Civil Procedure in Ontario

by

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

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Introduction

Laws can be divided into many different categories that help us understand and organize the many rules that regulate our everyday life. Two major subcategories of law are: substantive and procedural law. While the substantive law sets out the specific rights and duties of people and corporations, procedural law deals with the enforcement of these rights and duties within specific proceedings. In the light of the aforesaid, every lawmaker who wants to address an issue is required to prescribe the desired conduct and then designate a process to enforce it.

There are three main types of substantive law: civil law, criminal law and administrative law. Depending on the type of substantive law applicable to the case at hand, the enforcement of the underlying rights and duties is provided in the course of implementing the corresponding civil, criminal or administrative proceedings.

In this essay, we will concentrate exclusively on civil proceedings and the rules of civil procedure of the Canadian province of Ontario. In the course of this analysis, we will look at the following key stages of a civil action:

- Pre-trial stage including the interview with a lawyer, pre-trial motions and the decision to settle or the decision to bring the case to court
- Selecting the right kind of court, which will include a short overview of the subject-matter, territorial and monetary jurisdictions of the courts
- Commencement of the proceedings
- Parties to the proceedings
- Pleadings
- Discovery
- Case Management
- Trial
- Disposition without trial (injunctions etc.)

Interview with a Lawyer

In every jurisdiction, the first important step is the interview with a lawyer. There are certain steps that one can take to make such an interview effective and successful. The better the client prepares for this interview, the better legal advice the lawyer can give.

The client should start by writing down the names, addresses and contact information of all people and organisations, including witnesses, relevant to the case. The client should then gather and organize all letters and documents that he/she or others might have about the case. It might be useful to prepare a list of documents containing the date, description, author and recipient,

number of pages and, as the case may be, the current holder of each respective document.

Before going to the interview, it is always useful to prepare a written statement setting out your story in chronologically ordered points. The statement should contain all the important facts, dates and conversations regarding your case. Being honest about all the good, as well as bad, details will help your lawyer in handling your problem.

Apart from the written statement, the client should prepare a list of questions that he/she might want to ask the lawyer. At the interview, the client should keep in mind certain guidelines that contribute to a successful interview. In order to avoid missing relevant facts, the client should try to speak slowly and be honest about both positive and negative information. Also, law involves a complex set of rules that requires specific facts to be properly applied. It is the specific information that is vital for every case and the client should therefore always try to avoid speaking in generalities when explaining his/her case.

Once the circumstances of the case have been explained, the lawyer must assess the chances of success. This assessment is performed by applying substantive law and determining the cause of action, i.e. whether the facts warrant a legal case for remedying a wrong to be made; by evaluating the evidence in support of the client's version of events and by assessing the opposing party's ability to act on the judgment. Such pre-trial considerations also involve exploring the possibilities of a settlement. According to the Rules of Professional Conduct, a lawyer shall advise and encourage the client to compromise or settle a dispute and discourage commencement of useless legal proceedings. Due to the expenses and risks connected to litigation, only a small number of cases reach the courts, let alone are there actually tried; most are settled. In whose favor the cases are settled largely depends on whose version of the facts, supported by admissible evidence, is more persuasive.

Based on the facts provided, the lawyer is able to determine the cause of action and possibly initiate an action. Before this, the lawyer will consider whether the applicable limitation period has passed, rendering the claim unenforceable. According to the *Ontario Limitations Act, 2002 (OLA),* the limitation period for almost all actions is two years from the time (i) the event occurred (s.4 OLA) or (ii) could reasonably be discovered (s.5 OLA). Based on the specific facts, the lawyer will determine the specific cause of action and the applicable limitation period. The *Ontario Limitations Act, 2002* is only applicable to causes of action arising under Ontario law.

Apart from this purely legal issue, the lawyer should assess whether the defendant is worth pursuing and whether or not the claims of the client are covered by any insurance policy. The presence of a wealthy corporate defendant with an insurance policy would raise the chances of a favorable outcome. In other cases, some searches can be performed to determine the opponent's solvency. One way to make such a determination is to investigate whether there is a writ of

seizure and sale[1] in the sheriff's county or the administrative region where the defendant lives or carries on business. Since there is no province-wide registration system for writs of execution, one should search each region where the defendant might have had assets. The second way to assess solvency of the defendant is to perform a bankruptcy search. [2] It goes without saying that the lawyer must explain to the client what costs would be involved in pursuing the matter and the relief expected to be granted by the court.

