A COMPARISON OF CIVIL PROCEDURE BETWEEN CHINA AND MANITOBA

BY

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A COMPARISON OF CIVIL PROCEDURE BETWEEN CHINA AND MANITOBA

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JUAN LI

A Thesis/Practicum submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirements for the degree of

MASTER OF LAWS

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INTRODUCTION

China, with nearly five thousand years of recorded civilisation, has a corresponding legal culture with an equally long history. Before doing the formal comparison, it might be useful to review some unique features of the traditional Chinese legal system.

1. In traditional China, the government had much more interest in the suppression of crime and maintenance of social order[1] than what today would be denominated as "civil" matters. Almost all codes from the different dynasties were what today would be classified as criminal codes, mixed with simple civil and procedural laws. The distinction between criminal law and civil law did not exist and the law was essentially penal in nature.[2] The law did not distinguish between civil and criminal litigation either, and the same procedure was applied in all cases.[3]

2. Confucianism has had a deep impact on the adjudication

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[1] R. H. Brookman, Commercial Contract Law in Late Nineteenth-Century Taiwan. In J. A. Cohen, R. R. Edwards & Fu-mei Chang Chen, eds., Essays on China's Legal Tradition,(New Jersey: Princeton University Press, 1980), at p. 91.

[2] S. B. Lubman, "Emerging Functions of Formal Legal Institutions in China's Modernization" (1983) 2 China Law Report, at p. 199.

[3] J. A. Cohen, "Chinese Mediation on the Eve of Modernization", (1966) 54 California Law Review, at p. 1206.

system, and mediation was the preferred way to solve disputes.[4] Confucianism produced a hierarchical country, with its order of emperor and officials, father and son, husband and wife.[5] Everyone had to adhere to his own position, so that a natural harmony could be maintained. "The aim of government, and indeed of all human relations, was to preserve natural harmony"[6] Disputes were viewed as disruptions of the natural harmony, and yielding was virtuous because it avoided friction and disharmony.[7] The Confucian ethic believed that once the harmony had been disturbed, it could best be restored through compromise. Respectable people did not insist on their "rights" or on the exclusive correctness of their own position, but settled a dispute through mutual concessions.[8] To be involved in a lawsuit was considered disreputable because it implied a failure of personality. At the same time, law, backed by coercion, functioned largely to reinforce the dominant philosophy of Confucianism.[9] Those barbarous few who failed to follow the Confucian ideals were subject to the

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[4] *Ibid.*

[5] Zhang Min, *et al.*, The Judicatory System of Modern China (dangdai zhongguo de shenpan gongzuo), (Beijing: Modern China Press, 1993), at p. 5.

[6] S. Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China", (1967) 55 California Law Review, at p. 1290.

[7] *Ibid.*, at p. 1291.

[8] Cohen, *supra* note 3, at p. 1208.

[9] Lubman, *supra* note 2, at p. 199.

rigid judgments and painful punishments of a harsh penal system.[10] As a result, Confucianism believed that the legal process was not a paramount achievement of Chinese civilisation, but was a regrettable necessity.[11]

3. Informal dispute settlement by mediation was prevalent. Most civil disputes were settled extrajudicially rather than through litigation.[12] Actual civil authority was in the most part lodged in the local power groups: the family, the clan, the village, the guild, etc.[13] They combined to create pressures and institutions for extrajudicial mediation. Not only did Confucianism stress the virtue of yielding and the superiority of noncontentiousness, but there were other factors that contributed to the situation.

Evidence shows that litigation concerning "contract" was quite common and "not relegated altogether to the spheres of custom, private self-help, or religion" in the Han dynasty, which was the first dynasty in Chinese history to establish a long-lasting and universal legal system.[14] However, the Han social

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[10] E.J. Glassman, "The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees", (1992) 10 Pacific Basin Law Journal, at p. 464.

[11] Cohen, *supra* note 3, at p. 1206.

[12] Lubman, *supra* note 6, at p. 1295.

[13] Lubman, *supra* note 2, at p. 198.

[14] H. T. Scogin, "Between Heaven and Man: Contract and the State in Han Dynasty China", (1990) 63 Southern California Law Review, at p. 1367; and A.F.P. Hulsewe, Remnants of Han Law, (Leiden: E. J. Brill, 1955).

critic Wang Fu complained that "one of the failings of his contemporaries was the excessive litigation" and he regarded the litigation as "a major harm to society". He suggested reliance on the law of the state to defend against the beginning of disorder so that "society natually became pure and lawsuits ceased on their own."[15]

One emperor of the Qing Dynasty, K'ang-Hsi, whose reign deeply influenced the dynasty's development, had a famous decree:[16]

> ...lawsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice.... I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.
>
> In this manner...the good citizens who may have difficulties among themselves will settle them like brothers by referring them to the arbitration of some old man....
>
> As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law-courts--that is due to them.

The hostile attitude towards litigation and the will to apply law to prohibit litigation was increasingly obvious in traditional China.

Further, traditional China lacked the functional separation between law and bureaucracy.[17] At the district or county level, where most cases began and ended, the legal system coincided

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[15] *Ibid*.

[16] Glassman, *supra* note 10, at p. 463.

[17] Lubman, *supra* note 2, at p. 198.

with the governmental administrative system. The magistrate served both as a judge of general jurisdiction and as the government's principal administrative officer in the area.[18] Therefore the magistrate was severely limited in carrying out his judicial function,[19] favouring extrajudicial mediation, and sometimes referred cases to appropriate non-governmental mediators.[20]

In addition, the magistrate's office was usually far from the disputants' residences, the time required to travel and the expense involved were always more than ordinary people could afford.[21] Also the magistrate was untrained in law and relied heavily on his clerks who were notorious for their greed and corruption.[22] In the inquisitorial system that prevailed, torture might be employed to obtain evidence.[23] All the factors reinforced each other, causing widespread reluctance and fear of involvement in litigation. To a great extent, the formal legal process served to discourage or deter people from using it, to protect rights and interests.

On the other hand, the primacy of the basic nuclei of

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[18] Cohen, *supra* note 3, at p. 1209.

[19] *Ibid.*, at p. 1212.

[20] *Ibid.*, at p. 1201.
According to Brockman, on Taiwan during the Qin Dynasty, the magistrate referred civil cases to the local headman for mediation as a matter of course.

[21] *Ibid.*, at p. 1212.

[22] *Ibid.*, at p. 1213.

[23] Lubman, *supra* note 6, at p. 1296.

traditional Chinese society--family, clan, village, and guild; fear of possible disaster that might happen in litigation; and the coincidence with the prevailing Confucian ethic and social values made extrajudicial mediation a preferred way to solve disputes.[24]

It might be safe to conclude that an independant and formal civil adjudication system failed to develop in traditional China. "In the absence of a viable and respected civil legal system, mediation was forced into the breach."[25]

In the modern era, the Nationalist Government promulgated a series of codes of law after 1928, including one for civil procedural law, promulgated in 1935.[26] Basically, they followed the European continental model, as found in the laws of Germany, Japan, and Switzerland.[27] A modern court system was organized but it never functioned effectively in its short period of government.[28] Traditional, informal, extrajudicial mediation remained the characteristic mode of dispute settlement throughout

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[24] *Ibid.*, at p. 1297.

[25] Glassman, *supra* note 10, at p. 465.

[26] Zhang Wushen, ed., The Theory of the Code of Civil Procedure (minshi susong fa xinlung) (Henan: Law Press, 1993), at p. 33

[27] Zhang Ming, *supra* note 5, at p. 13.

[28] Lubman, *supra* note 6, at p. 1300.

the years of Nationalist rule.[29]

When the People's Republic of China was established in 1949, Marxism became the ruling ideology. This theory holds that:

> ... law is linked with the state and is thus a means by which those who control the means of production maintain their control over those which they have expropriated. With the passing of the ownership of the means of production into the hands of the community, the individual will be emancipated and state and law alike, justified only by the need of compulsion, will wither away."[30]

By instruction in this ideology, law in China became highly stressed as an instrument for class struggle, and as the tool for the dictatorship of the proletariat and for suppression of the enemies of socialism. It was to be regarded as a tool employed to achieve the transition from feudal society through state socialism to the ultimate goal of a communist society, rather than as a set of lasting values and autonomous procedures.[31] Law and legal practice bore the heavy imprint of politics,[32] changing with variations in the political situation. Several efforts to

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[29] *Ibid.*
And see Professor Wang Weiguo, "The Legal Modernization in China: A Cultural Survey", 2 (1990-1) Juridisk Tidskrift 645, during the decades from the 1920s to 1940s, 95 percent of the people lived in a social order regulated completely on the basis of customs, or else in a state of legal disorder.

[30] Wolfgang Friedmann, Legal Theory, 5th ed. (New York: Columbia University Press, 1967), at p. 367

[31] R. R. Edwards, "An Overview of Chinese Law and Legal Education", (1984) 476 The Annals of the American Academy of Political and Social Science, at p. 50.

[32] Lubman, *supra* note 2, at p. 196.

develop and improve the socialist civil legal system were frustrated by the change of policy, though these efforts established the foundation for full developments after 1977.

On the other hand, one basic socialist value has been a strong emphasis on collectivism. The interests of the state and of the individual have been assumed to coincide.[33] When there was a conflict between them, law and politics required that the individual interest should be subordinated to the interest of the state. Consequently, when dealing with civil cases, the protection of the interests of the state and of the collective have been emphasised, while the protection of individual legal rights was often ignored.[34]

Turning to the actual conduct of civil adjudication, it had its origin in judicial practices during the revolutionary base area controlled by the Communist Party before 1949. The requirements were "investigation and research" (diao cha yan jiu), "mediation is primary" (yi tiao jie wei zhu), and "dealing with the case on location" (jiu di ban an).[35]

The jurisprudential assumption has been that civil disputes are contradictions among the people and not only could be but

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[33] G. Watson, *et al.*, Canadian Civil Procedure: Cases and Materials, 3rd ed. (Toronto: Emond Montgomery,1988), at p. 126.

[34] Ma Yuan, ed., The Theory and Practice of Civil Adjudication (minshi shenpan de lilun yu shiwu), (Beijing: People's Court Press, 1992), at p. 43.

[35] Zhang Min, *supra* note 5, at p. 253.

should be resolved by education and persuasion, rather than by suppression and dictatorship in socialist society.[36] As a result, mediation has continued from traditional society as the principle for dealing with civil cases. Behind it, we can see both the strength of classical imperialism and the influence of modern Marxism. Furthermore, judicial mediation is believed to be the one essential way for the people's courts to serve the people.[37]

"Investigation and research" and "dealing with the case on location" followed the tradition during the war years, which required judges to go out of the courtroom and among the people to investigate and determine the facts; and then, starting from what was convenient for the mass of people, rather than from particular legal forms, they would hear a case by talking with the masses rather than by sitting in the courtroom and conducting a formal trial.[38]

However, since the "reform and open door" policy began in the late 1970s, active efforts in legal-system building commenced to adapt the transition from a planned economy to a market economy. The unprecedented developments in the Chinese legal reforms illustrate a strong will to use law instead of administrative "command" as a control upon economic activity, in the

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[36] *Ibid.*, at p. 267.

