Civil Procedure
Winter Term 2023

LECTURE NOTES NO. 1

I. INTRODUCTION

"Adversarial" Justice

Rule 1.04 (1)

> **General Principle**
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> 1.04 (1) These rules shall be liberally construed to secure the **just, most expeditious** and **least expensive** determination of every civil proceeding on its merits.

- **The importance of the adversarial principle cannot be overstated.** It colours the entirety of the field of litigation. As a matter of principle, it may well be a very useful approach to peaceful dispute resolution. For the litigants, it is brutal.

- In normal circumstances the contest is fought by adversaries before a judge who acts as neutral umpire respecting the rules of the contest and its ultimate result. Whichever side convinces the trier of fact (judge or jury) on a **'balance of probabilities'** wins.

- While the Court is neutral, the realities of economic disparities and resources challenge the judge to ensure that the weaker party is not denied justice. Judges may have to provide some guidance to an unrepresented party just to keep the matter on track and allow other cases to be heard before the end of time.

- **Procedures should be proportional to what is at stake.** Lawyers should bear in mind what things cost and how long procedures take and should then mould them to suit the nature of the dispute and how much money is at stake – i.e. use some common sense (an underrated quality, much prized in practice).

What exactly are 'The Rules'?

There are various types and sources of procedural rules:

- There are regulations under the statutes that create the court in question which we refer to as "rules or procedure" or "rules of practice". We will be dealing primarily with the "Rules of Civil Procedure" that are created under the *Courts of Justice Act*, Section 66, for proceedings in the Superior Court and the Court of Appeal. We may touch on the intersection between the Rules of Civil Procedure and the Family Law Rules.

- Superior Courts (and some inferior courts) have an inherent jurisdiction to deal with procedural points.

- 'Practice Directions' issued by courts provide procedures in a given region for particular kinds of litigation.

Access to Justice

"Access to Justice" has become a catch-all phrase in relation to the ability of a person to have reasonable recourse to the law. While there is a lot of talk, there is unfortunately not a lot of money. Legal Aid has been cut back substantially in recent years causing a glut of self-represented litigants before the courts (nb: there is no constitutional right to be represented by a lawyer). Where the courts have confronted such issues it is most often in relation to the imposition of additional road-blocks, such as fees charged for court time.

British Columbia (Attorney General) v. Christie
2007 SCC 21 (S.C.C.)

There is no right to counsel in civil litigation. The Court held:

> 10 **The respondent's claim is for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right. What is sought is the constitutionalization of a particular type of access to justice — access aided by a lawyer where rights and obligations are at stake before a court or tribunal** (Court of Appeal, at para. 30). In order to succeed, the respondent must show that the Canadian Constitution mandates this particular form or quality of access. The question is whether he has done so. In our view, he has not.
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> ...
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> 19 The rule of law is a foundational principle. This Court has described it as "a fundamental postulate of our constitutional

structure"… that "lie[s] at the root of our system of government" …. It is explicitly recognized in the preamble to the Constitution Act, 1982, and implicitly recognized in s. 1 of the Charter, which provides that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"…

20 The rule of law embraces at least three principles. The first principle is that the "law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power"…The second principle "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"…The third principle requires that "the relationship between the state and the individual . . . be regulated by law"…

...

23 **The issue, however, is whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.**

24 The text of the Charter negates the postulate of the general constitutional right to legal assistance contended for here. It provides for a right to legal services in one specific situation. Section 10(b) of the Charter provides that everyone has the right to retain and instruct counsel, and to be informed of that right "on arrest or detention". If the reference to the rule of law implied the right to counsel in relation to all proceedings where rights and obligations are at stake, s. 10(b) would be redundant.

25 Section 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the Charter, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see Dehghani v. Canada (Minister of Employment and Immigration), 1993 CanLII 128 (SCC), [1993] 1 S.C.R. 1053, at p. 1077; New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46. But this does not support a

general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in New Brunswick, the Court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).

26 **Nor has the rule of law historically been understood to encompass a general right to have a lawyer in court or tribunal proceedings affecting rights and obligations. The right to counsel was historically understood to be a limited right that extended only, if at all, to representation in the criminal context**: M. Finkelstein, The Right to Counsel (1988), at pp. 1-4 to 1-6; W. S. Tarnopolsky, "The Lacuna in North American Civil Liberties — The Right to Counsel in Canada" (1967), 17 Buff. L. Rev. 145; Comment, "An Historical Argument for the Right to Counsel During Police Interrogation" (1964), 73 Yale L.J. 1000, at p. 1018.