The lawyer will make sure the defendant is accurately identified, since suing a wrong person or legal entity may result in an unenforceable judgment.[3] In respect of businesses, all must have their names registered with the Companies and Personal Property Security Branch of the Ministry of Consumer and Business Services. By requesting a search of unincorporated businesses or by requesting corporation information, one can acquire the correct legal corporate name, which may be different from the business name.[4]

Successful interview with a lawyer

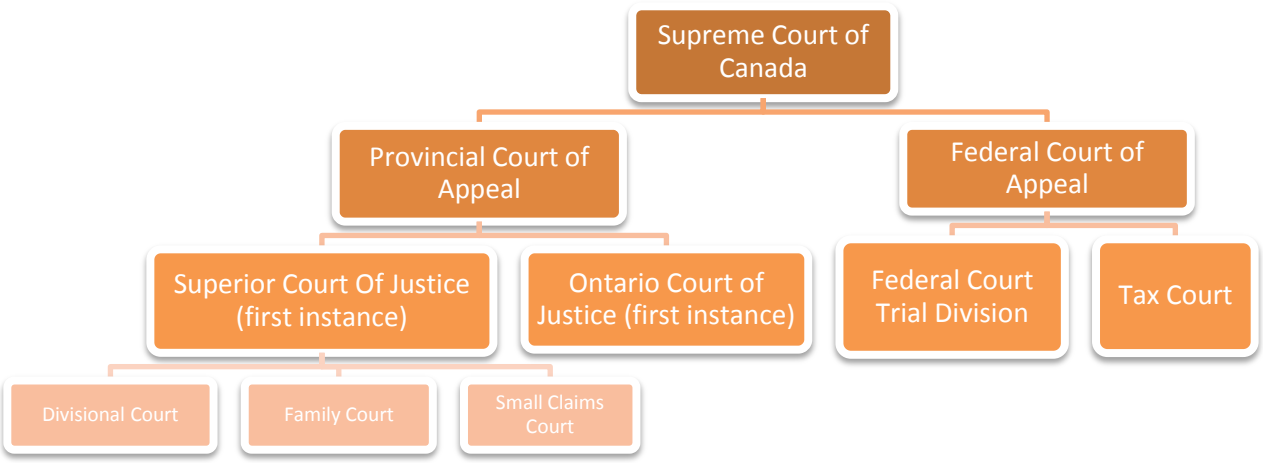
- Information on relevant people and organisations
- List of documents put in order according to their dates
- Written statement on the case
- List of questions
- At the interview - provide specific information on all relevant circumstances in an orderly and clear manner

Jurisdiction and the System of Courts in Ontario

According to s.92 (14) of the *Canadian Constitution Act, 1867*, the administration of justice in the civil courts lies within the jurisdiction of the provinces. In effect, Canadian provinces are responsible for constituting, maintaining and organising the civil courts as well as for regulating their civil proceedings. When bringing a case to the court, one must first determine which court has jurisdiction to hear the case. To gain a better overview of the topic of jurisdiction, we should first get to know the system of courts and only then will we take a look at their respective jurisdictional powers to try cases.

Canada has a system of provincial and federal courts with the Supreme Court of Canada at the top of the hierarchy. A tree chart illustrating the Canadian system of courts from the perspective of the province of Ontario is presented below:

[1] Done by completing a sheriff's request for certificate.
[2] Search is done by (i) performing a name search at the Office of the Superintendent of Bankruptcy in Ottawa or by conducting a search at the offices of the official receiver.
[3] Note that even the client, who wishes to sue, must have the legal corporate name under which he wants to sue, registered.
[4] Other search options include looking into Might's Directories and Bower's directories.



The following table provides an overview of court jurisdictions in civil law matters, including the corresponding rules of procedure:

COURT	JURISDICTION	PROCEDURE
Superior Court of Justice	• The Court has jurisdiction over civil (over $25,000) and family cases. • Simplified procedure under s.76 RCP (between $25,000 and $100,000). • The Court can hear any matter that is not specifically assigned to another level of court. • Additionally, the Court also has jurisdiction over matters granted to it by federal and provincial statutes (i.e. cases involving divorce and the division of property under federal law). • It sits in 52 locations in Ontario.[5] • **It has three branches: Divisional Court, Small Claims Court and Family Court**	RULES OF CIVIL PROCEDURE R.R.O. 1990, Reg.194 and other procedures governed by specific legislation
Small Claims Court	• The Small Claims Court has jurisdiction over monetary claims up to $25,000. • It hears cases in over 90 sites in the province.[6]	RULES OF THE SMALL CLAIMS COURT - Ontario Regulation

[5] http://www.ontariocourts.ca/scj/locations/
[6] http://www.attorneygeneral.jus.gov.on.ca/english/courts/Court_Addresses/