[37] *Ibid.*

[38] Ma Yuan, *supra* note 34, at p. 35

broadest possible sense.[39] Law is also expected to create "a certain kind of economic order" and "lead economic development".[40] In addition, the need for attracting and protecting foreign investment and technology is also a strong stimulus to the large-scale legal-system building.[41] With the development of democratic politics, people have been increasingly realising the importance of seeking protections through the law. Consequently, civil cases have increased dramatically. The comprehensive judicial investigation and collection of evidence has been increasingly seen as inconsistent with modern judicial principles, and also cumbersome in practice. Disregard for procedure and neglect of trial are seen to be out of the tune with the spirit of the rule of law. The role of mediation in civil adjudication is therefore being reevaluated.

In April 1991, the Code of Civil Procedure was enacted after nine years of practice with a Provisional Code of Civil Procedure. It is the direct outcome of the economic developments, needs, and political changes. Not surprisingly, the reform of China's adjudication style within the people's courts started almost at the same time. The trend for reform has been to change from the style which is similar to the inquisitorial pattern of the continental European system to one closer to the adversarial

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[39] J. V. Feinerman, "Economic and Legal Reform in China,1978-91", (1991) 40 Problems of Communism, at p. 62.

[40] *Ibid.*, at p. 63.

[41] Edwards, *supra* note 31, at p. 52.

system of the common law countries, especially in North America.

Canada (except for Quebec) belongs to the family of common law countries. The theory and form of the province of Manitoba's Court of Queen's Bench Rules [hereinafter Q.B.R.], which I choose as the object of the comparison in my thesis, is very similar and, in many respects, even identical to the rules in other Canadian provinces. Although there are significant differences in detailed regulations, e.g., the extent of discovery and the availability of costs, between Canadian civil procedure and the civil procedure in other common law countries, such as Great Britain and the United States, the theory and the underlying values are the same.

At the heart of the legal process in any common law society is the adversarial system.[42] The key elements of this system -- the burden on the parties to present evidence and the litigant's right to the assistance of professional counsel -- evolved as legal controls on governmental absolutism since the seventeenth century in England. Thus, the adversarial system is not only a theory of adjudication but a constituent part of the history of political liberty.[43] It can be viewed as an attempt to prevent abuses of political power. In the Anglo-American legal tradition, the philosophy is premised on a distrust of the state and

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[42] Watson, *supra* note 33, at p. 117

[43] Geoffrey C. Hazard, Ethics in the Practice of Law (New Haven: Yale University Press, 1978), at p. 127.

of public officials.[44] These people do not want their rights and interests to be represented by government or other state organs.

The two basic principles of the adversarial system are party-autonomy and party-prosecution,[45] which require the parties to initiate the lawsuit, to define the issues, to develop proofs to support their claims, and to present such proofs to a court.[46] The judge's role is to evaluate passively the merits of the case when presented to him and to make a decision based on such presentations. It is believed that the truth will come out through the adversarial contest between the competitive parties who are motivated by self-interests;[47] and the trier of fact is likely to reach a correct decision because he remains disinterested until all proofs have been elicited and arguments made.[48] At the base of the adversarial system is competitive individualism, which believes that if the party with the better case -- that is the case that can be proven correct on the facts -- were to lose, that result will still be satisfactory because he, not the system, would be the author of his defeat.[49] The philosophy not only works in the litigation process, but also in the whole

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[44] Watson, *supra* note 33, at p. 126

[45] *Ibid.*, at p.122

[46] L. L. Teply and R. U. Whitter, Civil Procedure (St. Paul: West Publishing Co., 1994), at p. 8.

[47] G. Gall, The Canadian Legal System, 2nd ed. (Toronto: Carswell, 1983), at p. 175

[48] Watson, *supra* note 33, at p. 129.

[49] *Ibid.*, at p. 126.

society. The underlying spirit is competition, which assumes that everyone is equal in ability, resources, and chances, even though this is often incorrect in reality.

Another important aspect of the adversarial system is the central role of lawyers. The idea is that skilled advocates operate on opposite sides of a case, to develop and present the partisan aspects of the case completely.[50] These advocates do their best to control the trial and persuade the judge to accept their points of view, so that they can help their clients win the case.

My thesis, "The Comparison of Civil Procedure between China and Canada/Manitoba" identifies and contrasts the whole process of judicial resolution for an ordinary civil dispute. Its analysis starts from the brief review of the jurisdiction of civil cases and ends with the final stages of appeal and of enforcement of a judgment, giving an overall comparison, topic by topic and step by step, so that the similarities and differences can be clearly seen. This analysis will facilitate an examination of the respective values underlying the two systems.

Another purpose of the comparison is to try to suggest some of the benefits of the adversarial system to the present reform of adjudication in China. The final chapter "Reforming the Civil Adjudication Model in China" will consider this issue.

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[50] Teply and Whitter, *supra* note 46, at p. 10.

BRIEF REVIEW OF JURISDICTION OF CIVIL CASES (CHINA)

1. Basic Level People's Courts

A Basic level People's court has jurisdiction over all civil cases which are within its territorial jurisdiction, except where the law stipulates otherwise.[51] In China, except for certain types of important civil cases provided by law to be heard by the courts above intermediate levels, most are heard by the basic level people's courts.[52] The C.C.P. also permits the basic level people's courts to refer cases that are difficult and complex to the higher level courts. However, in practice this happens very rarely. Generally, only when a basic level people's court finds out that the case is of great social significance, and that the scope the case touches upon is far beyond the court's jurisdiction, will it apply to refer the case to a higher level court.

2. Intermediate People's Courts

These courts hear major cases involving foreign interests, cases of major importance in the community within their jurisdiction, and cases under the jurisdiction of intermediate people's courts as determined by the Supreme People's Court.[53] In terms of economic cases, the amount of money for the object in issue is

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[51] Art. 18 of the Code of Civil Procedure [minshi susong fa], People's Republic of China, which was passed by the 4th Session of the 7th National People's Congress on April 9, 1991; hereinafter CCP.

[52] Zhang Wushen, *supra* note 26, at p.323.

[53] Art. 19, CCP.

a very important standard to decide whether a case is of major importance. They also hear cases appealed from the basic-level people's courts.

3. High People's Courts

This is the highest level among the local people's courts, set up in provinces and autonomous regions, as well as the cities that are directly under the central government's control, such as Beijing, Shanghai, and Tianjin. They hear civil cases which are of major importance,[54] such as transregional economic disputes, cases in which a special incident or a person with special status is involved.[55] Here, the amount of money for the object in issue is also an important factor to decide whether an economic case is of major importance. They also hear cases appealed from the Intermediate People's Courts.

4. The Supreme People's Court

It hears civil cases which are of national importance and cases which it decides should be tried by itself,[56] e.g., a case of significant precedential value and where the Supreme People's Court will give a judicial explanation after the trial of the case.[57] It also hears cases appealed from the High People's

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[54] Art. 20, CCP.

[55] Tang Dehua, ed., The Explanation of the Articles of the Code of Civil Procedure (xin minshi susong fa tiaowen shiyi), (Beijing: People's Court Press, 1991), at p. 41.

[56] Art. 21, CCP.

[57] Tang, *supra* note 55, at p. 42.

Courts.

The current system has four levels of people's courts and a case can be heard at two instances only, one is the trial and the other is appeal (si ji liang shen zhong shen zhi). In fact, this system was established in the Organic Law of the People's Court of the People's Republic of China, which was promulgated in 1954, and continues to be applied until now.[58]

BRIEF REVIEW OF JURISDICTION OF CIVIL CASES (MANITOBA)

1. Small Claims' Court

Unlike most other provinces in Canada where Small Claims' Courts are part of provincial courts, in Manitoba, Small Claims' Court is set up within the Court of Queen's Bench. It hears cases for amounts not exceeding $5,000.00.[59] It is designed to solve minor civil disputes with little formality. Parties are not generally represented by lawyers.[60] No pleadings or pre-trial discovery is permitted. Therefore, a case can be resolved less expensively and more expeditiously.

2. Court of Queen's Bench

This court is responsible for trying most civil cases within

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[58] Zhang, *supra* note 26, at p. 322.

[59] The Court of Queen's Bench Small Claims Practices Act, R.S.M. 1987, c. C285, s. 3(1).

[60] G. Watson, *et al.*, Civil Litigation: Cases and Materials 4th ed. (Toronto: Emond Montgomery, 1991), at p. 308

Manitoba. The jurisdiction is general. It also hears appeals from Small Claims' Court.

3. Court of Appeal

This court hears appeals from the Court of Queen's Bench. Very few decisions of the Court of Appeal are further appealed to the Supreme Court of Canada, because the party must seek "leave to appeal", either from the Court of Appeal or from the Supreme Court of Canada.[61]

4.Federal Court of Canada

It has two divisions -- the trial division and the appeal division. The trial court has specific jurisdiction such as admiralty, patents, and immigration. It is located in Ottawa, but the judges travel on circuit to all major cities in Canada.[62]

5. The Supreme Court of Canada

This is the final court of appeal for all civil and criminal matters decided by the all courts of record throughout Canada.

TRIAL ORGANISATION (CHINA)

The Code of Civil Procedure of the P.R.C. (C.C.P.) stipulates two systems of trial organisation: collegiate system (he yi

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[61] P. Russell, The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson, 1987), at p. 289.

[62] M. R. Rintoul and S.Bailey, The Judicial System of Canada (St. Paul: West Publishing Company, 1988).

zhi) and by a single judge (du ren zhi).

The Basic Level People's Court and its circuit tribunal may apply a summary procedure to try a simple civil action by a single judge. A simple civil action is defined in the C.C.P. as the case where the facts are clear, the relationship of rights and obligations is definite, and the dispute is minor.[63] There is not a fixed amount standard because of different situations within different areas in China.

Apart from this, almost all civil actions are tried by a collegiate bench. This is named "he yi yuan ze", which means the system of collective handling of cases at a people's court. A collegiate bench must be made up of an odd number of members[64] so that, when voting, there will be a majority which the minority must follow. However, the dissenting opinions of the minority must be recorded.[65] Normally there are three members in a collegiate bench. In cases of important and complicated issues, there will be five or, very rarely, seven.

Members of the collegiate bench are assigned by the president of a division in accordance with internal administrative rules of the people's court. The collegiate bench in the trial courts is composed of professional judges and lay assessors (pei shen yuan), or of judges only. Where assessors participate in the bench, they have the same rights and duties as the judges in

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[63] Art. 142, CCP.

[64] Art. 41, CCP.

