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NOTE

The Lawskool Judicial Institutions & Civil Procedure Summary covers judicial institutions in common law Canada and the rules of civil procedure of Ontario. While the rules of civil procedure are similar across the different common law provinces of Canada, there are areas in which they may differ. If you are required to know the rules of civil procedure in a province other than Ontario, it would be a good idea to look over the rules of civil procedure of that province in addition to this summary. This summary will provide you with general themes, structure, ideas and policy issues that are found in the rules of civil procedure of all of Canada's common law provinces.

To assist you better understand how the law is applied in practice we have included an Exam Hints Section at the end of some sections. It may include an exam style question and a flow chart detailing the sub headings that you should make and how you should go about answering the question in an exam.

Please note that the sample examination questions will be easier than that of the standard which you will be tested on. Your real examination paper will also contain lots of problems mixed together which will make identifying the issues one of your biggest challenges. Our sample questions, placed at the end of each section will only contain issues related to that section. They are only meant to give you a taste of how a question relating to that topic may sound. For more detailed model exams please see the Lawskool Model Exam.
Chapter 1: What Is Procedural Law?

1.1 DEFINITION

Procedural law provides the means through which decisions on the substantive law are made. It governs the conduct of proceedings before the court as well as procedural rights such as the right to discovery, the right to appeal, and the right to invoke the jurisdiction of the court.

Unlike substantive law, procedural law is not involuntary. The parties in the process decide themselves to participate in civil litigation and procedural law gives them the means to do so.

The purpose of civil procedural law is three-fold: (i) to demonstrate the effectiveness of the law (ii) to provide an opportunity for judges to perform their function of interpreting, clarifying and applying the law (iii) to facilitate dispute resolution.¹

Generally, failure to comply with rules of civil procedure will not render the proceeding void. This is seen in Rule 2 of the Ontario Rules of Civil Procedure. It signals the legislature’s decision that substance should be paramount to form in civil litigation.

1.2 ADVERSARIAL VS. INQUISITORIAL SYSTEM OF CIVIL JUSTICE

A given system of civil justice may be adversarial or inquisitorial in nature. In an adversarial system of civil justice, the judge has a very passive role and the parties/lawyers are in control of their respective cases. The system therefore leaves it up to the parties to present their case and articulate legal concepts after which the judge simply decides the outcome of the dispute. The adversarial system dominates Canada (including Quebec) where the mandate of the judge is largely to act as a passive umpire of the case (although legislative reforms are increasingly being put into place in order to create a more active judge).

In an inquisitorial system of civil justice, the judge has a more active role; he is more involved and has the main responsibility for the development of the case. For example, the judge is responsible for the articulation of legal concepts and rules regarding the presentation of evidence. The inquisitorial system dominates the legal systems of Europe. France, for example, has rejected three characteristics of the adversarial system: (i) class actions (ii) contingency fee agreements (iii) discovery.

1.3 FUNDAMENTAL VALUES OF CIVIL JUSTICE SYSTEM

Generally, there are four fundamental values that a civil justice system should strive to secure. In many common law jurisdictions, including Canada, reforms to rules of civil procedure are being put into place in order to further the following values of the system:

(1) **Accessibility:** People should be able to afford access to justice. There should be few cost barriers to individuals who want to use the civil justice system to resolve disputes. This raises the question of whether courts, lawyers or legislatures should be responsible for ensuring this accessibility? Reform need not only come from the legislature. For example, in some provinces, judges may use their powers to ensure legal aid to litigants by awarding advanced costs to parties.

(2) **Efficiency:** Generally, cases should be resolved within a reasonable amount of time. Costs of bringing a case to court should be proportionate to its complexity, importance and its monetary value. Lack of such efficiency, such as time delays, may deter
individuals from bringing important claims to court. This acts as a barrier to the exercise of individual legal rights.

(3) Impartiality & Accountability: Judges must remain neutral arbiters and the process must be transparent in order to ensure the trustworthiness and public confidence in the civil justice system. There are a number of mechanisms and principles available to judges in order to avoid conflicts of interest and appearances of bias such as motions for the judge to rescue himself, motions to vacate decisions, and the open court principle. These will be discussed in further detail later on in the summary.

(4) Fairness: There must be equality in the application of legal rules—there should be equality in the legal process and in the outcome of legal disputes. This involves treating like cases alike and using various mechanisms to balance the position of the parties in the parties such as interim costs and damages for abusive and vexatious claims.

Chapter 2: Institutions of Civil Justice & the Strategies of Litigants

2.1 PURPOSES AND REFORM OF CIVIL PROCEDURE

A well-administered civil justice system is essential to a civilized society. It provides the structure within which commerce and industry can operate and through which rights are protected. The basic principles that a civil justice system should strive to meet include just results, fairness, costs proportionate to importance and complexity of case, efficiency (resolution within a reasonable amount of time), understandable to users of the system, responsive, effective (adequate resources).

2.1.1 Problems with Current Civil Justice System

The current civil justice system in Canada is fraught with problems. The process is generally seen as being too expensive, too slow, and too complex. These problems stem from the uncontrollable nature of the adversarial litigation process where parties
control their case and the judge does not strive to institute limits and structure in the process of dispute resolution. Lack of judicial control encourages litigation as battlefields with the manipulation of rules.

<table>
<thead>
<tr>
<th>Costs</th>
<th>Delay</th>
<th>Complexity</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Uncertainty</td>
<td>• 18 month to 2 year wait to get your claim heard by the Superior Court in Ontario</td>
<td>• Lack of simplification of language and procedure makes the civil justice system difficult to navigate, especially for self-representative litigants which consequently causes delays</td>
</tr>
<tr>
<td>• Lawyer fees</td>
<td>• Self-representative litigants exacerbate delay even though it helps alleviate costs</td>
<td></td>
</tr>
<tr>
<td>• Judicial costs (service, proceeding costs, expert fees)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Massive increase in number of self-representative litigants</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The problems of cost, delay, complexity, etc. are causing a decrease in the public’s confidence of courts and the civil justice system as a whole. The majority of people believe that they do not have the means to bring forth their claim to assert their rights in front of a court. In the majority of cases, costs of the process have become disproportionate to the claim. Lawyers’ fees play a big role. As such, only those individuals who qualify for legal aid or individuals and companies who are very wealthy can afford access to the court system.²

Even if individuals choose to decrease their costs by representing themselves before courts, they are usually not competent enough to present their claims effectively and efficiently, as they lack an understanding of the laws and the judicial system.\(^3\)

### 2.1.2 Recommendations and Reforms

Given these problems of costs, time, complexity, etc., the current system of unrestrained adversarial culture of the civil justice system must be reformed. Reforms should aim to shift responsibility for management of litigation from parties and lawyers to courts (i.e. case management) and to allow for a more constructive collaboration between courts and parties.

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\(^3\) Ibid.