27 We conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.

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Trial Lawyers Association of British Columbia v. British Columbia (A.G.)
2014 SCC 59 (S.C.C.)

The B.C. Rules of Civil Procedure provide for 'hearing fees' for the use of a courtroom during trial; $156 for the first half-day of a trial and rising to $624/day after ten days. The imposition of the fees was struck down at first instance in this case. At trial, McEwan J held that fees were within the legislative ambit of the province but the level of fees rendered them unconstitutional as they went far beyond cost recovery. In the Court of Appeal (*Vilardell v. Dunham*, 2013 BCCA 65), **Donald J.A.** largely agreed with the reasoning of the trial judge but cured the constitutional defect by enlarging the jurisdiction of a judge to order relief based on need:

[26] **… What makes hearing fees constitutionally suspect is in their potential to impede persons who cannot afford them. Wealthy individuals and corporations may not like paying the fees but they are unlikely to alter their litigation strategy because of them. In that sense, the government efficiency objective is invidious because the fees impinge only on the economically disadvantaged. Only they, not the well-to-do, will be discouraged from pursuing their rights in a hearing of sufficient length to do justice to the issues. However, an effective**

> **exemption defeats the invidious purpose but allows the cost recovery objective to be achieved.**
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> …
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> [32] *Schachter v. Canada* is the leading case on constitutional remedies. Chief Justice Dickson in B.C.G.E.U. noted at 229 that "the rule of law is the very foundation of the Charter". Section 52(1) of the Constitution Act, 1982, states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In effecting a constitutional remedy under s. 52(1), Chief Justice Lamer for the majority in *Schachter* stated that the first step is to properly define the extent of the Charter inconsistency. In this case, **the constitutional inconsistency consists of an under-inclusive exemption from hearing fees, which restricts it to people who would be defined as impoverished. As I stated earlier, an enlarged interpretation of the indigency provision is necessary to uphold the constitutionality of hearing fees and remove a barrier to court access.**
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> [33] The next step is to determine the appropriate remedy for a constitutional violation, which can include severance, reading down or reading in provisions into the Rules. **Reading in is the most appropriate remedy in this case. Striking down the hearing fees or the exemption in its entirety would be undesirable for the reasons already given. This violation stems from an exemption which omits people who, while not impoverished, cannot afford the hearing fees. The effect of this omission limits their access to the courts, which violates the rule of law. The most effective way to deal with this omission is to read in the words "or in need" to Rule 20-5**.

The matter was then brought to the Supreme Court of Canada by interveners on the question of remedy. The appeal was allowed and the legislation struck down with immediate effect.

Per McLachlin CJC:

> [40] **In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law.** If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may

be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631 (CanLII), 262 D.L.R. (4th) 51, at paras. 68-9, per Newbury J.A.

[41] **This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in Christie — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts.** The tax at issue in Christie, on the evidence and arguments adduced, was not shown to have a similar impact.

…

[46] **A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.**

[47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[48] **It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them.** Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the Statute of Henry VII, 11 Hen.

> 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

[Please note that Ontario courts do not charge hearing fees. However, there are filing fees and other charges from which Courts may order relief. For more information, see the MAG's Guide to Fee Waiver Requests.]

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Van Delst v. Hronowsky
2022 ONCA 881 (Ont. C.A.)

What can be done where one litigant uses the justice system to delay and harass his or her opponent?

This was a family law dispute in which the Husband brought various motions and appeals without merit and sought to delay enforcement of remedies ordered after trial. The judgment in this case was rendered on a motion to quash an appeal because the Husband had failed "to perfect" it in the allotted time; that is, he failed to file all the necessary materials that would allow the appeal to be scheduled for hearing (causing yet more delay).

Gillese J.A.:

> [17] **Rule 2.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, empowers this court to stay or dismiss a proceeding if the proceeding appears, on its face, to be frivolous or vexatious or otherwise an abuse of the process of the court. On its face, this Appeal is another meritless attempt by Mr. Hronowsky to avoid paying Ms. Van Delst the equalization monies she is owed and the many unpaid costs awards in her favour.**
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> [18] As the moving party notes, one of the main grounds set out in the Notice of Appeal is that the hearing judge was not aware of the pending panel review of Simmons J.A.'s order before he denied Mr. Hronowsky's request for a stay. Because this court dismissed Mr. Hronowsky's challenge of Simmons J.A.'s order (with costs against him), on November 9, 2022, this ground of appeal is moot.
>
> [19] Although Mr. Hronowsky continues to challenge his obligation to make a cash equalization payment, this court upheld that method of payment on the first appeal. This court reiterated that point on the second appeal. Accordingly, this court cannot – and will not – consider again whether Mr. Hronowsky is required to pay the equalization in cash. To be

clear, Mr. Hronowsky is required to make the equalization payment in cash and he is also required to pay all of the costs orders in cash.

