Civil Procedure
Winter Term 2026

Lecture Notes No. 1

I. INTRODUCTION

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

- 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).

Professionalism: What role do lawyers play in litigation?

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*. Some organizations provide "best practices" guideline; for example, see the Advocates Society's publications on point and their *Principles of Civility and Professionalism for Advocates*.

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.

Rules of Civil Procedure, Rules 1.04 (1), 1.04(1.1)

> 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.
>
> (1.1) **In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding**.

Reform of Rules 1.04 (1), 1.04(1.1)

From the *Civil Rules Review – Final Report* (pp. 29-32):

…

> These existing principles are commendable but, in our view, lack the requisite specificity to provide clear guidance to both litigants and the Court as to the conduct they require.
>
> **In redesigning the Rules from the ground up, we begin with a trio of principled rules aimed at cultural change. They include (a) redefining the overarching goals of the Rules; (b) establishing representations that parties will be deemed to have made upon filing documents with the Court; and (c) establishing a general duty, shared by all users of the civil justice system, to cooperate with one another to ensure that the overarching goals are met.** We propose to more clearly define the goals of the Rules and to foster a culture that will help achieve them.

1. The Goals

We propose that the Rules include guiding principles, expressed as the "Goals". The precise wording of any amendments will be determined by legislative counsel who are responsible for drafting all Ontario legislation and regulations. We envision, however, that the proposed substance of the new rule expressing the Goals will be as follows:

(i) These Rules are to be given a purposive interpretation in accordance with the Goals.

(ii) These Rules seek to achieve the following Goals in all civil proceedings:

a. fair and practical results suited to the needs of the parties;

b. cost-effective proceedings that are proportionate to:

i. the nature of the proceeding and its importance to the parties;

ii. the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and

iii. the amount or value of the claim;

c. expeditious proceedings that strive for settlement or final resolution of most cases involving only claimant(s) and defendant(s) within two years of the close of pleadings, with a slightly longer period for cases involving subsequent parties;

d. timely access to, and efficient use of, court resources for the parties and all other litigants who need to access court resources;41 and

e. enforced compliance with the Rules and the orders and directions of the Court, while prioritizing substance over form and avoiding an overly technical application where a breach or irregularity creates no prejudice;

(iii) The Court must seek to achieve the Goals when imposing orders and giving directions, recognizing that enforcement of

the Rules and systemic justice considerations may, in certain cases, take precedence over a merits-based determination.

Unlike the existing guiding principles (set out in rule 1.04), the new Goals provide: (a) increased specificity as to the Rules' aims, including proportionality, timeliness, and efficient use of the Court's resources for the benefit of all litigants who need to access the Court; and (b) express direction that the Court must seek to achieve the Goals when imposing orders and giving directions.

More importantly, while the current system outlines guiding principles, it defines a process that, to a significant degree, undermines them. By contrast, our proposed reforms will incorporate the Goals directly into the processes that will govern all aspects of legal proceedings.

2. Representations to the Court

The expediency of civil proceedings is undermined when parties make representations to the Court that lack factual support, pursue patently indefensible positions, and/or engage in litigation gamesmanship (e.g., by intentionally delaying matters or taking steps solely to drive up litigation costs).

To address this problem, we propose to introduce a new rule concerning representations made to the Court (the "Representations Rule"), the substance of which is as follows.

(i) By presenting to the Court a pleading, written motion, or other document, a party certifies that, to the best of their knowledge or reasonably held belief at the time the representation is made:

a. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or unnecessarily increase the cost of litigation;

b. it is not frivolous or vexatious;

c. the factual contentions advanced are, or may be, after a reasonable opportunity for further investigation, supported by evidence; and

d. the denials of factual contentions are warranted in the circumstances.

Given that we are proposing that these certifications will be deemed to have been made by presenting a pleading, written motion, or other document to the Court, a separate certification document or attestation will not be necessary. Moreover, this new rule is also intended to apply whether a party signs or simply submits a pleading, written motion, or other document, or whether they authorize a lawyer to do so on their behalf.

…

3. The General Duty to Cooperate

One of the reasons why rule 1.04 has been ineffective is that litigants simply do not cooperate to ensure its aims are achieved. That part of our litigation culture needs to change. To that end, we propose to introduce a general duty to cooperate (the "Duty to Cooperate"). This is not an attempt to undermine the adversarial process. We expect that parties will continue to zealously pursue their cases in their own self-interests. The Duty to Cooperate is about embracing a shared responsibility to manage the Court's limited resources to promote the Goals.

In the result, we propose that parties and their lawyers will have a Duty to Cooperate with one another to further the Goals. This duty will require that parties, or their counsel, engage in discussions to try to agree on how the proceeding will be conducted. More specific duties to cooperate will appear in relation to specific rules, such as disclosure and preparing a joint book of documents.