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Divisional Court	• Divisional Court is an appellate court that hears appeals from administrative tribunals, reviews actions of the government in Ontario and hears specific civil ($50,000 and more) and family appeals. • The only place where it sits regularly throughout the year is Toronto.	RULES OF CIVIL PROCEDURE and FAMILY LAW RULES - Ontario Reg. 114/99
Family Court	• Sitting only in 17 locations[7] across Ontario, the Family Court hears all family cases including child protection, custody and access, adoption, divorce, division of property and support.	FAMILY LAW RULES Reg.114/99
Ontario Court of Justice	• The Ontario Court of Justice has jurisdiction over cases involving child protection and adoption, custody, access and support.	FAMILY LAW RULES
Federal Court	One type of civil law matter heard by the Federal Court is intellectual property disputes.	FEDERAL COURT RULES SOR/98-106

Most proceedings involving civil law are initiated at the Ontario courts of first instance, which are (i) the Superior Court of Justice and (ii) the Ontario Court of Justice. Notice that the Superior Court of Justice has three specialized branches, the Divisional Court, the Family Court and the Small Claims Court, each of which has differing jurisdictions. A decision of the court of first instance may be appealed to the provincial Court of Appeal with the possibility of being eventually appealed to the court of highest instance of Canada's court system, the Supreme Court of Canada. The empowerment of the jurisdiction of courts is found in various statutes and regulations. The statute that lays down the basic rules regarding the jurisdiction of Ontario's courts is the *Courts of Justice Act, R.S.O. 1990,* Chapter C.43. The rules of procedure of the courts, including the general *Rules of Civil Procedure ("RCP"), Rules of the Small Claims Court* and *Family Law Rules*, are regulations found in the *Courts of Justice Act ("CJA").*

7 Family Court Sites: Barrie, Bracebridge, Brockville, Cobourg, Cornwall, Durham Region, Hamilton, Kingston, Lindsay, London, L'Orignal, Napanee, Newmarket, Ottawa, Peterborough, Perth, St. Catharines.

Commencement of Proceedings

As a general rule, the proceedings start by way of an action or application. Actions are commenced by (i) a Statement of Claim or (ii) in cases of urgency, by a Notice of Action, which is shortly followed by a Statement of Claim. In contrast to these two methods of starting an action, proceedings where material facts are not likely to be disputed may start by way of an (iii) Application. Applications differ from actions in their use of written evidence, in the form of affidavits used and in the absence of pleadings and trial.

Statement of Claim and Notice of Action

Most frequently, actions are commenced by issuance of a document called the "Statement of Claim" (s.14.03 (1) RCP). The party that has filed the Statement of Claim with the court is the plaintiff and the party sued is the defendant. The step that notifies the court that a proceeding has been commenced is called the issuing of a Statement of Claim. In order for the Statement of Claim to be issued, the document needs to be brought to the court and the date of filing, a seal, a court file number and his/her signature needs to be provided by the registrar.[8] Two copies of the document should be taken to the court, one of which will be returned signed and sealed. Issuing the claim is subject to payment of the court fee. This is usually done by bringing a cheque payable to the Minister of Finance. Information regarding the amount of current fees can be obtained by calling the court or by checking the website of the Ontario Ministry of the Attorney General.[9] Different rules with regard to costs apply to actions and applications in Toronto, Ottawa and the county of Essex.[10]

Plaintiffs are generally required to use different standard forms for different purposes. A Statement of Claim must be filed under the standard form 14A available on the website of Ontario Court Services.[11] Attached as appendix 1 is form 14A as it would look after being filed by the plaintiff and issued by the Ontario Superior Court of Justice. It also contains instructions on where to set out the relief sought and how to structure the individual statements.

Appendix 1: Sample Statement of Claim

Lack of time for preparation of a Statement of Claim, which occurs mainly due to the threat posed by limitation periods, may force the plaintiff to have the action commenced by a Notice of

[8] Registrar acts in person only in small courts. In Toronto, there is an issuance office with employees acting on behalf of the registrar.
[9] http://www.gov.on.ca
[10] Procedure called "Case Management" defined in s.77 RCP applies.
[11] Form 14A - http://www.ontariocourtforms.on.ca/english/civil/

Action (s.14.03(2)).[12] A Notice of Action shall contain a short description of the nature of the claim and the aforementioned Statement of Claim must be issued within the following 30-day period. Claims stated in the Notice of Action may be altered or extended by the Statement of Claim.