[65] Art. 43, CCP.

trying the case.[66] Like a judge, an assessor can do investigations, sit in the trial with other members of the collegiate bench, and vote when the bench deliberates a case.

The collegiate bench of the appellate courts is composed of judges only and no assessors are allowed.[67]

In China, all Intermediate People's Courts, provincial or municipal High People's Courts, and the Supreme People's Court can exercise original jurisdiction over civil cases and can only use the collegiate system.

In judicial practice, the president of a division in any court will often appoint a member of the collegiate bench to be mainly in charge of a specific case: conducting the investigation and mediation, handling various procedural issues, and producing legal documents after the hearing; while the whole collegiate bench will sit in the trial and hear the case, and deliberate it after the trial.

TRIAL ORGANISATION (MANITOBA)

The Canadian legal system provides for two modes of trial: by a judge alone or by a judge sitting with a jury. In trials before a judge alone, the judge decides both law and fact. In jury trials, the jury decides question of fact and the judge

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[66] Art. 40, CCP.

[67] Art. 41, CCP.

decides questions of law. In addition, the judge needs to give instructions to the jury about the law during the course of a trial.

Excluding those cases which are required or prohibited from being tried by a jury according to law, a defendant has the right to choose the mode of trial. However, the types of civil cases that are allowed for trial by a judge and jury in Canada generally are limited. In Manitoba very few civil cases are allowed to be tried by a judge and jury, and jury trials rarely occur (i.e., about one civil jury trial every two or three years).

In accordance with The Jury Act, every citizen of Canada has the right and duty to serve as a juror unless disqualified or exempted under the Act.[68] The principle of jury selection is that the panel ought to be representative of the community, and that jurors must by selected randomly.[69] Under the Manitoba Jury Act, "The Chief Sheriff shall in each numerical year before November 1 in that numerical year, prepare each jury district for use in the ensuing 12 months a jurors' roll which comprises names of persons residing in that jury district." (s. 5) The Jury for the trial of a civil action consists of six persons who are selected in open court by balloting of a court officer from at least a 10-juror jury panel. The trial judge will not intervene. Either party to a civil action may challenge three jurors

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[68] The Jury Act, Revised Statutes of Manitoba, 1987, c. J30, s.2; hereinafter, RSM 1987

[69] *Ibid.*, s. 6(1)

without cause.[70]

In Manitoba, the Court of Appeal usually sits in a panel of three judges.[71] If there is an important issue or if they are being asked to overrule a previous decision, there will sometimes be five judges,or rarely, seven.

The Supreme Court of Canada comprises nine judges.[72] Usually a case is heard by a minimum quorum of five judges, although seven is the standard for cases of greater significance. Whenever possible, all nine judge will hear a case.

In Canada, trial judges generally hear pre-trial motions on the basis of a master calendar, so that they will spend a set amount of time hearing all pre-trial motions. It would be a matter of chance if the judge who heard a pre-trial motion then heard the trial.[73]

COMPARISON

In China, all four levels of people's courts have original jurisdictions over trial cases; while in Canada, the provincial courts of appeal and the Supreme Court of Canada only hear appeal

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[70] *Ibid.*, s. 40.

[71] The Court of Appeal Act, R.S.M. 1987, c. C240, s. 14.

[72] The Canadian Bar Association Committee Report: The Supreme Court of Canada (Ontario: The Canadian Bar Association, 1987), at p. 35

[73] Watson, *supra* note 60, at p. 380

cases. In China, most civil cases are tried by the basic level people's courts, while in Canada most civil cases are heard by courts at the provincial level which, in Manitoba,is the Court of Queen's Bench. There are far more people in China than in Canada, correspondingly there are more disputes in China too. Because the residence of parties, the locale of a case, and the location of the property in issue are always within the territorial jurisdiction of a certain basic level people's court, the basic level people's courts are convenient for people because they can sue in the local area.

In China, most civil cases are tried by a collegiate bench while in Manitoba/ Canada, at the trial level, a single judge will hear and decide a case alone in most situations. To a certain extent, this reflects the collectivism in China. However, at appeal levels, both in China and in Manitoba/ Canada, the cases are heard by a collegiate bench.

MEDIATION (CHINA)

As mentioned in the introduction, mediation is the normal Chinese tradition for resolving civil disputes. It is still highly favoured in socialist China and is an important part of the civil adjudication system. "Mediation" in this context means judicial mediation.

Mao Tse-tung's ideology highly influenced law and dispute resolution[74] in the post-1949 China. At several times, he pointed out that the dictatorship of proletariat should distinguish the "people", to whom the revolution belongs, from the "enemy". "Disputes among the people" ought to be resolved, whenever possible, by "democratic methods, methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods."[75] Law was basically regarded as a weapon of coercion and dictatorship in order to resolve problems between the people and the enemy.[76] Civil disputes were classified as problems within the people, and mediation was far superior to trial, which is considered coercive. Evolved in the revolutionary base areas controlled by the communist party before 1949, the

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[74] Lubman, *supra* note 6, at p. 1301.

[75] Cohen, *supra* note 3, at p. 1201. According to Donald J. Munro, The Concept of Man in Contemporary China, (Ann Arbor: The University of Michigan Press, 1977), the Chinese term for persuasion literally means "to bring into submission by spoken means". In the eyes of westerners, if mind is being caused to submit, some manipulation of the autonomous man is occurring, and that is bad.

[76] Lubman, *supra note 6, at p. 1302*.

principle that "mediation is primary" continued to be applied after the People's Republic of China was established, requiring judicial mediation in civil cases. The 1982 draft of civil procedure changed the principle into "in trying civil cases, the people's court shall stress mediation..." in order to "embody the guiding idea of the trial of civil cases."[77] Again the current code changes the rule into "when hearing a civil case, a people's court shall carry out mediation based on the principle of voluntary participation and legality...", further reducing the instances of required mediation and strengthening the role of trial in civil proceedings. The changes reflect that the understanding of mediation is being deepened gradually: judicial mediation, as a necessary supplement to trial, cannot supplant trial, which is the core phenomena of the legal process. China has finally established mediation's proper relationship to the trial proceeding. An interconnected civil adjudication system is being developed.

According to the C.C.P., judicial mediation can be used at any stage of the trial proceedings before the court pronounces its decision, although it is not a necessary procedure and either party's voluntariness is its prerequisite. It can also be used during the appeal procedure and in the procedure for trial supervision as well. In fact, if it is possible, a dispute can be resolved through mediation.

There are three principles regulated by law as to judicial

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[77] P. R. China, National Affairs (16 March 1982).

mediation:[78]

1. Mediation shall be based on clear facts and the judge's distinguishing of right from wrong;

2. voluntary participation by the parties; and

3. legality of the mediation procedure and contents; which means on the one hand, when conducting a mediation, a judge remains the one who ascertains the truth, rights and obligations, and on the other hand, that the contents of an agreement reached through mediation cannot harm the interests of the country, the collective, or other people.

Art. 89 and 90 of the C.C.P. provide that a mediation statement or an agreement becomes legally effective once it has been signed and accepted by all the parties concerned. If one party fails to perform accordingly, the opposing party can apply for court enforcement.

MEDIATION (MANITOBA)

Mediation is not regulated in the Queen's Bench rules. However, by an informal and developing practice , there are specific judges in charge of mediation to help the parties to settle cases before trials; because once a case goes to trial, it will be very expensive and time-consuming. Therefore, the first concern is different from what is in China now, which is to

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[78] Arts. 9, 85, and 88 of CCP.

strengthen unity among the people and promote social stability by resolving disputes through mediation.[79]

In Queen's Bench, all the contents of the mediation process must be kept confidential. In addition, the mediation judge cannot then be the trial judge, to hear the case that he has unsuccessfully mediated, and he cannot disclose anything of the mediation to the trial judge .

SUMMARY PROCEDURE (CHINA)

Summary procedure is a simplified procedure which is only applied by a Basic Level People's Court or its circuit tribunal to try simple civil actions. The purpose is to facilitate litigation and resolve disputes as soon as possible.

Art. 142 provides that when trying a simple civil action where the facts are clear, the relationship of rights and obligations is definite, and the dispute is minor, a basic level people's court or its circuit tribunal may apply the summary procedure. The law also provides that a case heard with a summary procedure shall be finished within three months of the case being placed on file.[80]

The judge who is entrusted with a specific case, but not the party, will decide whether the summary procedure will be applied

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[79] *Supra* note 77.

[80] Art. 146, CCP.

when dealing with the case. According to the stipulation of summary procedure, the court or its circuit tribunal, may adopt simplified methods of summons of the parties and witnesses,[81] such as a telephone call, and shall not be restricted by the time limitation stipulated in Art.122.

A single judge will hear the case[82] and the course of the hearing is not subject to the strict rules about the courtroom investigation and court debate stipulated in Art. 124 and 127 of the C.C.P. When hearing a case, if a complicated dispute develops, the judge can convert the case into the ordinary trial procedure.

China is a big country with an immense population. A lot of civil disputes are very simple. Summary procedure conveniences the litigation of people and the adjudication of courts. In addition, it lightens the financial burden on the party and reduces the expenditure of government, because in China the litigation fee is minimal. Besides, it also enables the court to concentrate on major and complicated cases.

SUMMARY PROCEDURE (MANITOBA)

1. Application

This is a civil proceeding, other than an action, that is commenced by a party in the court with "a notice of applica-

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[81] Art. 144, CCP.

[82] Art. 145, CCP.

tion."[83] The two types of proceedings, action and application, are designed to deal with different types of cases: an action is appropriate where there is likely to be seriously contested issues of fact in a case which requires a more elaborate procedure -- pleadings, discovery, and the opportunity to adduce oral evidence at a trial. An application is appropriate for cases where there are unlikely to be seriously disputed issues of fact.[84] Proceedings brought by an application are summary in nature: no pleadings are required and discovery is unavailable. Therefore an application is far less costly and time-consuming because many pre-trial procedures needed in an action are dispensed with. The relevant facts and supporting evidence are set out in affidavits.[85] Manitoba Rule 14.05(2) sets out proceedings which may be commenced by application, and item (d) of this rule indicates that any matter, "where it is unlikely there will be any material facts in dispute," can be commenced by application. An application shall be made to a judge.[86] On hearing an application, if a major factual dispute develops, a judge may direct that the application proceed to trial or direct the trial of a particular issue or set of issues. This will involve pleadings and discovery, and the proceedings shall thereafter be treated as

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[83] See Rule 1.03 of Queen's Bench Rules of Manitoba, hereinafter QBRM.

[84] Watson, *supra* note 60, at p. 329.

[85] *Ibid.*, at p. 329

[86] Rule 38.03, QBRM.

an action.[87] The party dissatisfied with the judgment on an application can appeal to the Court of Appeal in accordance with the provisions of The Court of Appeal Act and Rules.

2. Summary Judgment and Expedited Trial

Under Manitoba Queen's Bench Rule 20, in an action, at any time after a statement of defence has been filed and before the action is set down for trial, the plaintiff may move for summary judgment or the defendant may move for summary judgment dismissing the claim.