[20] It would be grossly unfair to Ms. Van Delst to allow Mr. Hronowsky to continue to relitigate this matter: her entitlement to the equalization payment and numerous unpaid costs orders is clear and has been reaffirmed in numerous judicial proceedings. Mr. Hronowsky's actions have prevented Ms. Van Delst from enforcing valid court orders and caused her to amass large legal bills. In addition to his non-compliance with monetary orders, he is in arrears of child support, and has failed to comply with court orders requiring him to provide his 2020 and 2021 income tax information to the moving party. In our view, Mr. Hronowsky's failure to abide by court orders alone justifies this court to exercise its discretion and refuse to hear his appeal: *Dickie v. Dickie*, 2007 SCC 8, [2007] 1 S.C.R. 346, at para. 6. In any event, to permit Mr. Hronowsky to continue with the Appeal is an abuse of process and will no longer be tolerated: *Bell v. Fishka*, 2022 ONCA 683.

[The doctrine relied upon by the Court – "abuse of process" – is one that we shall return to alongside principles dealing with estoppel.]

Professionalism

Lawyers are obligated to act competently and in the best interests of clients. For advocates, this means putting forward a client's case to the best of the lawyer's ability and using all available procedures and evidence. There are limits, however, imposed by the Law Society's *Rules of Professional Conduct*.

Fees

Fees = charges for professional services performed under a contract.

The usual practice is **hourly fees**; in some areas, **contingency fees** (payable at a percentage of an award only in case of success) or **block fees** are used. Minimum fees may be charged. In some cases, lawyers work *pro bono* or their fees are paid by Legal Aid (on an hourly or block-fee basis) or are ordered by the Court to be paid by the Crown (rarely). A contract between a lawyer and a client is called a **retainer agreement**. Money paid 'on retainer' is held in trust and applied to the amount owing after **an account is rendered**.

A client can have a lawyer's account '**assessed**' under the *Solicitors Act*, s.3 by an 'Assessment Officer' within 30 days after the final account is rendered. The bill can be reduced where it is outside the retainer agreement or unreasonable based on the following factors:

1. The time expended by the solicitor;
2. The legal complexity of the matters to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The client's expectation as to the amount of the fee.

57.07(1) of the Rules:

> **57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,**
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> (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
>
> (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> **(c) requiring the lawyer personally to pay the costs of any party.**
>
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.
>
> (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

Standard Life Assurance Co. v Elliott
2007 CanLII 18579 (Ont. S.C.J.)

Here the claim was made against an insurer and all of its former and present employees who dealt with the plaintiff's insurance claim for disability payments. The claim against the third parties was both unnecessary practically (the defendant admitted vicarious liability if the principal allegations were proved) and failed on legal grounds. The effect was to increase the defendant's costs which were sought on an elevated basis from the lawyer for the plaintiff *personally*.

Molloy J.:

10 In exercising discretion as to an appropriate costs award, it is relevant to take into account "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding" and "whether any step in the proceeding was improper, vexatious or unnecessary": Rules of Civil Procedure, Rule 57.01(1)(e) and (f).

...

13 Counsel for Standard Life gave Mr. Masters several opportunities to drop the third party claim against the employees without the necessity of a motion, but he refused.

...

15 As a result of the third party proceeding alone, Standard Life will have incurred nearly $40,000.00 in legal fees. This kind of tactical litigation is not conducive to the legitimate settlement of disputes in our judicial system. On the contrary, it is exactly the kind of conduct that makes litigation so prohibitively expensive that legitimate disputes cannot be litigated. It is appropriate in this kind of situation to discourage such conduct by imposing stiff costs consequences...

...

20 There is no evidence whatsoever to support that accusation. There is, in my view, considerable merit to Standard Life's request that Mr. Masters be personally liable for the costs. Although Ms Elliott is an intelligent, well-educated person, she is not a lawyer, has no legal training and cannot have been the inspiration behind the third party proceeding. That litigation strategy must have been developed and recommended by her lawyer...

