

# Advocacy and the Litigation Process



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## Learning Outcomes

After reading this chapter, you will understand

- the meaning of advocacy;
- the meaning of substantive law;
- the meaning of procedural law;
- the meaning of the law of evidence; and
- the importance of preparation to good advocacy.

When you read a case report it is often hard to imagine that the case—whether heard in a civil court, a criminal court, or an administrative tribunal—involves real people with a real dispute. A case report sets out the decision of the judge, justice of the peace, or adjudicator, which they arrive at by applying the relevant law to the facts of the case. While this process may sound simple, it is not. The parties involved—the plaintiff and the defendant in a civil case, the Crown and the defence in a criminal or provincial offences case, the applicant and the respondent in a tribunal case—typically disagree about the facts of the matter. This disagreement results in a trial or hearing and, after hearing the conflicting evidence of both parties, the judge, justice of the peace, or adjudicator has to determine which version to believe—in other words, the facts of the case. The judge, justice of the peace, or adjudicator has to make findings of fact and then apply the relevant law in order to reach a decision.

It is helpful to look at an example of each type of case in order to understand how the facts in an actual dispute are dealt with through the litigation process. What follows are three fact situations: a Small Claims Court case, a provincial offences case, and an administrative tribunal case. Throughout this text, we will revisit these fact situations as we discuss each step of the litigation process.

### FACT SITUATION 1

#### Small Claims Court: The Kitchen Renovation Case

Tina Fey and her husband, Tommy, hired Baldwin Brothers Construction to make some minor renovations to the kitchen in their home for a total contract price of \$7,500. The work is now completed, but the Feys and the Baldwins have a disagreement about payment for the installation of three pot lights. Tina and Tommy claim that the contract price included the installation of all necessary lights in the kitchen. Baldwin Brothers Construction, on the other hand, claims that the contract required them to install five pot lights only, and that three additional pot lights were installed at Tommy's request as an extra to be paid for separately. Tina and Tommy have paid the original contract price but refuse to pay more.

The parties cannot resolve this disagreement, so Baldwin Brothers Construction has started a Small Claims Court action claiming \$750 for the cost of supplying and installing the three disputed pot lights.

At the trial of this case, the judge must decide whether to grant judgment to the plaintiff, Baldwin Brothers Construction (Alec Baldwin and Stephen Baldwin, carrying on business as Baldwin Brothers Construction), for the \$750. The first part of the decision-making process is to determine what, exactly, the parties agreed to. Of course, the judge was not present when the contract was entered into, so they must make this decision based on the evidence presented by the parties in court.

As often happens, the parties in this case did not have a written contract. Tina Fey and Alec Baldwin were the only people present when the oral contract was made, and they each have a very different understanding of what they agreed to.

## FACT SITUATION 2

### **Provincial Offences Court: The Liquor Licence Case**

Treetop Catering Inc and Victoria Levens, its sole director, officer, and shareholder, have been charged with an offence under the *Liquor Licence Act*, RSO 1990, c L.19. Treetop Catering Inc was hired by the Simpson Advocacy Club to organize and manage a party for its members being held at the Simpson Academy student lounge. The lounge included an indoor bar and a fenced outdoor patio area. In addition to a bartender, Treetop Catering Inc hired a security guard to ensure that guests did not take alcohol outside the fenced patio. The party became quite noisy, and a neighbour, Patrick Elder, called the police to complain. When the police officer, Constable Matthew Lee, arrived, he found empty beer bottles and plastic wine glasses on the lawn outside the patio. He therefore charged Treetop Catering Inc and Victoria Levens with the offence of permitting the removal of alcohol from the premises as prohibited under RRO 1990, Regulation 719 of the *Liquor Licence Act*.

At the trial, the justice of the peace will have to decide whether the defendants are guilty or not guilty. To secure a conviction, the prosecution must first prove beyond a reasonable doubt that the defendants permitted the removal of alcohol from the licensed area of the premises. If the prosecution does so, the defendants must then prove, on a balance of probabilities, that they had taken all reasonable steps to comply with the law.

## FACT SITUATION 3

### **Administrative Tribunal: The Landlord and Tenant Dispute**

Alice and Arlo Guthrie were tenants in a two-unit building owned by Jim Croce. At the end of their one-year lease, Jim served a notice of termination of their tenancy so that Jim's daughter, Cynthia, could move into the apartment. Alice and Arlo could not find a similar apartment for the same rent but did find a suitable apartment in the same neighbourhood at a higher rent. Alice and Arlo moved out,

(Continued on next page.)

but Cynthia did not move into the apartment. Instead, Jim put it up for lease at a higher rent than Alice and Arlo were paying. Jim says that Cynthia changed her mind about moving into the apartment because she got a job in Ottawa. Arlo and Alice do not believe Jim. They think that he terminated their tenancy in bad faith, intending all along to re-rent to a new tenant for a higher rent.

Arlo and Alice have started a proceeding before the Landlord and Tenant Board under section 57 of the *Residential Tenancies Act*, SO 2006, c 17, claiming that Jim's notice of termination was given in bad faith and asking for an order that Jim pay their increased rent for one year ( $\$100$  per month  $\times$  12 =  $\$1,200$ ) plus their moving costs of  $\$750$ , for a total of  $\$1,950$ .

At the hearing, the adjudicator will have to decide whether to order Jim to pay Alice and Arlo  $\$1,950$ . The first part of the decision-making process is to determine whether Cynthia ever intended to move into the apartment and, therefore, whether Jim acted in good faith in terminating Alice and Arlo's tenancy. The adjudicator must make this decision based on the evidence presented by the parties at the hearing.