In contrast to the content of German civil actions, Canadian Statements of Claim do not contain a detailed account of the case or a list of evidence intended to prove such account. Rather, a Statement of Claim contains a summary account of the facts and a statement of the relief sought without any evidence being pleaded. The purpose of this approach is to enable the court to determine the cause of action. In cases where no such cause can be determined, the defendant can ask the court to dismiss the action, thus avoiding the expense and inconvenience of trial. The same is valid for a Statement of Defence. If the Statement of Defence fails to raise an issue that would in law amount to a defence, the plaintiff can apply for judgment. A complete failure to deliver a Statement of Defence can result in a default judgement. A similarly fast way for the court to dispose of a case is to issue a summary judgment. This occurs in cases where there is no doubt on the basis of the facts that one side will win.

In certain cases where both parties agree on the facts of the case, they may proceed by bringing a question of law before the court. Based on the Agreed Statement of Facts, the court issues its decision by applying the relevant legal rules.

Service in Actions

The Statement of Claim must be served within 6 months of the issuing of the Statement of Claim/Notice of Action (s.14.08 (1) (2) RCP). Defaulting on this duty means that the plaintiff is running the risk of having his action dismissed as abandoned. The Statement of Claim shall be served personally or by an alternative method of service (ss.16.02 and 16.03 RCP).

Motions

Particularly during the pre-trial proceeding, different issues arise, the settlement of which is pursued through filing of motions (e.g. motions to join parties to a lawsuit). Motions are not limited to the pre-trial stage exclusively.

A motion shall be made by a Notice of Motion (Form 37A) unless the nature of the motion or the circumstances make a Notice of Motion unnecessary (e.g. where serving a Statement of Claim is not possible).

In general, the moving party shall set an appointment with a master or judge and then serve a Notice of Motion with the supporting affidavit on the responding party. The purpose of the notice of motion is to inform the responding party of the issue, including the reasoning and the

[12] Form 14C - http://www.ontariocourtforms.on.ca/english/civil/

remedy sought (s.37.06 RCP). The motion is supported by an affidavit, the content of which can either be personal knowledge of the deponent or hearsay subject to identification of the source. The form used for affidavits is Form 4D (s.4.06 RCP).

Once a date for the motion hearing is set, the Notice of Motion served and the response of the responding party acquired, one must prepare a document called the "Motion Record". A Motion Record would regularly consist of the Notice of Motion, affidavits, the responding party's documents and other documents (s.37.10 (2) RCP), unless the responding party prepares a Motion Record of its own. The Motion Record is filed with the court providing it with all material necessary to consider the merits of the motion. Regularly, the motion is disposed of after the motion hearing. Sometimes, statements regarding facts, arguments, application of law and case law are summarized in a document called the "Motion Factum", which is then filed on the motion.

Case Management and Preparing for Trial

Rising costs of litigation and procedural delays have forced the Canadian courts to bring the preliminary stages of litigation under more strict supervision. Particularly in complex cases, the court will set a time-schedule for the different pre-trial stages of the litigation and enforce compliance with its provisions. Once the pleadings are completed and there is no more need for pre-trial discovery or interlocutory motions, the plaintiff shall put the case on the list for trial.

Discovery

Discovery is a part of the proceedings, in the course of which evidence is presented for the purpose of determination of the case facts. Discovery proceedings are normally available in the course of actions, which are instigated by the issuing of a Statement of Claim, and not in the course of applications. Aside from rules of discovery that have general application, there are rules of discovery governed by the Simplified Procedure (s.76 RCP) and rules of discovery applying to proceedings in the Small Claims Courts.

Types of Discovery	
Pre/trial examination of witnesses **(ss.36 and 34 RCP)**	Instead of examination at the trial, a party may examine a witness (who is not a party to the action) before the trial begins. This can only be done with the other party's consent or with the court's permission. A witness examined before a trial is not allowed to give evidence at the trial without the court's permission.

Request to admit **(s.51 RCP)**	Request to admit allows one party to ask the opposing party to admit the truth of a fact or the authenticity of a document. In these cases, failure to respond within a specific period of time is deemed an admission.
Discovery of documents **(s.30 RCP)**	The all-encompassing rule is the requirement of disclosure of every relevant document to all other parties. Disclosure is performed by providing a list of documents called an "Affidavit of Documents". The party receiving the affidavit can then ask to see the documents of its choosing.
Examinations for discovery **(ss.31 and 34 RCP)**	This is the opportunity of either party to ask questions of the opposing party before the actual trial. The answers are given under oath without the need for a judge or court official to be present.
Written examinations for discovery **(ss.31 and 35 RCP)**	Instead of oral examination, questions can be provided to the other party in writing; the form of an affidavit is used to provide the answers.
Inspection of property **(s.32 RCP)**	Subject to a court order, an inspection of personal and real property is possible to resolve an issue in the action.
Medical examination **(s.33 RCP and s.105 CJA)**	In cases where mental or physical health is the issue, an examination by a health practitioner may be required.

