

CIVIL PROCEDURE REFORM IN CANADA 2010-2018

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Abstract

The article deals with the course "Civil Procedure in Foreign Countries", taught at PFUR (RUDN University), where the lecturers conduct research and thoroughly monitor civil proceedings, arbitration and mediation reforms in foreign countries. This article is the result of such research. (Dudin et al., 2017) It presents a general description of the most significant reforms of civil procedural law in Canada in 2010-2018. The tendency to reduce the procedural rights of parties and other participants in civil disputes is emphasized: since 2010, a number of Canadian provinces (including Ontario, Alberta, British Columbia and Quebec) have made significant amendments to their civil procedural codes aimed at facilitating the resolution of civil disputes spending less time and being less complicated.

These reforms include: 1) reducing the number of documents considered by the court in the process of proving; 2) a reduction of the time allowed for oral hearings; 3) the mandatory consideration of the principle of proportionality in the procedure for disclosing evidence; 4) granting the court the right of expanded control when drawing up a plan for the conduct of the proceedings; 5) an increase in the amount that can be filed in cases with a small amount of the claim.

To be able to make conclusions, the authors studied the 2015 Quebec CPC, which focuses on alternative (private) methods of preventing and resolving disputes and extending the court's powers to control the movement of cases; New Alberta Civil Procedure Law 2010 ed. 2018, which are focused on the creation of two separate litigation management systems; New Rules of Civil Procedure of the Province of Ontario ed. 2018; New rules for civil litigation in the province of British Columbia ed. 2016 and others.

Conclusions are made that the reform of civil proceedings in Canada in 2010-2018 was aimed at resolving civil disputes in a less costly, time-consuming and complicated way. We shall underline that all the innovations listed above contribute to the acceleration and simplification of providing the administration of justice in civil cases. However, will the primary goal of the administration of justice - the achievement of equity - be preserved in this case? (Frolova et al, 2017) The answer to this question is not apparent. So far there is no data on how the Canadian society has taken the provisions of the reforms.

Keywords: administration of justice, equity, Civil Procedure, Canada

1. INTRODUCTION

Since 2010, a number of Canadian provinces (including Ontario, Alberta, British Columbia and Quebec) have made significant changes to their civil procedural codes to help resolve civil disputes in a less costly, time-consuming and sophisticated way. The mentioned reforms include: 1) reducing the number of

documents examined by the court in the process of proof; 2) reducing the time allowed for oral hearings; 3) mandatory consideration of the principle of proportionality in the procedure for disclosing evidence; 4) granting the court the right of expanded control when drawing up a plan for proceedings; 5) increasing the amount that can be filed in cases with a small amount of the claim.

Canada is a parliamentary confederation consisting of ten provinces and three federal territories, each of which has an independent judicial system. In addition to the federal government, each province and territory has its government. Besides, the population of each province elects members to the Provincial Legislative Assembly or Provincial Parliament. Canada's Constitution Act, 1867 defines the areas of federal and provincial legislative regulation. The federal government has, among other things, powers to regulate trade, banking, patents, copyrights, civil and criminal law, taxation, and the administration of justice. Some areas of legislative regulation coincide, so the separation of legislative powers between the federal government and the provinces is a long-standing source of controversy. Canadian lawyers noted that "since the provinces also have authority over the administration of justice, there may be cases when it is more profitable or advisable to sue in a certain province" [Blake, Cassels & Graydon LLP, 2017].

There are three types of courts in Canada. The choice of the court in which to file a claim or a statement of defence is a critical step in the trial process. The first type of court in Canada - the Superior Court of each province and territory is the court that most often deals with complex commercial disputes. These are the courts of the first instance and appellate court, which handle both civil and criminal cases. Depending on the province, the trial is referred to as the Court of Queen's Bench, the Supreme Court or Cour suprême du Canada or the Superior Court. The structure of the High Court of each province also includes the Court of Appeal, which is called the Court of Appeal of a particular province. The Supreme Court of Canada considers appeals against the rulings of the Courts of Appeals of any province.