The proposed substance of this new Rule is as follows:

All parties have a duty to conduct their cases in a manner that will facilitate achieving the Goals. This includes, but is not limited to, a duty to:

a. identify the central issues in dispute at an early stage;

b. perform work in connection with the proceeding in a manner that is proportionate to the nature of the claim and its importance to the parties, the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises, and the amount or value of the claim;

c. comply with the Rules, including timelines for steps in the proceeding, as well as any orders and directions of the Court;

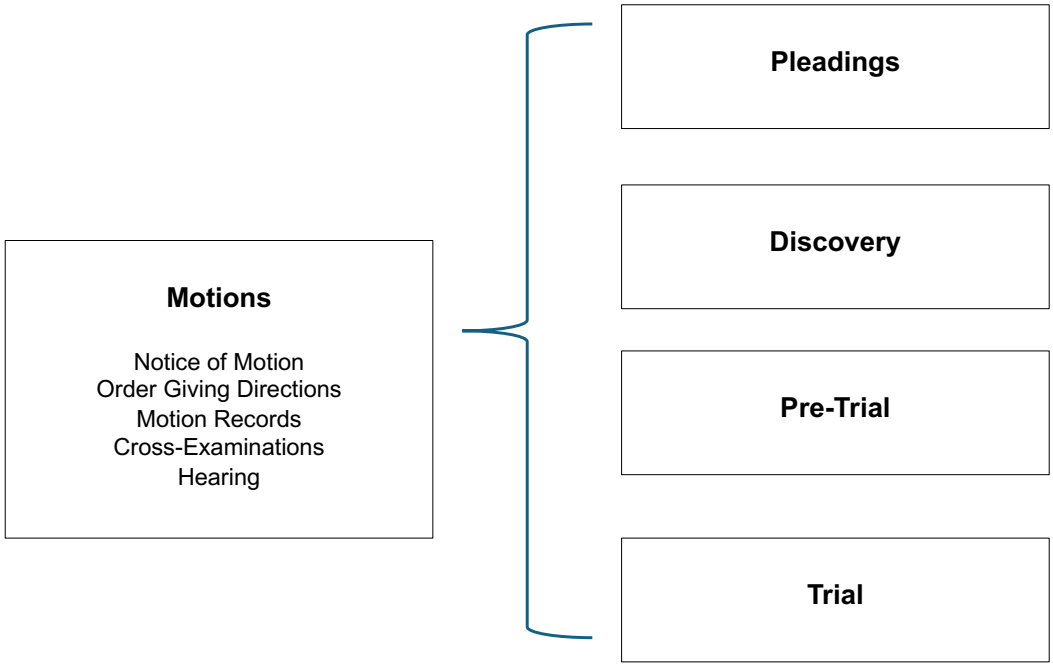
d. make reasonable efforts to resolve the dispute or to limit the issues in dispute and to resolve interlocutory issues before seeking the Court's assistance;

e. make use of available technology where and to the extent that it will promote efficiency and efficacy; and

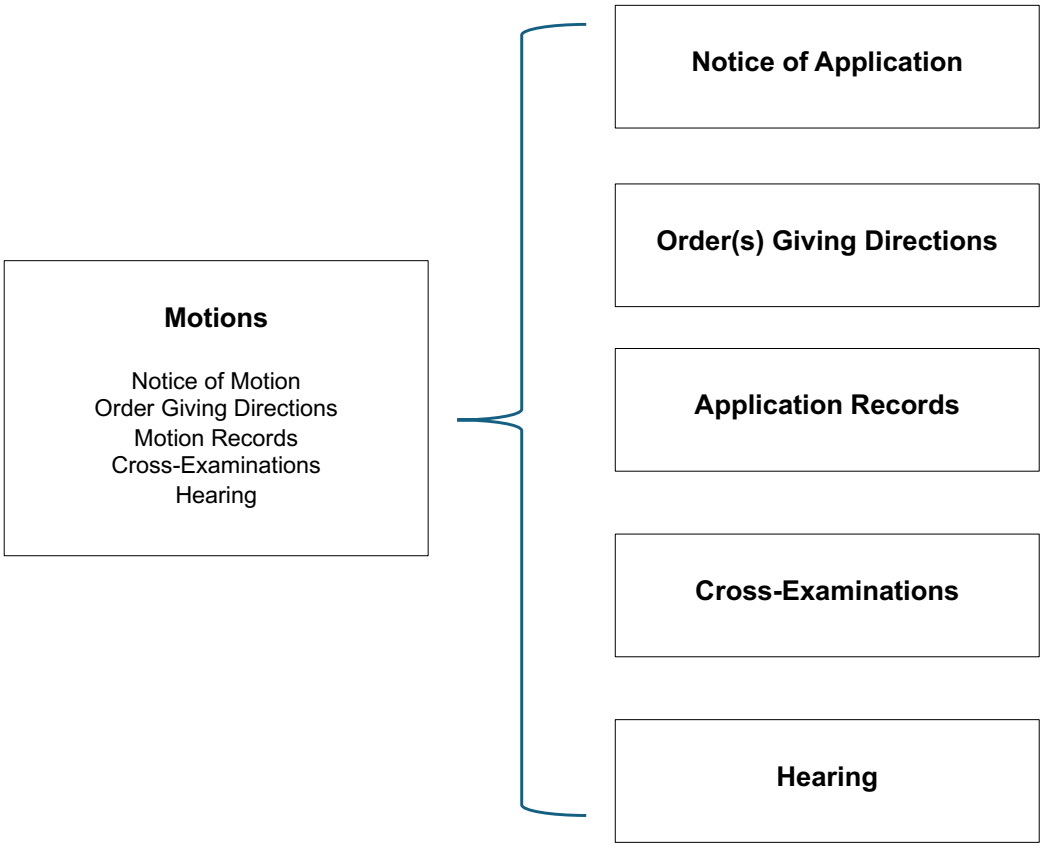
f. maintain courteous, cooperative, and prompt communication between the parties, and between the parties and the Court.

Types of Proceedings & Stages

ACTIONS



APPLICATIONS



In either type of proceeding, costs are argued following the disposition of the litigation.

Reform

From the *Civil Rules Review – Final Report* (p.23):