The moving party needs to provide an affidavit and other evidence to demonstrate that there is no genuine issue requiring a trial; and if the court is satisfied that there is no triable issue in the case with respect to a claim or defence, the court shall grant a summary judgment.[88] The parties can save time and costs since the case is disposed without going to trial. The right to bring a motion for summary judgment is not limited to any specific class of case.[89]

The judge may also, on motion by either party, order an expedited trial if the judge is of the view that the case can be resolved more quickly. The judge will order that the matter be set down for hearing, with the pre-trial preparations to be finished within a fixed time, the evidence to be adduced by

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[87] Watson, *supra* note 60, at p. 330

[88] Rule 20.03(1), QBRM.

[89] Bar Admission Course for Civil Procedure/ Administrative Advocacy (Winnipeg: Law Society of Manitoba, 1995-1996), at p.3-18

affidavit, etc., so that a party will not suffer undue delay. The expedited trial is stipulated in Rule 20.06 of Q.B.R.

3. Small Claim Proceedings

In Manitoba, civil disputes under $5,000.00 can be sued in the Small Claims Court in which summary procedure is applied. No complicated pre-trial proceeding is available and the cases are solved in a summary manner.

COMPARISON

As a legal tradition, judicial mediation is deep-rooted in Chinese civil adjudication and there is one independent chapter in the C.C.P. dealing with it. It reflects the traditional Chinese philosophy that peace is valuable (He Wei Qui). On the contrary, no judicial mediation is provided for in the Manitoba QBR, or the rules of civil procedure of other provinces in Canada. In Manitoba, it is only a judicial practice by some judges who want to lessen the burden of cost and time brought by a trial. The practice has demonstrated it to be quite successful. Actually, in both countries, the great majority of all civil cases are solved by agreement between the parties before trial.

Summary procedure is regulated in both the C.C.P. and Manitoba QBR. The difference is that in China the judge who is entrusted with the case will decide whether the summary procedure

is applied, while in Manitoba it is mainly decided by the parties.

PLEADING STAGES (CHINA)

A. Initiation (institution) and acceptance of an action (qi su he shou li)

1. Initiation of an action

The initiation of an action is how a party indicates that he would like to exercise his litigation right; this is not necessarily the commencement of a civil proceeding. The court will examine the complaint to check whether the criteria for bringing a civil action have been met; if so, the case will be filed (li an), and the civil proceeding is then commenced. The People's Court will not accept all complaints.

The C.C.P. provides for four criteria which must be fulfilled when instituting an action:[90]

1) The plaintiff is an individual, legal person, or organisation with a direct interest in the action.

2) The defendant must be identifiable.

3) There are specific claims, facts, and a cause for the action.

4) The action falls within the jurisdiction of the People's Courts and is subject to the jurisdiction of the particular People's Court in which it is brought.

In item (3), "specific claims" are the concrete civil rights and interests that the plaintiff asks the court to protect.

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[90] Art. 108, CCP.

"Facts" include the narrative description of the whole story of the case, based on evidence which can support the case. And "cause for the action" is the basis in law that allows the plaintiff to institute an action.

In principle, when initiating an action a plaintiff shall submit a written bill of complaint to a people's court, along with as many copies as there are numbers of defendants. However, as an exception, a plaintiff can present an oral complaint if the plaintiff has genuine difficulties in writing; in this case, a people's court will transcribe the details and notify the other parties.[91] Because there are still a certain amount of illiterate people in China, and because the cost to hire a lawyer is always beyond some persons' financial ability, this stipulation enables people to ask for judicial protection in spite of their difficulties.

A complaint shall specify the following items:[92] 1) the basic situation of the parties, such as name, sex, age, etc.; 2) the litigation claims, the facts and the cause for the action; 3) evidence or sources of evidence, with the names and addresses of witnesses.

Normally, if the evidence is in the possession of the plaintiff, it is required to be submitted to the court together with the complaint; if the evidence cannot be submitted by the plaintiff, such as governmental records, bank files, etc., it

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[91] Art. 109, CCP.

[92] Art. 110, CCP.

shall be indicated in the complaint; and, persons who are thought to have knowledge of the case in favor of the plaintiff's position should also be identified in the complaint.

2. Acceptance of an action

A people's court will file the case for hearing after it inspects a complaint and is satisfied that it meets the criteria for acceptance. The decision should be made within seven days on receiving a written or oral complaint, and the court shall notify the parties concerned; if the complaint fails to meet the requirements, the court shall issue a ruling within seven days rejecting the complaint. The plaintiff may appeal against the decision.[93]

Qi Su (the initiation of an action) may start a civil proceeding because the plaintiff's complaint is subject to the court's inspection before the court accepts it for hearing. To a great extent, the scope of the acceptance of actions reflects the level of rule by law and of human rights protection. In recent years, the number of actions accepted by the courts for hearing keeps increasing, which means law is more and more important in our society.

B. Pre-trial preparation

When a court accepts the action, judicial personnel will begin a series of preparations in order to make sure the formal trial will be carried out successfully. The preparations include

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[93] Art. 112, CCP.

four items, as follows:

1. Serving the copies of pleadings[94]

A people's court shall send a copy of a bill of complaint (qi su zhuang) to the defendant within five days of accepting a case for hearing and the defendant may file a bill of defence (da bian zhuang) within fifteen days of receiving the bill of complaint. After a defendant has filed a bill of defence, the people's court shall send a copy of this bill to the plaintiff within five days after receiving it. Failure by a defendant to submit a bill of defence will not affect the continuing of the proceeding.

In the bill of defence, a defendant can rebut the claims, facts, and reasons alleged by the plaintiff, on the basis of wrongful facts or rule of law, regarding either procedural or substantive issues, or both. At the same time, the defendant may assert a counterclaim (fan su) in the bill of defence. However, there are no legal rules regulating the bill of defence in the C.C.P., as there are in the Q.B.R. (see Rule 25.07).

In China, to file a bill of defence is a matter of the defendant's litigation right, rather than his obligation. Therefore, unlike Canada, if the defendant fails to file the bill of defence, or fails to file the bill of defence within the prescribed time after being served with the statement of complaint, he will not suffer a default judgment at this stage. The reason is that the judge has the responsibility to collect evidence

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[94] Art. 113, CCP.

according to law and ascertain the facts of a case. The defendant can file the bill of defence at any time during the court's proceedings in the action.

2. Notifying the rights and obligations in litigation proceedings[95]

When it decides to hear a case, a people's court has a duty to notify the parties concerned in the notice of case acceptance (shou li an jian tong zhi shu) and notice of response to the prosecution (yin su tong zhi shu), or orally of their rights and obligations in a litigation proceeding. The purpose of this provision is to enable the parties who are involved in an action for the first time to be familiar with their rights and obligations, so that they know how to protect their legal interests and cooperate with the court in the proceedings.

The court shall notify the parties of the members of the collegiate bench within three days after it is made up,[96] and so a party can apply for timely withdrawal of a member of the collegiate bench if the party has legal reasons.

3. Reading and examining case materials, verifying, collecting, and investigating necessary evidences. (This will be discussed from p.47 to p.52)

4. Notifying an indispensable party to participate in the proceedings[97]

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[95] Art. 114, CCP.

[96] Art. 115, CCP.

[97] Art. 119, CCP.

If an indispensable party to an action fails to participate in the proceedings, a people's court shall notify the said party to participate. "Indispensable party" is the party who has an immediate interest in the case, whom the result might affect. The court can call upon the indispensable party to participate in the action, either ex officio or according to the party's application. The one who is notified as a plaintiff can decide whether or not to participate in the action; while the one who is notified as defendant has to attend the action. If he fails to attend the trial despite the court subpoena, a judgment by default may be issued against him.[98]

PLEADINGS (MANITOBA)

All civil proceedings are commenced by an action through the issuance of a written "statement of claim", unless the rules or a statute otherwise provide. Pleadings are statements in writing of the plaintiff's claim and defendant's response, respectively, that are exchanged between them before trial.[99] The pleadings serve the purpose of defining or "joining" the issues between parties and of exchanging notices.

There are three parts to a statement of claim. The first is

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[98] Zhu Xilin, ed., An Introduction to the Code of Civil Procedure (xin minsu fa jianghua), (Beijing: Procurator Press, 1991), at p. 203

[99] Watson, *supra* note 60, at p. 717.

the "title of proceeding", which indicates the names of all parties and the capacity in which they are made parties. The second part is a standardised form which informs the defendant how to respond when being served with the statement of claim and warns the defendant of the default judgment if he or she fails to respond. The third part identifies the specific claim(s) and the relief(s) sought, if any. This part should include a concise statement of material facts on which the plaintiff relies for the claims. However, no evidence need be presented at this stage.[100]

Rule 31.12 of Q.B.R. allows a person to examine any other person for discovery before commencement of a proceeding, in order to identify an intended defendant or defendants. However the person needs to apply to the court for approval before such examination can be conducted. This procedure is rarely used.

After preparation of the statement of claim, the plaintiff or the lawyer for the plaintiff should take it to the court registry for issuance. The registrar will issue it by signature, date, and number. A copy will be kept for the court's case file, which is thereby opened. The proceeding commences when these steps have been taken.

Pleadings largely reflect the traditional, adversarial and bi-polar model of disputing. The pleading rules pre-suppose that the dispute will be defined and shaped by the parties without the intervention of a judge.[101] The issuing of a statement of claim

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[100] Rule 25.06 (1), QBRM.

[101] Watson, *supra* note 60, at p. 716

is an administrative act and, unlike China, no approval from the court is needed, except in unusual cases, e.g., in a representative action.

The statement of claim should be served on the defendant by the plaintiff within six months after it is issued;[102] and the defendant needs to file a statement of defence within the prescribed time (which, in most cases, is 20 days).[103] If the defendant fails to do that, the plaintiff may, on filing proof of service of the statement of claim, require the registrar to note the defendant in default.[104] A defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim and cannot file a statement of defence or take any other step in the action, unless there is a rule to the contrary.[105] Then the plaintiff can move, or require to obtain, a default judgment against the defendant from the court. However, both the noting of default and the default judgment itself can be set aside later by the court on such terms as are just.[106]

If a defendant raises a counterclaim or crossclaim, it shall be included in the same document as the statement of defence, which document is entitled "a statement of defence and counter-

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[102] Rule 14.07, QBRM.

[103] Rule 18.01, QBRM.

[104] Rule 19.01 (1) QBRM.

[105] Rule 19.02, QBRM.

[106] Rule 19.03 (1) and 19.08 (1), QBRM.

claim " (Rule 27.02) or "a statement of defence and crossclaim" (Rule 28.02). In China, there is no crossclaim.