The most frequently used methods of discovery are the Production of Documents and the Examination for Discovery. Evidence and information that have successfully gone through discovery are used for the purpose of the proceedings and only special circumstances allow them to be used outside of those particular proceedings (e.g. in a subsequent action).

Discovery Plan

In general, discovery is the part of civil proceedings that follows the close of pleadings. Unless the parties agree otherwise, the parties must present a discovery plan within 60 days of the close of the pleadings. The purpose of the discovery plan is to set out the scope of the documentary discovery, including dates for service of each party's affidavits, the names of persons intended to be produced for oral examination and information regarding the timing, length, manner and costs of examination.

Discovery of Documents (Affidavit of Documents)

Discovery of Documents provides access to relevant documents of both parties to the proceedings as well as documents in the power of third parties. The definition of the term "documents" is broad (s.30.01 (1)(a)RCP) and it includes such evidence as sound recording, videotapes, films, photographs etc. The Discovery of Documents begins with creating an Affidavit of Documents, which contains a list of all documents relevant for any matter in issue in the action that are or have been in the parties' possession, control or power.[13] Matters in issue are points that were raised by a party in the pleadings, e.g. Statement of Claim or Statement of Defence. In order to prepare an Affidavit of Documents, one must fill out the court form 30A (for individuals) or 30B (for corporations) and list the documents in three schedules:

- **Schedule A**: All documents that are in your possession, control or power and you do not object to producing
- **Schedule B**: All documents that are in your possession, control or power and to the production of which you object on the basis of privilege
- **Schedule C**: Whether one claims privilege[14] or not, one must list all the documents that were in one's possession, control or power, together with a statement of how this possession, control or power was lost

Both parties prepare and exchange their Affidavits of Documents for inspection. If you have no documents related to the matters in issue, you still have to swear an Affidavit of Documents containing the corresponding statement. Sometimes a Supplemental Affidavit of Documents may have to be served in order to produce new documentary evidence.

Appendix 2: Sample Affidavit of Documents

Viewing of documents of the opposing party takes place in two ways. One can either begin by serving the other party with a Request to Inspect Documents (s. 30.04(1) RCP, Form 30C)[15] or inspect the documents later in course of the Examination for Discovery or in the course of the trial.

Examination for Discovery

Examination for Discovery is another practical tool used to settle the facts of the case. Conducted under oath and before an official examiner (not a judge), the parties obtain a transcript of all the questions and answers. If you want to examine a party, you will have to complete and serve a Notice of Examination (Form 34A). The person examined and all other parties must be given at least 2 days' notice of the time and place of the examination (s.34.05 RCP). What follows is an

[13] This includes documents that a party is entitled to obtain, such as a bank statement.
[14] Privilege prevents the opposing party from seeing the document.
[15] The documents must be disclosed within 5 days of the serving of the request.

overview of the basic questions regarding the Examination for Discovery.

Written Examination for Discovery

Written Examination for Discovery is essentially the same as Examination for Discovery in person (s.35 RCP). In principle, a list of questions is served (Form 35A), which must be answered by an affidavit (Form 35B) and served back on the examining party within 15 days of the serving of the questions. The examined party may answer the questions, give an undertaking to provide answers, object to answering or refuse to answer, or take the questions under advisement (the questions the opposing lawyer wishes to consider in greater detail). If the examining party is not satisfied with the answers provided or wants to suggest a new line of questioning, it may serve a further list of questions.

Overview of Examination for Discovery	
Who will be examined?	• One can examine any party that is adverse in interest (s.31.03 RCP). • One can examine a person who is not a party to the action. Such examination is subject to permission by the court and serving of the Summons of Witness (s.31.10 RCP). • One can examine expert witnesses.
What can be asked?	• Questions related to the matter in issue in the action. • Questions on the identity of people who have knowledge of matters in the issue in the action. • Answers contain knowledge, information or belief. Failure to provide an answer can result in sanctions (s.31.07(2) and s.34.15 RCP).
When?	• When the examinee(s), the official examiner and the lawyers are available. • After serving the Notice of Examination. • As plaintiff, only after the defendant has served his/her Statement of Defence and the plaintiff has served the Affidavit of Documents. • As defendant, only after you have served your Statement of Defence and your Affidavit of Documents.
Where and how long?	Unless the parties agree or the court grants a leave, the examination will take place in the county where the examinee resides. Oral Examinations for Discovery are not allowed to exceed a seven-hour time limit.