The second type of court in Canada is the Provincial Court, whose jurisdiction includes consideration and resolution of disputes relating to provincial law. This is the court of the first instance. The powers of the provincial civil court are limited compared to the jurisdiction of the High Court. For example, in Alberta, a provincial court does not have jurisdiction over land disputes, and it can only deal with disputes where the amount in controversy does not exceed \$ 25,000. Appeals against the decisions of a provincial court go to the High Court of a particular province or territory.

The third type of courts is the federal courts whose jurisdiction includes the resolution of disputes related to federal law. The Federal Court of Canada and the Tax Court of Canada are trial level courts whose decisions can be appealed to the Federal Court of Appeal. Appeals against the decisions of the Federal Court of Appeal are considered by the Supreme Court of Canada, the country's highest court.

Understanding the hierarchy of courts in Canada is essential for understanding the role of precedent in Canadian law. Canada is governed by two different legal systems: common law and civil law. Except for Quebec, all Canadian provincial jurisdictions follow the "common law" system, which applies the principle of "stare decisis", which means that precedents or prior decisions of higher courts are binding on all lower courts. We will note that the decisions of the Supreme Court of Canada are binding on all other courts in Canada, regardless of type or level. The system of continental law in Quebec, which is based on the French Civil Code of 1804, operates in Quebec. The Civil Code of Québec (CCQ) regulates relations in the field of private law in the province of Quebec. (Blake, Cassels & Graydon LLP, 2017).

In addition to the judicial system, Canada has a wide range of administrative tribunals with jurisdiction over various types of commercial activities. These tribunals have the right to impose fines and impose mandatory orders.

Besides the judicial system, litigants can resort to alternative dispute resolution methods, such as mediation or arbitration. In many cases, the parties may agree to resolve all their disputes through arbitration. In most cases, Canadian courts will apply the arbitration clause, prohibiting the parties to resolve their dispute in court, and require them to arbitrate. (Blake, Cassels & Graydon LLP, 2017).

METHODOLOGY

Firstly, the authors would like to state that this work is research explicitly prepared for students in order to lay out the basics of reforming Canadian civil procedural law in the most accessible form. The information presented in this article should serve as a base for graduate students and law students to prepare a thesis, reports, course papers and master's thesis. General information about the legal regulation of civil proceedings in Canada until 2015 can be found in the works of Russian authors: N.S. Bocharova "The main features of the civil process in Canada: judicial system, sources, principles" (Bocharova, 2006) and an article

by D.V. Knyazev "Reform of civil proceedings in Canada." (Knyazev, 2015). However, after 2015, Canada adopted a number of regulations, which can be described as another stage in the reform of civil justice. Canadian lawyers Michael Schafer and Melissa Saunders in their "Review of Civil Justice and Enforcement of Judicial Decisions in Canada" pointed to a tendency to reduce the procedural rights of the parties and other participants in civil disputes (2018). The work is also based on research by the law firm of Blake, Cassels & Graydon LLP (LLP, 2017), as well as by such Canadian authors as Angenot Maya, (2015), Boillat-Madfouny Carmen (2015), Roberge Jean-François (2013), and others.

Some Canadian regulations were also used in the work: Alberta's new rules 2018, British Columbia's new rules 2018, Ontario's new rules 2018. There were also examined case precedents: Seidel v Telus Communications Inc., 2011 SCC 15; Carmen Alfano Family Trust v. Piersanti, 2012 ONCA 297; Moore v. Getahun, 2015 ONCA 55; White Burgess Langille Inman v. Abbott and Haliburton Co., *Mouvement Laéque Québécois v. Saguenay (City)*, 2015 SCC 16).