A party shall be deemed to deny the allegations of fact made in the defence of the opposite party, where a reply is not filed and served within the prescribed time.[107]

In pleadings, unlike a Chinese complaint or defence, neither party needs to disclose the evidence by which he proposes to establish his case at trial. But each must give the opponent a sufficient outline of the case.

A basic requirement of a pleading is that it disclose a legally valid cause of action or defence. Otherwise the other party will move the court to have the pleading struck out or expunged.[108]

Pleadings in an action are closed, when the plaintiff has filed a reply or the time for filing a reply has expired and every defendant who is in default has been noted.[109]

COMPARISON

Both in China and in Manitoba, the parties will initiate an action and identify the claim(s), facts, and relief(s), if any, without the interruption of the court. However, in China, the

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[107] Rule 25.08 (4), QBRM.

[108] Rule 25.11 QBRM.

[109] Rule 25.05, QBRM.

court will examine the case to decide whether it meets the requirement for institution of a hearing, while, in Manitoba, it is up to the opposing party to move to the court to strike out a pleading or other documents, if there is any defect according to the Rule 25.11 of Q.B.R.

In China the court is responsible for the serving of pleadings, while in Manitoba this is done by counsel or the parties themselves. In China, the court has the duty to inform the parties about the relevant law; while in Manitoba, the counsel is the instructor of law to his client.

In China, the defendant's failure to respond to the plaintiff's complaint "shall not affect the hearing of the case by a people's court."[110] The judge is responsible for collecting necessary evidence and deciding the case on its merits. However, in Manitoba, ignoring the statement of claim means that the defendant admits all the plaintiff's allegations of fact so that he risks a default judgment.

Compared to the Manitoba approach, the Chinese judges participate in civil litigation from the very beginning of the proceeding. Evidence is required to be provided to the court at this stage so that the judge can start the necessary preparation. While in Manitoba, the pleadings are generally fulfilled by the parties themselves and without the intervention of a judge. No evidence is required at this stage. The practice fully reflects the adversarial principle of party-prosecution.

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[110] Art. 113, CCP.

DISCOVERY STAGES (CHINA)

> C.C.P. Art.64: A party to an action shall be liable to present evidence to support its own assertions.
> If a party to a case or its agent ad litem is unable to obtain evidence due to objective reasons or if a people's court considers certain evidence to be relevant to a case, the people's court shall itself investigate and collect evidence.
> A people's court shall inspect and verify evidence comprehensively and objectively pursuant to legal procedure.
> Art.116: Judicial personnel must conscientiously read and examine case material and collect and investigate necessary evidence.

Under the C.C.P., according to its external forms and internal characteristics, evidence is divided into seven types: documentary evidence, material evidence, audio-visual material, testimonies of witnesses, statements of interested parties, expert conclusions, and notes of an investigation of real evidence or an "on-the-spot" inspection.[111]

Documentary evidence, material evidence, and audio-visual material in the possession of the parties will be submitted by the parties to the court in the course of proceedings.

Statements of an interested party are the disclosures of the matters made to the court by the party, as to the facts of an action. In practice, it is an indispensable procedure, that before the trial the court notifies the opposing parties as well as their lawyers separately, asks them to narrate the key facts, and inquires of them concerning the case. This comprises one major

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[111] Art. 63, CCP.

portion of investigation (discovery) made by the court before the trial. The whole process is recorded verbatim by a court clerk. At the end, the party will read the record and sign or seal it, if he thinks there are no mistakes inside it, and this becomes the named "statements of an interested party". (The signed or sealed record of the presentation of a party at trial can also be the statement of an interested party.)

The C.C.P. provides that a people's court shall examine the statement of a party to an action in relation to other evidence in the case, to determine whether or not the statement is admissible for ascertaining the facts of the case.[112] Therefore, theoretically even the facts without issue are still subjected to the court's examination before it can be ascertained. However, in practice, this happens only when the judge thinks that the admission is made under threat, or the ascertainment of the fact may impair another party's interests.

Testimonies of a witness are the statements made by the witness to the court, written or orally. Witnesses are those who have knowledge of the case apart from the parties to an action. Thererfore, unlike Canada, the concept of "witness" does not include "party". At the investigation stage, the judge may summon the witnesses identified in the bill of complaint or defence to the court to take their testimonies. The law provides that any unit and individual shall not refuse to provide evidence to the

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[112] Art. 71, CCP.

court,[113] even before the trial. Item (1) Art. 103 of the C.C.P. provides that if a relevant unit refuses to provide evidence or hinders the court's investigation and collection of evidence, the court, in addition to ordering the unit to fulfill the obligation, may also impose a fine on that unit. The witness can provide either direct information, of which they have knowledge by personal experience or, unlike Canada, hearsay.

Though the judge acts as the main examiner of witnesses and parties, the parties or their counsel can ask additional questions as well. This is similar to the practice in European continental countries.

If the judge considers the evidence to be insufficient, he will ask the party to supplement the evidence. If a specialised issue is confronted, the judge can refer the matter to an official appraisal authority for evaluation. In the absence of such an authority, the judge, but not the parties or their lawyers, will choose and commission an expert.[114] If it is considered necessary by the court or requested by the party, an investigation of actual evidence or an on-location inspection will be carried out by the judge. If necessary, specialised personnel will be invited to assist the inspection or investigation.[115]

The people's court is authorised to conduct investigations and collections of evidence under the C.C.P.. The discovery must be

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[113] Art. 65, CCP.

[114] Art. 72, CCP.

[115] Tang, *supra* note 55, at p. 141

conducted by at least two judicial personnel. In the out-of-courtroom investigations, the judicial personnel are required to present their credentials to the person under investigation. Written records of the investigation shall be checked by that person, and both the judicial personnel and the person shall sign or affix their seal to the record.[116]

During the course of investigation, the counsel of either party can continue to nominate the witnesses who are thought to have favourable knowledge of his client's case; he can also interview a witness and submit the note of the interview to the court before the trial. Further, after the court takes a witness's testimony and the opposing party's statements, or receives some other evidence, counsel have the chance to comment orally or in writing to the court.[117]

Discovery is a stage which can sufficiently demonstrate the characteristic of a country's civil procedure. The change of rules as to discovery in the C.C.P. reflects the development of civil procedure in China. The 1982 draft of civil procedure provides that the people's court should comprehensively and objectively collect and investigate evidence.[118] Judges took over both providing evidence and examining evidence. The current code

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[116] Art. 117, CCP.

[117] J. H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 University of Chicago Law Review, at p. 829. The Chinese practice is very similar to the German practice.

[118] Tang, *supra* note 55, at p. 129.

require that providing evidence should be furnished mainly by the parties. A party having a duty to provide evidence to support his allegations or assertions becomes a principle of litigation and this is obviously a big improvement.

Under the C.C.P., there are no rules for different discovery devices as in Canada. Statements of an interested party, testimony of witnesses, and various evidences are all made or submitted to the court, or discovered by the court itself. All the evidence will go to the court's file, which is open to the lawyers. In practice, there is no information exchange or production of evidence between parties. Therefore, if one party wants to know the opposing party's case, counsel for that party must come to the 4court to read the file. There is a saying: the party moves his mouth, the judge does the legwork, and the lawyer reads the file and hears the case.[119] The C.C.P. emphasises the duty of the party to provide evidence, and strengthens the function of the judge to inspect and verify evidence; nevertheless, in practice, judicial investigation still is an important aspect of civil adjudication.

DISCOVERY (MANITOBA)

After the close of pleadings, litigation proceeds to the discovery stage. Through this stage, the parties narrow the issues

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[119] Dan Shi Ren Dong Zui, Fa Guan Pao Tui, Lu Shi Yue Juan Ban An.

and focus on the area of true controversy raised in the pleadings. It enables parties to exchange information and evidence relevant to the case before the trial. Through the examination for discovery, one party obtains admissions on oath from the opposing party, and with such admissions the party can at the trial either support one's own case or undermine the opponent's case.[120] Moreover, one party can find the evidence which the opponent's case relies on because most documents in the possession of parties involved in the case are also disclosed at this stage. Discovery also helps the parties to weigh the strength of each other's case and therefore tends to result in an out-of-court settlement or to a more efficient trial process. Just like the pleading process, the discovery process is furnished by the parties without the participation of a judge.

There are mainly four types of discovery: discovery of documents, examination for discovery, inspection of property, and physical and mental examination of the parties.

A. Discovery of documents

Under Q.B.R.M., " document " includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device (Rule 30.01(a))

Discovery of documents includes two steps. The first is that

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[120] D. Stockwood, Civil Litigation, 3d ed. (Toronto: Carswell, 1993), at p. 65

a party to an action shall, within prescribed days, serve on every other party an affidavit of documents "disclosing to the full extent of the party's knowledge, information, and belief all relevant documents that are or have been in the party's possession, control, or power; and the affidavit shall sufficiently identify the documents" (Rule 30.03 (1)). If the party claims privilege for a document, he should indicate the reason. If the party is no longer in possession of a document, he should indicate how and when he lost possession of it and where its present location is. Moreover, if a party is represented by a lawyer, the rule imposes an obligation on the lawyer to ask his client to disclose all relevant documents by requiring the lawyer to certify by affidavit.

The second step is the inspection of documents.[121] By serving on another party a request to inspect documents, a party is entitled to see any document that is not privileged and that is referred to in the other party's affidavit of documents and pleadings, if it is in that party's possession, control, or power. All documents produced for inspection shall also be available at the examination for discovery or at the trial of the action, unless the parties agree or the court otherwise orders. The Rule also provides that the court may, on motion by a party, order that a non-party produce a relevant document where it would be unfair for the moving party to proceed to trial without the document (Rule 30.10).

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[121] Rule 30.04 QBRM.

B. Examination for discovery

An examination for discovery can take the form of an oral examination, or by interrogatories, or both, in Manitoba (Rule 31.02).

A party to an action can orally examine for discovery any other party adverse in interest, but can only examine that party once, unless leave of the court is granted.[122] The time and place of the examination can be arranged by consent of the parties. A party can also initiate an oral examination by serving notice on other parties.[123] Although the examination does not take place in a court room, it is nonetheless a formal process conducted in an informal setting.[124] Ordinarily, the examination will be held before a court reporter and only the parties to the litigation and their counsels will be present at such an examination for discovery. The examining party or lawyer is entitled to ask the opposing party any question relating to any matter in issue which is defined by the pleadings in the action, or to any matter made discoverable by the rules. Unlike what is asserted in pleadings, here the examinee on discovery must take an oath to tell the truth.[125] The court reporter will record every examination and the certified transcript of the examination for discovery can be used

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[122] Rule 31.03 (1) QBRM.

[123] Stockwood, *supra* note 120, at p. 66

[124] L. Stuesser, An Advocacy Primer (Toronto: Carswell, 1993). at p. 31

[125] Rule 30.08 (1), QBRM.

in evidence at trial.[126] In Manitoba, examination for discovery of a non-party is available. However the court grants leave for such examination subject to a number of rigid tests, and therefore the process is rarely used.