Use at trial	Any part of the evidence given in the Examination for Discovery may be read into evidence, i.e. the court record of which a transcript is kept, as part of the party's own case.

Pre-Trial Procedures

Once the parties are given the chance to examine their cases in the course of the discovery process, they may abandon their action or try to settle the case or they may decide to go to trial. Going to trial may require you to go through certain pre-trial procedures, in the course of which the parties would notify the court that they are ready for trial. This procedure includes attending a pre-trial conference and dealing with admissions. What follow are an overview and a short description of these procedures:

Pre-Trial Procedures	
Place of trial • General rule sets out that the trial is held in the place where the proceeding was commenced. • Court has the power to move the place of trial on the "balance of convenience" test (s.114 CJA and s.13.1.02 RCP) based on whether a fair hearing can be held in the county where the proceeding was commenced or whether a transfer is desirable in the interest of justice.	s.46 RCP
Deciding between a trial with jury and a trial without jury • In general, any party may require that the issues of fact and the assessment of damages be tried by a jury.	s.47 RCP
Setting down for Trial • The court does not automatically schedule a trial after the filing of the lawsuit. Rather, the court must be notified by the parties of their being ready to move to trial. Under regular circumstances, an action is set down for trial by the plaintiff by serving a trial record prepared in accordance with s.48.03 RCP on every party to an action along with proof of service. Once the party sets the action down, it is prohibited from bringing any motions or performing any further discoveries without leave of the court. • 60 days after filing the trial record, the register places the action on a trial list. In major cities, once the record is filed, the case is simply placed on the bottom of the list. The lawyers must keep track of the position of their cases on the list. • An action that was defended should be placed on the trial list within 2 years of the filing of the first defence. The registrar will serve a status notice on the parties	s.48 RCP

warning them of the possibility of dismissal unless the action is set down within 90 days of the serving of the notice.	
Pre-Trial Conference • Pre-trial conference is a mechanism, the purpose of which is to settle disputes and/or enable an expeditious disposition of the proceeding by narrowing the issues for trial. It is attended by both parties and the pre-trial judge. The parties outline their cases, describe the evidence they intend to use and tell the judge about how they plan to protect their interests in the proceeding. In Toronto, the parties are required to prepare a pre-trial conference memorandum. Without making a final decision, the pre-trial judge[16] provides his/her opinion regarding the case, including telling the parties of their chances to succeed.	s.50 RCP
Admissions • Admission is a mechanism that removes the need to prove authenticity of documents or the truth of certain facts. A party may serve a Request to Admit on the opposing party (Form 51A) and the party who receives such a request must respond within 20 days of the serving of the request. The Request to Admit must be answered by admitting or denying facts or documents. • Failure to respond to the Request to Admit is deemed an admittance of the facts and/or documents. • An admission may be made in an affidavit, in an Examination for Discovery or in any other examination under oath or affirmation in or out of court.	s.51 RCP

Trial

The Ontario Rules of Civil Procedure offer two types of trial:

(i) trial before a judge; and
(ii) trial before both the judge and a jury.

Trial before a judge alone involves the judge's assessment of the case from both the legal and factual perspective. In civil proceedings, a jury trial allows the 6-member jury to perform the function of deciding the questions of fact.[17] The trial starts with the opening statement of the plaintiff, which is generally followed by the introduction of the evidence for the plaintiff.

[16] The pre-trial judge may not be the presiding judge at trial.
[17] Certain cases cannot be tried by a jury.

Preparing for Trial

Having the case near the top of the trial list should force the parties to prepare their evidence as soon as possible. As we know, this evidence may include documentary and physical evidence and testimonies of witnesses.

Documentary Evidence

Most of the documentary evidence may have already been prepared in the course of discoveries and in the course of drafting the Affidavit of Documents. Only a small part of these documents is actually used at trial, due to issues between the parties being narrowed and, in turn, resulting in a decreased amount of relevant evidence. Subject to certain exceptions, documents introduced as evidence must be authenticated by a witness. In principle, trial requires production of original documents. Exceptions to this rule include production of certified copies acknowledged by the law[18] or giving the other parties notice at least 10 days before the trial. The *Canada Evidence Act* and the *Ontario Evidence Act* provide for an exception that allows introducing business records subject to a 7-day notice of intention, which must be served on the other parties.[19]

Physical Evidence

Physical evidence may be introduced into evidence and provided to the court. Sometimes, this type of evidence may require the court to inspect an object outside of the courtroom; this is called a "view" (s.52.02 Ontario Evidence Act).