2. RESULTS

2.1 New Code of Civil Procedure of the Provinces of Canada

2.1.1 New Code of Civil Procedure of the Province of Quebec 2015

On February 20, 2014, the National Assembly of Quebec passed Bill 28, containing the draft of the new Code of Civil Procedure. The Decree of the Government of the Province of Quebec No. 1066-2015 of 02.12.2015 on inuring the Law on the Adoption of the New Civil Procedure Code (Loi institue le nouveau Code de procédure civile) was published in the Official Québec newspaper (la Gazette officielle du Québec). (Boillat-Madfouny Carmen, 2015) The new Code of Civil Procedure became effective on January 1, 2016. According to Canadian lawyer Maya Angeno, the enuring of the new Code of Civil Procedure (nouveau Code) will make significant changes in the civil procedure. The new Code demonstrates the desire of the legislator to promote access to justice, to empower judges more and to give greater importance to the principle of proportionality (au principe de la proportionnalité un rôle plus important). (Angenot Maya, 2015)

Emphasis on alternative (private) ways of preventing and resolving disputes (les modes alternatifs)

The first article of the Quebec Code of Civil Procedure provides obligations for the parties to cooperate (l'obligation des parties de coopérer) and considers the possibility of using private methods preventing and resolving their dispute before going to court. When creating a case in court (l'actuel "échéancier"), parties should consider using an amicable conference on dispute resolution (conférence de règlement à l'amiable). However, the new Code does not provide for sanctions in case of non-compliance with the obligation to consider these alternative methods.

Expansion of the court's power to control the progress of the case

The powers to control the movement of the case, given to the judges, are clarified and expanded. The court may, for example, take any measures to simplify or expedite the proceedings (simplifier ou à accélérer la procédure), to limit or define the conditions of the expert reports, to limit the number and duration of the parties' explanations and the testimony of witnesses. From the very beginning of the proceedings, the court may call the parties to agree on the case schedule (à une conférence de gestion), during which the court may take appropriate measures to control the progress of the case (les mesures de gestion) and invite the parties to take part in the proceedings.

Reform of preliminary (pre-trial) explanations of the parties and interrogation of witnesses (des interrogatoires au préalable)

In order to reduce the time and ensure access to justice, the new Code imposes significant restrictions on the preliminary (pre-trial) explanations of the parties and the questioning of witnesses. In particular, the Code of Civil Procedure restricts interrogation to five hours in cases where the cost of a claim (la valeur en litige) is \$100,000 or less. The parties may agree among themselves on extending the time of interrogation from five to seven hours. Any other renewal requires the court order.

Reform of review

According to the provisions of the new Code of Civil Procedure, the parties do not have the right to request the appointment of more than one review of the case, with the exception of difficult cases when the complex

expertise (les affaires complexes) can be appointed by court permission due to the development of knowledge in this area (en raison du développement des connaissances dans le domaine en question).

Although the parties retain the right to conduct their extrajudicial review, they will have to justify their decision when they refuse to conduct a joint forensic examination. If the reports of experts contradict each other, the court may schedule an expert meeting (la réunion des experts) or require each expert to submit an additional report (un rapport additionnel). (Angenot Maya, 2015)

Other measures to simplify and expedite proceedings and reduce the costs of litigation:

- The introduction of the inadmissibility of a partial refusal of the claimant from the claims or partial refusal of the defendant from his objections;
- Simplification of petitions (demandes) during the proceedings, which can now be presented informally: in writing - employing notes, letters or notifications, or orally;
- Permission to submit written testimony in court in the event of evidence of a minor fact (un élément secondaire au litige);
- The requirement for the parties to submit the "case protocol" indicating the number of pre-trial examinations they intend to conduct and the number of experts that the parties intend to call;
- An increase in the amount of the dispute that can be resolved by the Small Claims Court from \$ 7,000 to \$ 15,000;
- Allowing judges to consider an undue delay in the allocation of costs between the parties as an abuse of procedure;
- Support the use of information technology to avoid unnecessary travel. (Schafner Michael D. and Saunders Melissa, 2018)

2.1.2. New Rules of Civil Justice of The Province of Alberta 2010 as in force in 2018

The new Rules entered into force on November 1, 2010, because the old Rules became obsolete, are not applied consistently or are not applied at all. The main elements of the reform include:

- Mandatory alternative dispute resolution before the date of the first court hearing;
- creation of two separate litigation management systems: a) in simple cases, the parties must complete certain steps of the litigation, including alternative dispute resolution, within a reasonable timeframe, taking into account the nature of the judicial action; b) in difficult cases, the parties must create a formal complex court litigation plan, which should contain a timeline and an agreed protocol for conducting legal proceedings and making records.
- The use of all documents, except the commencement documents, can now be carried out by electronic means.