An examination for discovery can also be conducted in the form of interrogatories,[127] a procedure originating in the equity jurisdiction of the English Court of Chancery. Interrogatories are a list of questions which are to be answered by one party under oath by an affidavit.

Not like discovery of documents, which requires a party to disclose all relevant documents and if requested to produce all such documents that are not privileged, a witness need only answer the questions asked and is under no duty to volunteer information in an examination for discovery.[128]

Examinations for discovery are often quite expensive and time-consuming. In many cases, it contributes to significant delay in the proceedings

C. Inspection of property

Generally the inspection of property is conducted by the consent of the parties, and also furnished by the parties themselves.

If the consent is not forthcoming, the Q.B.R. provides that

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[126] Rule 34.15 and 34.17, QBRM.

[127] Rule 35, QBRM.

[128] Watson, *supra* note 60, at p. 796

the court may on motion make an order for the inspection of real or personal property, where it appears to be necessary for the proper determination of an issue in a proceeding.[129] The court may authorise the entry into or the taking of temporary possession of any property, and may also permit the measuring, surveying or photographing of the property, or the taking of samples, the making of observations, or the conducting of tests on the property. The order may permit any other act that appears reasonable in the circumstances.

The order of inspection of property may be made in respect of the property that is in possession either of a party or a non-party.

D. Physical and mental examination of parties

The Court of Queen's Bench Act provides that where the physical or mental condition of a party is in question, the court, on motion, may order the party to undergo a physical or mental examination. The order will not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe there is substance to the allegation [130]

The party who has obtained the order shall serve the report of the examination on every other party.[131]

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[129] Rule 32, QBRM.

[130] The Court of Queen's Bench Act, S.M. 1988-89, c. 4, c. 280, s.63

[131] Rule 33.06, QBRM.

COMPARISON

In China, judicial investigation is an important supplement to the principle that the party has the duty to provide evidence, because the judge in China is responsible for the finding of the real truth of a case. In Manitoba, the process of evidence collection is generally the responsibility of counsel to the parties through discovery of documents, examination for discovery, inspection of property, and physical and mental examination of a party. The judge is not involved in this process. The reason is that with the assistance of skilled counsel, the parties will "develop and present all aspects of the case completely"[132]; and it is considered improper for the judge, whose task is to decide the case according to the submitted evidence, to participate in this process.

The Chinese practice illustrates the desire to combine the merits of both inquisitorialism and adversarialism. However, in reality, the parties cannot exchange evidence effectively at this stage due to the absence of discovery devices in the C.C.P.. Appropiate judicial investigation not only provides necessary legal aid, which is indispensable to the Chinese status quo because of the comparatively less developed legal profession, but it also reduces undue delay. Nevertheless, over judicial-involvement often restrains the autonomy of the parties to realise their litigation goals through their own efforts, which is fundamental in civil

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[132] L. L. Teply and R. U. Whitter, *supra* note 46, at p. 10.

litigation. It can also be detrimental to a judge's impartial appearance.

On the contrary, in the adversarial society, the parties assisted by their counsel go forward with the case of their own will and fully realise the principle of individual autonomy and party-prosecution. However, the complexity of discovery can cause high expense and significant delay in the proceedings.

PROPERTY PRESERVATION

AND PRELIMINARY EXECUTION BEFORE JUDGMENT (CHINA)

A people's court can, at the request of a party, or ex officio when the court deems necessary, issue a property preservation ruling before judgment.[133]

An interested person may, before initiating legal proceedings, apply to a people's court for adoption of a property preservation measure as a matter of urgency. Upon request for property preservation, the court may order the applicant to provide security. If an applicant fails to provide security, the request shall be rejected.[134]

The measures of property preservation include sealing, or confiscating, or freezing the assets, or some other method prescribed by law.[135]

Property preservation shall be limited to the scope of the claim or to the property relevant to the case.[136] If a party against whom a preservation order is made provides security, a people's court shall cancel the property preservation order.[137] If an application is wrongfully made, the applicant shall compensate the party against whom the application was made, for any losses

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[133] Art. 92, CCP.

[134] Art. 93, CCP.

[135] Item 2, Art. 94, CCP.

[136] Item 1, Art. 94, CCP.

[137] Art. 95, CCP.

sustained due to implementation of the property preservation order.[138]

In addition, Art 74 provides that if there is a possibility that evidence may be lost or destroyed or be difficult to obtain at a later date, a participant in litigation may apply to the court for the preservation of evidence. The court may make an order to preserve evidence ex officio.

Also, a people's court can order the obligor to advance the obligee some sum of money or property or to abstain from doing an act prior to judgment. According to the C.C.P., a people's court may, at the request of the parties concerned, order preliminary execution in the following instances:[139]

1. a claim for alimony, payment of maintenance, payment of child support, compensation for the disabled or for the family of the deceased or for medical treatment expenses;

2. a claim for remuneration for labour; or,

3. other claims involving urgent circumstances which require preliminary execution.

PRESERVATION OF RIGHTS IN PENDING LITIGATION (MANITOBA)

In Manitoba, there are seven proceedings that enable a party to move to the court to preserve rights pending the outcome of the

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[138] Art. 96, CCP.

[139] Art. 97, CCP.

litigation. Their availability is narrowly circumscribed.

1. Interlocutory Injunction.[140]

The court may grant an order requiring a party to do something or refrain from doing something, pending resolution of the dispute by litigation. The moving party is required to undertake to the court to abide by any order concerning damages that the court may make, if it ultimately appears that the moving party ought to compensate the responding party.

2. Appointment of Receiver.[141]

A receiver or receiver-manager may be appointed by the order of a judge on motion of a party or a person who undertakes to commence proceedings forthwith. The receiver or receiver-manager assumes control of the opposing party's business or other assets for the interim.

3. Pending Litigation Order.[142]

A pending litigation order made by the court is to inform a person who is not a party that real property is subject to litigation. The order needs to be registered in a land titles office and can only be registered against property which is the subject matter of the litigation.

4. Interpleader.[143]

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[140] Rule 40, QBRM.

[141] Rule 41, QBRM.

[142] Rule 42, QBRM.

[143] Rule 43, QBRM.

An interpleader order is available where two or more persons make adverse claims in respect of property which is in the possession of another person, who claims no interest in the property and is willing to deposit the property with the court or dispose of it as the court directs. With the order, the person may require the persons making claims to attend the hearing to substantiate their claims, and thereby the person with no interest can relieve his liability.

5. Recovery of Personal Property.[144]

A plaintiff may obtain an order to recover personal property by satisfying the court that he is entitled to possession of the property and that the property is unlawfully taken from the possession of the plaintiff. The plaintiff is required to pay into court a sum of money as security against an ultimately unfavourable decision.

6. Interim Order for Preservation or Sale.[145]

This rule allows a party to obtain an order for custody or preservation of any property which may be relevant to an issue in the proceeding. The property may either be the subject-matter of the proceeding or a material article of evidence, for example. If the property is of a perishable nature or likely to deteriorate, the court may order its immediate sale.

7. Attachment And Garnishment Before Judgment.[146]

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[144] Rule 44, QBRM.

[145] Rule 45, QBRM.

[146] Rule 46, QBRM.

Manitoba Queen's Bench Rules provide purely monetary relief before judgment. A plaintiff may obtain an attaching order before judgment by proving to the court that he has a good cause of action against the defendant and legal grounds for such an order. After the plaintiff posts the required security, the sheriff will attach, seize, receive, hold, and dispose of property described in the order in which the defendant has an interest.

A plaintiff may also obtain an order for garnishment requiring a third party who owes money to the defendant to pay that sum to the plaintiff before judgment, by proving that the plaintiff has a good cause of action and that the plaintiff has grounds for belief that a proposed garnishee is indebted to the defendant. The plaintiff needs to post security according to the rule to get the notice of garnishment issued.

COMPARISON

Both in China and in Manitoba, the preservation measures are adopted very carefully and the party applying for a preservation measure is always required to provide security against the unfavourable result. In China, the law also provides that,if necessary, the court can also order a property preservation measure to be adopted without the request of a party. However, in practice this rarely happens. Otherwise the rules in both countries are quite similar.

PRE-TRIAL MEDIATION (CHINA)

A people's court may conduct mediation at any stage in the litigation proceeding, at least theoretically. In practice, after the examination of a case, the court will call the parties together to mediate before the trial, if the court is satisfied that in this case the relationship of rights and obligations is definite, the facts are clear, and the possibility of settlement by mediation does exist. Alternatively, one party may apply for a mediation conducted by the court but all other parties must consent.

The purpose of pre-trial mediation is to facilitate the parties to resolve the disputes without trial, so that the burdens of both parties and court can be reduced. As discussed in the former part, this is not a necessary procedure.

The court may use simple and convenient methods to notify the parties to an action and witnesses to appear. The mediation can be conducted either by a single judge or by a collegiate bench. If no settlement can be reached, the date for a trial will be fixed by the judge or the collegiate bench.[147] However, in China the judge or the collegiate bench conducting the mediation before the trial will usually also preside at the trial.

PRE-TRIAL CONFERENCE (MANITOBA)

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[147] Art. 86, CCP.

Any party may initiate the procedure for setting a case down for trial as soon as it is ready for trial. This party needs to file a trial record and pre-trial brief, and then obtain a date for a pre-trial conference from the court. The party must serve copies of the trial record, pre-trial brief, and notice for pre-trial conference within prescribed days on each party to the proceeding.[148]

Any party who is not ready can make a motion before a judge to change the pre-trial conference date; otherwise the date will be fixed.[149]

The formal pre-trial conference is required in all cases unless the court orders otherwise. The conference serves two main purposes. The first is purely administrative. It is the function of the pre-trial judge to ensure that the action is ready for trial and the focus of the conference will be on this point. The second is to provide settlement mechanisms whereby a pre-trial judge might offer assistance in the form of informal opinions. If settlement is impossible, an attempt should be made to eliminate unnecessary issues before the case goes to trial, thus making the trial simpler.[150]

Under Manitoba procedure a pre-trial judge cannot be the trial judge[151], because in the pre-trial conference there is a full

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[148] Rule 48.01 (1), QBRM.

[149] Rule 48.01 (2), QBRM.

[150] Stockwood, *supra* note 120, at p. 91

[151] Rule 50.01 (10), QBRM.

discussion of the issues in the case and of possible settlements between the parties. The discussion at a pre-trial conference is without prejudice and cannot be mentioned in any subsequent motion or at trial.[152] On this point, the practice is very different from what occurs in China.

At the end of the conference, if the judge considers that the action is ready for trial, he or she will fix the date and place.[153]

TO SUMMON THE PARTIES AND ADVISE THE WITNESSES TO ATTEND THE TRIAL (CHINA)

In China, the law provides that any unit or individual with information on a case is under an obligation to testify in court. A witness who has difficulty in appearing may submit written testimony with the approval of the court.[154]

It is the court's responsibility to notify the parties, their agents ad litem, and witnesses about the time and place to attend the trial and this should be done three days before the trial.[155] The court will notify the parties by serving subpoenas, while other participants including the agents ad litem, witnesses, etc., will

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[152] Rule 50.01 (9), QBRM.