21 Furthermore, from what I have seen of Mr. Masters' conduct in the material before me, I believe it goes well beyond a lawyer "forcefully and aggressively" advocating for his client...

...

23 In Ontario, the test is now set out in Rule 57.07 (1) (c), which states:

> 57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (c) requiring the solicitor personally to pay the costs of any party.

...

26 In *Young v. Young* (1993), 108 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada held that costs ought not to have been awarded

personally against the solicitor for the father in protracted child custody proceedings dealing with the extent to which the father could involve the children in his Jehovah's Witness religious activities during periods of access. The Supreme Court recognized that the proceedings had been lengthy and acrimonious. However, the Court held, at p. 284 that costs are compensatory and are not awarded for the purpose of punishing a barrister. McLachlin J, (writing for the majority on this point), stated p. 284:

> . . . **Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging that abuse and delay. It is as clear that the courts possess that jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. . . . Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.**

31 **Costs are meant to be compensatory. The likelihood of recovering the costs thrown away as against the defendant are remote. The only way to truly compensate the plaintiff insurer for its costs would be to make them payable by the solicitor.** Given my finding that Mr. Masters was the instigator of the action taken and that he took the steps he did for an improper purpose, as well as the fact that his general conduct of the litigation excessively drove up costs, it is in my view appropriate that he pay the costs personally.

Best v. Ranking
2016 ONCA 492 (Ont. C.A.)

The typical part of this case is that a litigant alleged a widespread conspiracy against him involving the judiciary, lawyers, the police, and others that opposed his claims. The less typical part is that costs of $84,000 were ordered to be paid by the plaintiff and his lawyer (personally), jointly and severally. The plaintiff already owed huge sums for costs in the same proceedings. The lawyer argued that other lawyers would be reluctant to provide forceful advocacy in weak cases if costs were ordered against him personally – the Court of Appeal would have none of it.

Pardu J.:

[50] I agree with the submission of the appellant that the fact that a lawyer starts an action which is unlikely to succeed is not, on its own, a basis to award costs personally against that lawyer.

[51] Rule 57.07 is "designed to protect and compensate a party who has been subjected to costs being incurred without reasonable cause, not to punish a lawyer": *Galganov* [*Galganov v. Russell (Township)*, 2012 ONCA 410], at para. 14.

[52] The motion judge here did not make Mr. Slansky liable for costs personally simply because he started a case that was weak. As the motion judge pointed out, the nature of the proceedings is an important contextual factor in assessing whether costs wasted by a solicitor justify an order that he pay costs personally.

…

[54] The motion judge examined the entire course of the litigation in assessing the specific actions and conduct of counsel, as she was required to do. In particular, she focused on the vexatious or abusive nature of the proceeding. This is not a necessary element of an award of costs against counsel personally but is not unfamiliar in this context…

[55] On appeal, Mr. Slansky argues that Action 2 was not abusive. It was against many different parties and for different causes of action. That issue has now been conclusively determined by the dismissal of Mr. Best's appeal from the decision striking Action 2 as an abuse of process. Action 2 made similar allegations of impropriety as had been voiced in the course of Action 1. The motion judge did not err in considering that Mr. Slansky incorporated into the pleading in Action 2 accusations of criminal misconduct against opposing counsel that had repeatedly been judicially rejected as baseless.

[56] Finally, as this court indicated in *Galganov*, at paras. 23-25, deference is owed to a motion judge's decision as to whether a lawyer should pay costs personally:

> The determination as to costs is a matter within the discretion of the application judge. An appellate court may set aside a costs award if the application judge made an error in principle or if the costs award is plainly wrong.
>
> In *Rand Estate*, this court held that:

> The application judge who managed the proceedings was in a much better position than this court to make the necessary assessments underlying the findings of fact he eventually made. Those findings are, by their nature, somewhat subjective and the cold paper record cannot, in our view, capture all of the considerations that would be relevant to those findings. We defer to the [application] judge's findings unless they are clearly in error and clearly material to his ultimate determination.
>
> As a result, this court owes a high degree of deference to the application judge's holding…. [Citations omitted.]

[57] I see no basis to interfere with the motion judge's discretionary decision to order Mr. Slansky to pay some portion of the costs wasted.

[58] In the event leave to appeal a costs order against counsel personally is necessary, I would grant leave.