

## Comparing Litigation in the US, Canada and the Rest of the World: The Role Legal Traditions Play

Professor Rosalie Jukier  
McGill University  
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## Different Visions of Civil Justice

- There is no one way to organize a civil justice system
- “Societies may see their basic values reflected more in their procedural systems than in their substantive law”
  - Stephen Goldstein, “The Odd Couple: Common Law Procedure and Civilian Substantive Law”, (2003) 78 Tulane L Rev 291 at 293
- Civil Procedure has been eloquently described as “a mirror held up against the legal system itself”
  - David Bramberg et al, “Learning the ‘How’ of Law: Teaching Procedure and Legal Education” (2013) 51 Osgoode Hall L J 45 at 67-8

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## Different Visions of Civil Justice

- “No one can begin to understand any legal system without a careful dissection of its procedural component”
  - Kevin M Clermont, “Integrating Transnational Perspectives Into Procedure: What Not to Teach” (2006) 56 J Legal Educ 524 at 528
- “Adversarial” versus “Inquisitive” procedural systems
- We generally associate adversarial systems with the common law and inquisitive systems with the civil law

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### Misleading Nature of this Differentiation

- 1. Common law procedural systems do not have a monopoly on the “adversarial” quality of litigation
- 2. The civilian continental procedural system might better be labelled “investigative” or “judge-centered” rather than “inquisitorial”
- 3. Wrong to see the two systems as polar opposites and often, differences are in degree not in kind
- 4. As in all areas of comparative law, we must be cognizant of the variances amongst legal systems within the same legal traditions (E.g., US vs UK)

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### Moreover...

- Things get complicated with “mixed jurisdictions”
- We see legal jurisdictions that belong to the civil law tradition and apply civilian substantive law but adhere to a common law adversarial procedural system
- One such example is Quebec!
- Quebec procedural law has been portrayed as having “un air de common law en pays de droit civil” (Daniel Jutras)

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### Major Tradition-Based Differences

- Role of the judge vs the role of the parties
- The traditional Common law judge has been described as “a passive, receptive and detached umpire” who views the case “from a peak of Olympian ignorance”



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### Major Tradition-Based Differences

- The judge of the civilian tradition is, by contrast, vocal and dominant, “activist, outspoken or even paternalistic”, “the director of an improvised play”
- or even a “priest, [where] the advocates act as the acolytes – deferential assistants in a ceremony controlled thoroughly by the judge”

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### Essence of the distinction

- In the adversarial system, the parties (through their lawyers) take charge of the process, frame the issues, investigate the evidence and select what will be presented at trial
- In contrast, the civilian judge controls the evidentiary process and performs the critically important function of exploring and sifting evidence (engages experts, questions witnesses, asks questions...)
- Thus, no need for party-initiated discovery because the court, rather than the parties, is in charge of the development of evidence

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### Major Tradition-Based Differences

- The civilian system is predicated on finding “la vraie vérité”
- Whereas in the common law, procedural fairness is prioritized over truth and there is an assumption that truth will be teased out by examination and cross-examination of witnesses
  - “The role of the court is to decide on the basis of allegations of the parties and not on the basis of underlying truth”
    - (Air Canada v. Secretary of State for Trade 1983, House of Lords)

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## Major Tradition-Based Differences

- Different role of expert witnesses
  - In the continental conception of procedure, experts are judge-appointed and there is common or joint expertise unlike the adversarial system which is often a battle between parties' respective experts
- Primacy of the oral versus the written (French dossier system)
- Jury trials
- Distinct "pre-trial" and "trial" periods

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## Additional Differences: Appellate Review, Judges and Judgment Writing

- Civilian conceptions of appeal are much broader both in their availability and in the nature of the reconsideration
- Compare 30,000 cases heard annually by the Cour de Cassation in France with the 60 – 80 cases tackled by the Canadian Supreme Court per year (similar to US and UK)
- Different conceptions of becoming a judge: Compare the training of the judge (eg French École de la magistrature) versus the appointment of judges from the practicing Bar in common law systems)
- Different judgment styles: Anonymous, impersonal and syllogistic vs signed, opinionated and discursive
- No concept of appellate dissent in the civil law tradition

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## Civil Justice Reform

- Rapprochement between the legal traditions
- The role legal traditions play in the legislative evolution of procedural law
- We live in an era of tremendous civil justice reform
- Reason: Major problems (even dubbed a crisis) in existing civil justice systems plagued by high cost, delay and complexity (Lord Woolf)
- Idea: Reform procedural rules to accomplish policy change and a new procedural culture

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## Civil Justice Reform

- Recent procedural reforms in adversarial systems have some characteristics of the civilian procedural system (especially with respect to the role of the judge) and/or
- Are aimed to eliminate or temper the negative effects of the adversarial system
- Demonstrate this using Quebec’s new Code of Civil Procedure as a microcosm

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## Quebec’s Procedural Reform: A Case in Point

- *2014 Code of Civil Procedure* came into force January 1, 2016
- Purpose of the Reform: (Preliminary Provision)
  - Accessibility of Justice
  - Promptness of Justice
  - Proportionate application of procedural rules
  - Spirit of cooperation
- Many changes re ADR, principle of proportionality, mandatory time rules, judicial case management, discovery and expert evidence

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## Judicial Case Management

- Made an explicit part of the court’s “mission” (art. 9(2))
- Parties continue to control their own case subject to the duty of the court to ensure proper case management (art. 19)
- Parties must, within 45 days of initiating action, submit a Case Protocol to the Court (art. 148)
- Court is given extensive case management measures (art. 158)
- Parties must complete their entire pre-trial procedures (includes discovery) in 6 months (art. 173)

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## Discovery

- Discovery is limited: (art. 229)
- No discovery for cases less than \$30,000
- In family cases or those less than \$100,000, discovery is limited to 3 hours
- For all other cases, discovery is limited to 5 hours
- Slight extensions (3 – 4 hours, 5 – 7 hours) by agreement between the parties
- Longer extensions require court authorization

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## Expert Evidence

- Mission of expert is to enlighten the court (art. 22)
  - “This mission overrides the parties’ interests”
- The case protocol must include information about the parties intentions re experts and their justification for not seeking a joint expert opinion (art. 148(4))
- Part of case management measures includes the court imposing joint expert evidence on the parties (art. 158(2))
- Court may, on own initiative, appoint expert (art. 234)

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## A Quick Look at Procedural Changes in Ontario

- Mandatory Mediation (Rule 24.1) within 180 days of filing the defence
- The ability of the court to impose case management at any time (Rule 77)
- Mandatory Pre-Trial Conferences within 180 days of setting a case down for trial (Rule 150)
- Limitations on Discovery - 7 hours (Rule 31.05.1)

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## What do the changes tell us?

- That the legislator continues to try new things to fix a problematic civil justice system
- And they are doing so by borrowing heavily from the philosophy and attributes of a civilian procedural system
- Changes demonstrate that the excesses of the common law adversarial system are often blamed for the current crisis
- Seen to be a need for more “managerial judging”
- Shows that aspects of the continental civilian system of procedure are worth studying and potentially implementing

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## Conclusion

- There is a rapprochement between adversarial and investigative systems of procedure
- We see the “action de groupe” in France which is a small step in the direction of the common law class action
- In adversarial systems, we see the legislator importing civilian procedural concepts (such as active judge, common expertise)
- And a limitation on the ambit of common law procedural concepts (such as discovery, party control of their case)
- This is part of the ebb and flow of the ever changing and developing nature of law (legal transplantation)
- Demonstrates the importance of learning from the other and experimenting through the experience of two legal traditions

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