[153] Rule 48.01 (4), QBRM.

[154] Art. 70, CCP.

[155] Art. 122, CCP.

be served notices of appearance.

Generally, the list of witnesses is provided by the parties or their lawyers, and one party or his lawyer can choose not to call a specific witness to appear in court. Nevertheless, if the judge thinks that a witness is important for clarifying the facts of a case, he can notify that witness to attend the trial directly. This is because in China the judge's duty to collect necessary evidence is an important supplement to the principle of the litigant's duty to provide evidence to support his allegations.[156]

If a defendant who is required to appear in court refuses to do so without valid grounds, in spite of twice having been served a subpoena, a people's court may take him into custody and compel him to appear in court (Art. 100). There are three pre-conditions to be met before the court can apply the coercive measure: (1) It applies only to the defendant who must appear in court, i.e., the defendant having the obligation of support, fosterage, etc., according to the judicial explanation of the Supreme People's Court. Normally, a court may proceed with the trial in the absence of the defendant and issue a judgment by default against him if he fails to attend at the trial. (2) It applies only if the court has served the subpoena on the defendant twice. (3) It applies only if the defendant refuses to attend the trial without due grounds.

Though the law provides that persons who have knowledge of the facts of the case are obliged to testify in court, there is no provision as to punishment if a witness is unwilling to testify.

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[156] Art. 116 and Art. 64, CCP.

The method used by the court is "persuasion and education",[157] such as explaining to the witness that to testify in court is the duty provided by law and is important to the resolution of the case, in order to dispel the misgivings of a witness to testify.

TO CALL THE WITNESS TO TRIAL (MANITOBA)

After the pre-trial conference, a party needs to serve all witnesses with a subpoena and pay the required attendance money to them, if the party requires their appearance at the trial (except those who will surely appear at the trial, such as the paid expert). Rule 53 defines how a subpoena is issued: at the request of a party or a lawyer, and on payment of the prescribed fee, a court registrar shall sign, seal, and issue a blank subpoena bearing the file number and the title of the proceeding. The party or lawyer completes the subpoena by inserting the names of any number of witnesses, etc. The party or the lawyer serves the subpoena on witnesses personally and the service of a subpoena and the payment of attendance money may be approved by affidavit.

One basic premise of the adversary system is that it is the parties who bring forward the evidence, not the judge. If a party chooses not to call a witness, the judge may suggest the witness be called but has no power to call the witness to give evidence out of

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[157] Ma Yuan, *supra* note 34, at p. 215

his own initiative.[158]

Rule 53.04 (7) provides that if a witness whose evidence is material to an action is served with a subpoena and the proper attendance money is paid, and the witness fails to attend at the trial or to remain in attendance in accordance with the subpoena, the trial judge may order the witness to be apprehended and brought before the court under the threat of a contempt order, for which the ultimate sanctions include fine and imprisonment.

COMPARISON

Under the C.C.P., mediation is not a necessary procedure before the trial. However, it will usually be held by a judge or a collegiate bench if no party is against it. The contents of mediation are not confidential and the mediation judge or collegiate bench will hear the case if the mediation fails. In contrast, everything in a pre-trial conference in Manitoba should be kept confidential and cannot affect the following procedure. The judge of the pre-trial conference must not hear that case. The main function of the conference is to prepare the case for the trial.

In China, it is the court's responsibility to summon the parties and advise the witnesses and other participants about the

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[158] J. Sopinka, The Trial of an Action (Toronto: Butterworth, 1981), at p.115

time and place of the trial. While in Manitoba, it is the counsel's or the parties' responsibility to call all the witnesses and a party can choose not to call a witness. The judge is not supposed to interrupt unless a contempt order is needed.

The reason for differences between the two systems can be that in China the judge has the responsibility to find out the substantive truth of what originally happened to a case and decide the case accordingly. Therefore, the judge has the power to call evidence and there is no need to keep the contents of the mediation confidential. The mediation judge(s) can also hear the case. However in Manitoba, a case will be decided according to the evidence presented by the party in court rather than through a judge's own active investigation or inquiries. At trial a party will put favourable evidence as best he can and try hard to persuade the judge to accept his point of view. As a result, it is up to the party's own decision to choose witnesses. Everything in a pre-trial conference must be confidential and cannot affect the trial. Therefore, the real value of the adversarial system may not be its contribution to truth but its contribution to the ideal of individual autonomy.[159]

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[159] Hazard, *supra* note 43, at p. 129.

THE TRIAL (CHINA)

A. The Order of the Trial

1. Announcement of a trial session's opening.

Before a trial session opens, the court clerk shall ascertain the presence of the parties to the action and other participants in the proceedings, and announce the rules of the court.[160] The court clerk will ask the parties and other participants to take their seats and then ask members of the collegiate bench to take their seats.

The presiding judge shall announce the trial session to be open. He shall check that the parties to the action are present, announce the subject matter of the action and the names of presiding members of the collegiate bench and court clerks, inform the parties of their rights and obligations as litigants and inquire if the parties wish to apply for withdrawal of any of the judicial members.[161]

2. Courtroom investigation

2.1 Presentation of statements by the parties[162]

The parties and their litigation agents will state their facts, reasons, claims, and evidence with regard to the dispute. The order of presentation is plaintiff, defendant, and third party, if any. In the course of or after each presentation, the judge can

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[160] Item 1, Art. 123, CCP.

[161] Item 2, Art. 123, CCP.

[162] Item 1, Art. 124, CCP.

ask questions. Also, a judge can stop a party if the presentation becomes irrelevant to the case.

However, some judges still follow the traditional method by which they question the parties, who must answer the questions accordingly. This is because some judges are still used to the inquisitorial method. In addition, some parties are illiterate and not represented by lawyers at trial, and are unable to present their cases clearly and logically; therefore, the judges have to question these parties, to prevent their suffering failures even with good cases.

At this stage, one party can question or even debate with the opposing party with the approval of the court; but the presiding judge will intervene if he finds the question or debate exceeds the scope of the case.

2.2 Examination of the evidence.[163]

After the presentations of statements by the parties, witnesses will be called by the court to testify in the order decided by the judge, according to his needs in the ascertaining of the facts. The witnesses will be informed as to their obligation to tell the truth. As well, the judge can intervene if the testimony is irrelevant. With permission of the court, the parties or their litigation agents can question the witnesses. If a witness is unable to appear because of real difficulties, his written testimony will be read out by a judge and the parties can give opinions on it.

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[163] Art. 124, CCP.

All the documentary evidence, material evidence, and audio-visual materials which are provided by the parties or collected by the court will be presented at trial by the judge and are subject to testing by the parties.

Any conclusion by an expert witness, or a written record of an investigation of real evidence or an on-location inspection, shall be read out at trial. The parties or their litigation agents can question the expert or the inspector after they obtain approval from the court. They may even ask for a re-investigation or re-evaluation by an expert, or a re-inspection by a new inspector subject to the approval of the court.[164] The parties may introduce new evidence at any time during the trial.[165]

3. Court debate[166]

The courtroom investigation is followed by the court debate, which involves all parties and their litigation agents' addressing the facts, evidence, law, and reasons. The order is again plaintiff, defendant, and the third party, if any. Then the parties can ask each other questions to set forth one's own points and rebut the opponent's case. The whole process must remain under the control of the judge.

At the end of the debate, the presiding judge will ask for the final opinions of the parties and whether mediation is needed and desired. If one party does not want mediation, or a mediation has

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[164] Item 3, Art. 125, CCP.

[165] Item 1, Art. 125, CCP.

[166] Art. 127, CCP.

failed, the presiding judge will announce an adjournment so that the collegiate bench can appraise the case. A judgment will be made at a later date.

During the whole trial process, one party can question the opposing party concerning the case. However, there is no strict requirement as to the form for questions. The use of direct examination, cross-examination, and leading questions are unfamiliar at a trial in China. The Code of Civil Procedure has no provision with regard to the form for questions. In China, the credibility of testimony is not tested by an adversarial cross-examination, as in common law countries. Rather, it is required that the judge should examine the testimony in relation to other evidence in a case, to decide whether it can be used as a basis for ascertaining the facts of the case.[167] Compared to civil trials in common law countries, the proportion and the role of the questions between the parties, and the questions of witnesses by parties, is not very significant in the whole trial process in China.

4. Appraisal by the collegiate bench.

Members of the collegiate bench will deliberate as to ascertaining facts, applying law, and assessing the costs. The appraisal will be recorded and signed by the members who participate in it. The conclusion will be drawn according to the principle that the minority defers to the majority.[168]

When it comes to important and difficult cases, the president

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[167] Art. 71, CCP.

[168] Art. 43, CCP.

will submit them to the judicial committee, to discuss and decide even though the judicial committee did not hear the trial. A judicial committee is set up in each Chinese court, reflecting its collective leadership. It is headed by the president of the court and is the highest decision making organisation in a court.

After the judge who is entrusted with the case has drafted a civil judgment, it will be subject to approval by the president of the Basic Level People's Court, or by the president of the civil or economic division if in an Intermediate Level People's Court or in a High Level People's Court. A president of a court or a division is an administrative leader within that court. When he is not a member of a collegiate bench, he controls the quality of the case procedure. If he does not agree with the decision of the collegiate bench, he has the authority to ask the collegiate bench to review it. The president of a court can also submit the case to the judicial committee to decide. In China, judicial independence means that the court in its entirety should be independent from interference by an administrative organ, public organisation, or individual.[169] In contrast to the common law system at trial level, it does not mean that the judge or the collegiate bench that hears the case should make the decision independently. The style of collective leadership follows the maxim that "those who try the case do not decide it, those who decide the case do not try it."[170]

5. Others

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[169] Art 6, CCP.

[170] Shen Zhe Bu Pan, Pan Zhe Bu Shen.

If a plaintiff served with a subpoena by the court refuses to attend the trial without due cause, or leaves the courtroom during a trial without permission of the court, the complaint may be deemed to have been withdrawn and if the defendant files a counterclaim, a judgment by default may be issued against him. A judgment by default may also be issued in the following situations: a defendant served with a subpoena by the court fails to attend the trial or leaves the courtroom during a trial without permission of the court, and he is not needed to be compelled to appear; a plaintiff applies to withdraw the action and the court rules to disallow the withdrawal, and the plaintiff is served with a subpoena by the court but refuses to appear (See Art.129-131).

Even the judgment by default must be issued after the facts in issue are ascertained and the rights and obligations become defined by the court. The rights and interests of the absentee should not be injured due to his failing to attend at the trial.

B. The Role of a Judge at Trial.

The role of a Chinese judge at trial is quite different from the role of a trial judge in common law countries.