In each of these cases, the decision-maker (judge, justice of the peace, or adjudicator) will listen to each party's retelling of the events and choose which version to believe. Sometimes the parties' versions of events differ because one of them is lying, but more often their versions differ simply because they remember the events differently. So, how does a decision-maker choose between the different stories of two honest witnesses? The decision-maker will believe the story that makes more sense—the one that is more likely to have happened. It is the role of the advocate to present the client's story in the more persuasive—more believable—way.

After determining the facts of the case, the decision-maker will arrive at a decision by applying the relevant law to the facts. It is the role of the advocate to advise the decision-maker of the applicable law and also to suggest how that law should be applied to the facts so that the advocate's client wins.

**advocacy**

the process of presenting a case or defence at a trial or hearing

**advocate**

a person who pleads the cause of another before a court or tribunal

**substantive law**

the law that defines legal rights and obligations

**Advocacy** is the term used to describe the process of presenting a case or defence at a trial or hearing before a civil court, a criminal court, or an administrative tribunal. An **advocate** is a person who pleads the cause of another before a court or tribunal. Advocates are often lawyers but, at tribunals and lower-level courts, paralegals may also act as advocates.

To appreciate the role of advocacy in the trial or hearing process, it is important to understand the relationship of advocacy to substantive law, procedural law, and the law of evidence.

**Substantive law** defines legal rights and obligations. Substantive law can be divided into categories, such as contract law, tort law, family law, real estate law, and criminal law. It is substantive law that determines whether you have a civil cause of action or a defence to a civil action. It is also substantive law that defines the elements of a criminal offence and the defences available to that offence. Substantive law also determines the facts that you must establish to constitute your claim or defence. The Kitchen Renovation case involves the substantive law of contract. The Liquor Licence

case involves the substantive law of liquor licensing regulation. The Landlord and Tenant Dispute case involves the substantive law of residential tenancies.

**Procedural law**, both criminal and civil, deals with the way in which a dispute first comes to a court or tribunal and is then brought forward to a final resolution at a trial or hearing. Procedural law is, for the most part, concerned with what occurs before the actual trial or hearing and afterward. The procedure in the Kitchen Renovation case is governed by the procedural law of the Ontario Small Claims Court. The procedure in the Liquor Licence case is governed by the procedural law of the Ontario Court of Justice (Provincial Offences Court). The procedure in the Landlord and Tenant Dispute is governed by the procedural law of the Landlord and Tenant Board.

Table 1.1 lists these distinctions for each of the three fact situations.

**TABLE 1.1 Substantive Law and Procedural Law Aspects of Three Fact Situations**

Fact Situation	Substantive Law	Procedural Law Venue
1. The Kitchen Renovation Case	Contract law	Ontario Small Claims Court
2. The Liquor Licence Case	Liquor licensing regulation	Ontario Court of Justice (Provincial Offences Court)
3. The Landlord and Tenant Dispute	Residential tenancy	Landlord and Tenant Board

You will not be successful in asserting your claim or defence when you get to the trial or hearing unless you can establish the facts that support your client's claim or defence. The **law of evidence** deals with how the facts, as required by substantive law, are to be proved.

Advocacy has been described as both a science and an art. The key to successful advocacy is preparation, which is the science of advocacy. The art of advocacy lies in the performance. Some people are naturally better than others at public speaking, but this art can be developed. However, no amount of art can take the place of thorough preparation. If you go to the court or tribunal prepared and organized, and are courteous, you will be way ahead of most paralegals (and perhaps some lawyers) you will meet in opposition.

Good advocacy does not mean that you will win every trial or hearing. There are some cases that you cannot win, no matter how good an advocate you are. But you never want to lose a case that you *should* win. That is where good advocacy comes into the picture.

This book is not about evidence or about civil, criminal, or tribunal procedure. It assumes that you already have a basic understanding of those areas and an understanding of substantive law. This book will teach you the skills necessary to become a good advocate. It starts with a discussion of the paralegal as advocate, including an

**procedural law**

the law that deals with the way a dispute comes to a court or tribunal and then continues to its final resolution

**law of evidence**

the law that determines the way in which the facts are to be proved, as required by substantive law

overview of the relevant *Paralegal Rules of Conduct*<sup>1</sup> and *Paralegal Professional Conduct Guidelines*<sup>2</sup> of the Law Society of Ontario. Then, after an overview of the litigation process, it takes you through the steps necessary to prepare and present a case at a trial or hearing, including an examination of the ethical issues that may arise.

Because this book is written for paralegals, it deals with advocacy before the courts and tribunals in which paralegals may lawfully appear. Trials can involve civil, criminal, or provincial offence matters, and hearings can also take place before administrative tribunals. The advocacy skills involved in all of these trials and hearings are the same.

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1 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 27 February 2020), online: <<https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>>.

2 Law Society of Ontario, *Paralegal Professional Conduct Guidelines* (1 October 2014; amendments current to 27 February 2020), online: <<https://lso.ca/about-lso/legislation-rules/paralegal-professional-conduct-guidelines>>.

## KEY TERMS

advocacy, **6**

advocate, **6**

law of evidence, **7**

procedural law, **7**

substantive law, **6**

## REVIEW QUESTIONS

1. What is advocacy?
2. What is an advocate?
3. What is substantive law?
4. What is procedural law?
5. What is the law of evidence?
6. What is the key to successful advocacy?