Testimonies

In principle, witnesses are summoned to testify in person. Oral evidence given in person is the general rule, whereas affidavits can only be used with a special leave of the court. The parties or their lawyers are the active elements who ask questions in the course of the examination-in-chief (examination by the lawyer, who has called the witness) and in the course of the subsequent cross-examination (examination by the adverse party). The judge and the jury concentrate on listening to the answers. There is a considerable difference between the oral evidence provided by an expert witness and a regular witness. The expert witness equipped with the necessary qualification and experience is allowed to give opinion-based evidence, unlike a regular witness, who must strictly narrow his/her statement down to what he or she saw, heard or otherwise perceived.

It is preferable to serve each witness with a summons. The summons is issued by a court, it must be served personally on the witness and it must be accompanied by a cheque for the full amount of the attendance allowance including any travel allowance. Calling of an expert witness requires production of a report, which must be signed by the expert and must describe the substance of

[18] Such as public or official documents under s.29 of the Ontario Evidence Act
[19] Somewhat similar rules apply to medical reports under s.52 of the Ontario Evidence Act

his/her testimony. This report must then be served on all the parties at least 90 days before the trial. The opposing party may then decide to produce their own expert witness by serving a similar report at least 60 days before the trial. Failure to provide the expert report in advance is legal grounds to object to the report being tendered as evidence.

Brief of Authorities

The parties may prepare a document called the "Brief of Authorities", which would contain all the statutes, regulations and cases that support the parties' arguments. The document is given to both the judge and the other parties.

Trial Brief

A Trial Brief is a document prepared by the lawyer for his/her own use in the court. By preparing a Trial Brief, the lawyer organizes all the relevant material. It will include opening and closing arguments, summaries of evidence and other important materials necessary to make the case in trial. It is not to be confused with the Trial Record required to set the action down for trial.

Judgment

The court orders issued by the courts of first instance are divided into "orders" (Form 59A) and "judgments" (Form 59B). Orders are used for decisions on motions and applications, whereas judgments present the final decision on the merits of the case. Drafting of an order is a process of its own, which consists of the following steps:

Process of Drafting Orders and Judgments
Endorsement of the record by the judge or master Decisions on a motion or on the merits of the case are made by endorsement of the decision on the back of a trial or motion record, or other court document. The judge may add reasons for his/her decision or state "reasons to follow" (s.59.02 RCP).
Drafting of the order or judgment Preparation of the order is the responsibility of the parties, particularly of the one that wins. This party needs to copy the endorsement and, depending on the type of order, it will fill out the prescribed form. In the course of the latter, the party will have to prepare a draft order that will contain (i) the name of the judge, (ii) date on which the order was made, (iii) recitals, and (iv) all the commands listed in numbered paragraphs.

Approving of the order

After the order is drafted, approval by the other parties is required. This is done by writing "approved as to form and content" on the face of the order and adding the appropriate signature. In the best case scenario, the order is then taken to the Registrar, who will sign it on behalf of the Court. Should the other parties or the Registrar disagree with the form of the order, the order is referred to the Judge or Master who made the order. Urgent cases require the lawyer to prepare the order beforehand, persuade the judge of the urgency and let him/her sign the order ("let this judgment issue and enter").

Entering the order

The signed order is officially recorded and a seal is applied to the order.

Costs

In most cases, the losing side bears at least part of the legal costs of the winning side. The awarding of costs, their amount and even the possibility of the winning party paying the costs of the losing side, lies within the discretion of the court.[20] In order to keep the costs within a reasonable range, s. 57.01(1) CJA [21]sets out factors that must be considered in a decision on costs:

- Funds that the winning party recovered
- Importance of the issue (severity of the impact on damaged/injured party)
- Complexity of the proceedings
- Conduct of any party, including negligence and mistake
- Experience of the lawyer, rates charged and the time spent

Costs awards rarely cover total expenses of the winning party. The amount of the costs recovered depends on the court's choice of scale. The court chooses between the more frequently used (i) partial indemnity scale, and the less frequent (ii) substantial indemnity scale. The substantial indemnity scale equals 1½ times the amount awarded under partial indemnity. Logically, determining the partial indemnity scale is necessary to calculate the amount awarded under the substantial indemnity scale. The judge decides who is awarded the costs and he/she has the option to determine the costs himself/herself ("fixing the costs") or to leave that up to an

[20] Jurisdiction is determined by s.131 CJA
[21] Form 57B

assessment officer ("assessment of costs").

