judge may exclude this piece of evidence on the basis of its probative value. Remember, the probative value of a piece of evidence means the value and importance of that evidence in relation to a claimed fact. The serious drug problem has quite a limited connection to the mother's parenting ability today because it happened many years ago. So, in this case, the evidence that the mother used to have a serious drug problem when the child was very young is not important to the claim that the mother is an unfit parent *now*.
- The judge may also assess the prejudicial effect of that evidence. Remember that prejudicial effect refers to using evidence for an improper or unfair reason. Accusing a mother of being an unfit parent because of an old addiction wrongly assumes that a person who struggles with substance abuse cannot overcome it, It stereotypes addiction and wrongly assumes that a person who struggles with substance abuse cannot overcome that and go on to be a responsible and caring parent. This makes the prejudicial effect of the father's evidence very high.
- So now, the evidence before the judge is deemed to have some limited probative value. This may be enough for the judge to allow the evidence. However, the other side of the judge's assessment reveals a prejudicial effect that is very high. Using their discretion, the judge may decide to exclude this evidence.

ii) Hearsay

"Hearsay evidence" refers to statements made by other people outside the Court. The general rule is that hearsay evidence will be inadmissible. Still, there are some exceptional circumstances where it will be admitted.

Hearsay is admitted as evidence when:

a. It is necessary to prove a fact;
b. It is both reliable and trustworthy;
c. It contradicts a piece of evidence that has been used in Court and it helps determine the truth of that evidence. For example, under the Ontario Evidence Act s. 20-21: inconsistent/contradictory written statements may be admitted to determine the truth of the evidence being provided in court (and see R v B (KG).

iii) Opinion evidence (+ exceptions)

"Opinion evidence" refers to statements that the witness thinks, believes, or infers in regard to facts, as opposed to personal knowledge of the facts.The general rule is that "opinion evidence" is inadmissible.

There are some exceptions to the inadmissibility of opinion evidence. Opinion evidence will be admissible when the opinion refers to:

a. Expert opinion evidence; that is, the opinion of a properly qualified expert in the field (see above). A properly qualified expert is a person whose expertise is recognized as special knowledge of a topic. This means that, for example, a family member who gives their opinion based on personal knowledge is not usually considered an "expert."
b. Evidence that is common knowledge.

iv) Character evidence

This type of evidence refers to a person's personality, conduct, and reputation.

The general rule is that character evidence is inadmissible, except where the character of a Party is at issue, such as in a defamation case. In other kinds of cases, such as family law cases, character evidence is generally not admissible.

C) EXHIBITS

Exhibits are physical pieces of evidence introduced at trial.

For example: a signed contract that may be used to verify a piece of information.

Quick facts about exhibits:

- Exhibits must be marked and numbered consecutively. (Exhibit 1, exhibit 2, exhibit 3, etc.)
- An exhibit may be referred to when asking a witness questions. (For example, “Is this your signature on this contract?”)
- This questioning will determine whether the exhibit is relevant.
- If the exhibit is deemed relevant, it will be given to the Court and become part of the record.

D) FINALLY: BE PREPARED

Here are some final tips for preparing your evidence before your trial or hearing.

Witnesses

You want to have the questions you will ask your witnesses ready, so that both you and your witnesses know what to expect. Also, try to anticipate what the other side will ask your witnesses, so that you can have questions ready that will clarify what your witnesses are saying.

Exhibits

If you have any exhibits you wish to include, make sure they are numbered and in order for presentation during the trial. Be organized: having to shuffle through documents during trial will bring you unnecessary stress. The more organized you are the more confident you will feel and look.

Exhibits: Extras and back-ups

Always try to bring extra copies of all documents with you to Court. It is likely that as you present your exhibits, the other side will want copies. The Court will need the original of your exhibit, or at least a copy of it, to be stamped as the official exhibit. Also, the judge may ask for their own copy. You may even want one for your witness as you question them, so they have something to follow. And of course, you need one for yourself as well.

E) PROVINCIAL LEGISLATION

- **Ontario**
  - Evidence Act
  - Rules of Civil Procedure
- **Alberta**
  - Rules of Civil Procedure
- **British Columbia**
  - Rules of Civil Procedure
- **Manitoba**
  - Rules of Civil Procedure
- **New Brunswick**
  - Rules of Civil Procedure
- **Newfoundland**
  - Rules of Civil Procedure
- **Nova Scotia**
  - Rules of Civil Procedure
- **Prince Edward Island**
  - Rules of Civil Procedure
- **Quebec**
  - Rules of Civil Procedure
- **Saskatchewan**
  - Rules of Civil Procedure
- **Northwest Territories**
  - Rules of Civil Procedure
- **Nunavut**
  - Rules of Civil Procedure
- **Yukon**
  - Rules of Civil Procedure

REFERENCES

Evidence 101 –A Primer on Evidence Law, by Nancy Shapiro and David Silver, Koskie Minsky LLP

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