2.1.3 New Rules of Civil Justice of the Province of British Columbia as in force in 2018

In the province of British Columbia, new rules entered into force on July 1, 2010 and were changed in 2018 to ensure fair, prompt and inexpensive resolution of cases on merits in ways that are proportional to the amount of disputes, the importance of the issues and the complexity of the case.

The main elements of the reform include:

- Creation of trial management conferences for all legal proceedings that will be conducted under the guidance of the judge, who will subsequently preside over the trial;
- Strict restrictions on recoverable costs in fast-track litigation cases (usually those with a claim up to \$ 100,000 or less);
- The right of the judge to order the use of joint expert witnesses agreed upon by the parties;
- Reduction in documentary production.
- Decrease in the length of the oral discovery (limit of seven hours per side) (Schafner Michael D. and Saunders Melissa, 2018)

2.2 Selected Elements of Civil Justice Reform

"Ensuring access to justice is a serious problem for any judicial system", Canadian scholar Jean-François Roberge says, - Canada has done much work to solve this problem over the past thirty years, partly by developing alternative dispute resolution methods. Unfortunately, the results were not very promising. Currently, Canadian society is ready to update its vision of the problem of access to justice and the contribution in the alternative dispute resolution methods to solve this problem (Roberge Jean-François, 2013)

2.2.1 The Introduction and Promotion of Alternative Dispute Resolution: Mandatory Use of Alternative Dispute Resolution (Mandatory ADR).

Currently, most jurisdictions require certain types of dispute resolution procedures (such as mandatory settlement conferences) to be used in litigation procedures. For example, in the province of Ontario, some claims are subject to compulsory mediation within 180 days after the submission of the response of the defence. New Alberta's new rules for civil litigation require parties to participate in a dispute resolution procedure before they can receive a subpoena with a hearing date. In the province of Quebec, the new Code of Civil Procedure (Boillat-Madouny Carmen, 2015) requires the parties to consider the possibility of alternative settlement of the dispute before going to court. In addition, the provincial law societies now require lawyers to consider alternative dispute resolution in each case and inform their clients about the available ADR options.

2.2.2 Maintaining Respect for Arbitration Clauses: Confirmation of the Principle of Independence of Experts

In recent years, Canadian courts have issued many court decisions enshrining the independence of expert witnesses. The Court of Appeals for the Province of Ontario was particularly active in issuing several decisions on this issue ("Carmen Alfano Family Trust v. Piersanti, 2012 ONCA 297" and "Moore v. Getahun, 2015 ONCA 55"), which tightened the rules governing the legal status of such witnesses. The trend is aimed at the exclusion of expert witnesses showing bias or lack of independence. Recently, the Supreme Court of Canada issued two decisions ("White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23" and "Mouvement Laéque Québécois v. Saguenay (City), 2015 SCC 16"), confirming the approach of the Supreme Court of Ontario at the national level. (Schafner Michael D. and Saunders Melissa, 2018)

3. FINDINGS

As noted above, the reform of civil proceedings in Canada in 2010-2018 was aimed at resolving civil disputes in a less expensive, time-consuming and complicated way, which is achieved by: reducing the amount documents studied by the court in the process of proving; reduced time for oral hearings; taking into account the principle of proportionality in the procedure for disclosing evidence; granting the court the right for expanded control in drawing up a plan for the conduct of the proceedings; increase in the amount that can be filed in cases with a small claim. It should be noted that all of these innovations contribute to the acceleration and simplification of justice in civil cases. However, will the primary goal of justice - the achievement of justice - be preserved in this case? The answer to this question is not apparent. So far there is no data on how Canadian society has taken the provisions of the new reform.

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