To help the practice of fixing costs and aid the parties in focusing on the cost factors, the parties prepare a document called the "Costs Outline" (Form 57B), which outlines (i) the fees at each step of the proceeding, (ii) the counsel fees for time spent in court, and (iii) the disbursements. It sets out all the cost factors (s.57.01 RCP), so that parties can provide their commentary. More specifically, the costs outline should provide the docketed hours and the rates charged to the client for each stage of the proceedings.

The form requires the parties to provide partial indemnity rates claimed for each person, which must obviously be lower than the actual rates charged. For example, had the lawyer charged $300 CAD per hour, he would set the partial indemnity rate at about $200 per hour. It is obvious that this system clearly lacks predictability and the chances of being awarded substantial indemnity costs are not designed to compensate for this deficiency. Should the costs not be fixed by the court, the matter is referred to an assessment officer, who will determine the costs in the course of an assessment hearing.

A Bill of Costs (Form 57A) is a document the purpose of which is to show all the work done on the file. The dockets are divided according to the nature of tasks into those that involve work predicted by the Rules of Civil Procedure and those not covered by the rules, such as meetings with clients.

Factors to be considered in Determining a Bill of Costs

1. Determine the scale (partial or substantial)
2. Divide the time dockets into cousel and non-counsel fees
3. Based on the actual rate and the years of exprience, determine the partial indemnity rate
4. Set out the disbursements including the evidence thereof
5. Provide time dockets

Determining costs usually comes at the end of a stage or stages of civil proceedings.

Appendix 1: Statement of Claim

Court File No. 11-11111

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEEN:

[Court Seal]

Canadian Company A, LTD.

Plaintiff

and

Canadian Company B, LIMITED

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

(Where the claim made is for money only, include the following)

IF YOU PAY THE PLAINTIFF'S CLAIM, and $ for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $400 for costs and have the costs assessed by the court.

Date …..... Issued by ….....

Local registrar

Address of
Court office ….....

TO *(Name and address of each defendant)*

THIS ACTION IS BROUGHT AGAINST YOU UNDER THE SIMPLIFIED PROCEDURE PROVIDED IN RULE 76 OF THE RULES OF CIVIL PROCEDURE.

CLAIM

1. The plaintiff claims: *(State here the precise relief claimed.)*

(Then set out in separate, consecutively numbered paragraphs each allegation of material fact relied on to substantiate the claim.)

(Where the statement of claim is to be served outside Ontario without a court order, set out the facts and the specific provisions of Rule 17 relied on in support of such service.)

(Date of issue) *(Name, address and telephone number of lawyer or plaintiff)*

Appendix 2: Affidavit of Documents

FORM 30A

Courts of Justice Act

AFFIDAVIT OF DOCUMENTS (INDIVIDUAL)

(General heading)

AFFIDAVIT OF DOCUMENTS

I, *(full name of deponent)*, of the *(*City, Town, *etc.)* of ... , in the *(*County, Regional Municipality, *etc.)* of ..... ,.....the plaintiff *(or as may be)* in this action, MAKE OATH AND SAY *(or* AFFIRM*)*:

1. I have conducted a diligent search of my records and have made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relevant to any matter in issue in this action that are or have been in my possession, control or power.

2. I have listed in Schedule A those documents that are in my possession, control or power and that I do not object to producing for inspection.

3. I have listed in Schedule B those documents that are or were in my possession, control or power and that I object to producing because I claim they are privileged, and I have stated in Schedule B the grounds for each such claim.

4. I have listed in Schedule C those documents that were formerly in my possession, control or power but are no longer in my possession, control or power, and I have stated in Schedule C when and how I lost possession or control of or power over them and their present location.

5. I have never had in my possession, control or power any document relevant to any matter in issue in this action other than those listed in Schedules A, B and C.

6. I have listed in Schedule D the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue. *(Strike out this paragraph if the action is not being brought under the simplified procedure.)*

SWORN *(etc.)*

.....

(Signature of deponent)

LAWYER'S CERTIFICATE

I CERTIFY that I have explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action;

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings; and

(c) if the action is brought under the simplified procedure, the necessity of providing the list required under rule 76.03.

Date.....

.....

(Signature of lawyer)

Schedule A

Documents in my possession, control or power that I do not object to producing for inspection.

(Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it.)

Schedule B

Documents that are or were in my possession, control or power that I object to producing on the grounds of privilege.

(Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it. State the grounds for claiming privilege for each document.)

Schedule C

Documents that were formerly in my possession, control or power but are no longer in my possession, control or power.

(Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it. State when and how possession or control of or power over each document was lost, and give the present location of each document.)

Schedule D

(To be filled in only if the action is being brought under the simplified procedure.)

Names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue.

RCP-E 30A (November 1, 2008)