Before trial, a judge is required to know well what he needs to know throughout the trial. Therefore, he is required to examine case materials carefully before the trial and draft the outline of the trial.

During the courtroom investigation, the judge is the main examiner; even at the court debate stage, the judge is not a

passive bystander and he still actively controls the whole process and its direction. All these form a striking contrast with the role of a Canadian judge at civil trials.

c. Public Trial

To conduct a trial publicly is a principle provided in the Constitution of the P.R.C. and is also a basic principle in the C.C.P..[171]

> Article 120 of the C.C.P.: Except where state secrets or confidential details of personal matters are involved or as otherwise stipulated by law, all trials of civil actions before a people's court shall be conducted in open session.
>
> A closed trial may be held in a divorce case or a case involving trade secrets if a party to the action so requests.

Before a public trial, the law provides that the names of the parties to the action, the subject matter of the action, and the time and place of the hearing shall be announced publicly,[172] so that people can sit in on the trial and the media and the press can report. The law also provides that regardless of whether the case was tried publicly or in a closed court, a people's court shall publicly pronounce its judgment on all cases.[173]

There are sufficient provisions as to conducting trials publicly, but in reality some judges ignore the announcement of a trial in advance, and generally the public pay little attention to

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[171] Art. 10, CCP.

[172] Art. 122, CCP.

[173] Art. 134, CCP.

the daily process in the court. Although the media and the press have reported civil adjudication and civil trials more frequently in recent years, it still cannot be relied on as a kind of supervision. Therefore the legal and democratic consciousness of the whole society still needs to be encouraged. On the other hand, due to the different methods of pre-trial investigation, the effect of a public trial may have some differences between China and the common law countries.

The trial session is primary in the whole civil legal process. The course of a trial session can demonstrate how much the parties exercise their litigation rights, how the evidence system works, and how open the adjudication activities are, etc.

The rules in the C.C.P. reflect the combination of adversarialism and inquisitorialism. Nevertheless, in practice, whether it is an inquisitorial style or an adversarial style, or the combination of both, the role of a judge at trial is mainly controlled by the judge hearing the specific case. As to the role of the Communist Party, its policies will be applied in the absense of rules or if the rules are not definite or clear.

THE TRIAL (MANITOBA)

The traditional presumption in the adversarial system is that it is through oral testimony and documentary evidence presented at

trial in an open court that the decision can be reached by a passive tribunal. The trial is a stage for opposing parties and their lawyers to fight a dispute in "battle atmosphere"[174] within the courtroom. The law permits oral evidence as a general rule. Q.B. Rule 53.01 governs:

> (1) unless these rules provide otherwise, a witness at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination, and re-examination.

A. The Order of Presentations in Trials [175]

1. Opening statement.

This is the chance for a party or counsel to outline the case before a judge (or a judge with a jury, which is rarely used in civil trials in Manitoba). The judge and jury will be fresh and attentive,[176] and the opening will be an important first impression. In opening, the party or counsel states the facts of the case, the evidence he has to adduce and its effect on proving the case, with remarks upon any point of law involved in the case. At the end counsel shall state the relief sought.[177] Counsel for the plaintiff has the opportunity to give the opening statement first.

2. The plaintiff adduces evidence.

2.1 Direct examination of a witness

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[174] Watson, *supra* note 33, at p. 127

[175] Rule 52.07, QBRM.

[176] Sopinka, *supra* note 158, at p. 58

[177] *Ibid.*

After the opening statement, counsel for the plaintiff will call witnesses (perhaps including the plaintiff) and question them about the matters in issue. The object of direct examination is to get the witness to tell the story, while counsel stays in the background and controls the direction and flow of the examination.[178] Counsel cannot use leading questions on materially disputed matters in direct examination. "A leading question is one that suggests to the witness the answer desired by the examiner."[179] The reason is that this is tantamount to counsel giving the evidence, while counsel is not a witness and does not swear to give evidence.[180] However, the judge has discretion to permit a leading question if it is considered necessary. The situation is set out in the Q.B.R.

Rule 53.01(2):

> Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine the witness by means of leading questions.

2.2 Cross-examination

After counsel for the plaintiff has directly examined each witness, counsel for the defendant will have the opportunity to cross-examine the witness. The purposes of cross-examination are to allow the opposing party to test the evidence given by the

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[178] *Ibid.*, at p. 63

[179] Stuesser, *supra* note 124 at p. 91

[180] C.L. Smith and J.C. Bouck, Civil Jury Instructions (Vancouver: Continuing Legal Education Society of British Columbia, 1994), at p. 1.02-4

witnesses and to bring out facts that may assist the defendant.[181] Therefore, leading questions can be used as a test in cross-examination. Counsel for the defendant may ask questions intended to test the truthfulness of the witness or to test the ability of a witness to perceive things.[182] It is this kind of questioning which has resulted in cross-examination being a much-feared ordeal by witnesses. The right to cross-examination is regarded as essential to a full and fair adversarial trial. Cross-examination is such an indispensable and fundamental device in the adversarial system that if "there is no cross-examination of a witness, or indeed a failure of cross-examination on a material point, this often implies that that evidence should be accepted."[183] Furthermore, cross-examination is so important and full of lawyers' art that a failure to do so can produce the following situations: "if it was a criminal case, your client would go to jail for a long, long time because of your cross-examination. If it was a civil case, your client would pay out a lot of money because of your cross-examination."[184]

2.3 Re-examination

After completion of the cross-examination by counsel for the defendant, the witness may be re-examined by counsel for the plaintiff on new matters raised in cross-examination. This

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[181] *Ibid.*, at p. 1.02-5

[182] *Ibid.*

[183] Sopinka, *supra* note 158, at p. 91

[184] Stuesser, *supra* note 124, at p. 115-116

procedure will repeat for each witness called to support the plaintiff's case, until the evidence is concluded.

3. The defendant adduces evidence

When the plaintiff's evidence is concluded, counsel for the defendant may make an opening statement, if he has not made one immediately after the plaintiff's opening,[185] and then call and examine witnesses for the defendant, following the same procedure as in the presentation of the plaintiff's evidence. Except for oral testimony, evidence also includes documents and objects. A witness will be called to prove any disputed document or object before the trial judge rules as to its admissibility, unless the parties have agreed prior to trial to admit the authenticity of a document or object. During the trial, either counsel can cite part of the examination for discovery as evidence. Manitoba's Rule 31.11 (1) provides:

> At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examin ation for discovery of
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> a) the adverse party; or
> b) a person examined for discovery on behalf of, or in addition to the adverse party, unless the trial judge orders otherwise,if the evidence is otherwise admissible, whether the party or person has already given evidence or not.

4. Evidence in reply

After the close of the defendant's case, the plaintiff may adduce evidence in response to evidence presented by the defendant.

5. Closing addresses or arguments by plaintiff and defendant.

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[185] Rule 52.07, QBRM.

After all the evidence is presented, counsel can make final addresses or arguments in which they review the evidence, argue facts and law, and state the relief sought.

6. Others

Rule 52.01 provides that if all the parties fail to attend a trial, the trial judge may adjourn the trial or may dismiss the claim and the counterclaim, if any; if the plaintiff attends and the defendant fails to attend, the court will allow the plaintiff to prove the claim and dismiss the counterclaim, if any; if the plaintiff fails to attend and the defendant attends, the court will dismiss the action and allow the defendant to prove the counterclaim, if any.

A judge may set aside or vary a judgment obtained against a party who has failed to attend at the trial.

B. Preparation

1. Preparation of a witness

Before trial, counsel is free to speak with all potential witnesses and should arrange interviews with those witnesses he intends to call at trial, including the client.[186] It would be unusual and dangerous in civil cases for counsel to call a witness who he has never interviewed. The preparation involves review of the general issues in the case with the witness, the discussion of any witness evidence in detail, and going through the direct examination with the witness and conducting some practice cross-

[186] Law Society of Manitoba, *supra* note 89, at p. 4-6

examination by assuming the role of opposing counsel.[187] However, such preparation cannot influence the substantive evidence of the witness at trial. In China, the preparation of a witness is something never heard of, practiced or allowed.

2. Preparation of the questions and order of witness.

Counsel should plan the examination by structuring specific questions and their order.[188] At trial it is counsel who keep a witness under control and steer the witness from one topic to another.

Counsel also has the responsibility to determine the order in which he decides to call his witnesses, so that the case can be presented logically and understood and remembered by the trial judge. The trial judge has no power to interfere with this order.

C. The Role of Judge

The judge always comes to the trial with only a very general picture of the case, which is usually derived from reading the pleading and the pre-trial conference memorandum. Nevertheless, he is not familiar with either party's detailed story. Furthermore, the role of the judge during trial is essentially passive and peace-keeping. There is a limitation on the extent of his participation at trial.[189] The following is a classic statement as to the role of the trial judge made by Lord Denning:

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[187] Stockwood, *supra* note 120, at p. 88

[188] Stuesser, *supra* note 124, at p. 45

[189] Sopinka, *supra* note 158, at p. 117

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure;... If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.[190]

There is also a restriction on a trial judge to not intervene during the trial, for fear that this destroys the "image of judicial impartiality."[191] The judge is to act as an impartial umpire, to reach his conclusions only after the parties have presented all of their evidence and delivered their arguments.

D. The Open Court

The tradition that judicial proceedings are to be held openly and in public is fundamental to the Canadian court system. Court files must be available for public review unless the judge orders that the file be sealed, which is rarely done.

The people believe that justice is more likely to be done if the process is open to public scrutiny, especially by the press and media's supervision. If there is a closed trial going on, the public will be very upset. However, in order to protect the rights of certain persons, the law provides some proceedings to be closed to the public, e.g., adoption and young offender proceedings.

In Manitoba, the written judgments of each Queen's Bench decision are widely distributed to, e.g., commercial publishers, the Law Library of University of Manitoba, and the media.

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[190] *Ibid.*

[191] *Ibid.*, at p. 121

COMPARISON

In China, the process of the whole trial session is primarily controlled by the judge and the judge is required to prepare for the trial by examining case material, etc., because he will act as the main examiner at trial. Under the judge's direction, the parties present evidence and question each other or the witnesses. The process reflects the combination of adversarialism and inquisitorialism. Similar to the European system,[192] the Chinese system is premised on the belief that an activist role on the part of the judge is necessary for the ascertainment of truth.

In Manitoba, it is mainly the counsel who carry the process forward. The role of counsel at trial in Manitoba is far more prominent than what is in China. Before the trial, they must prepare carefully for the trial, including the preparation of a witness, which is not practised in China. The counsel will decide the order of calling evidence. The presentation of evidence is fulfilled through their direct examination, cross-examination, and re-examination; and the judge is principally in the position of hearing evidence, and does not control the construction of the trial session. The belief is that through the adversarial contest the truth will eventually emerge and the judge's role is as an objective umpire.[193] However both systems require that all the

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[192] Gall, *supra* note 47, at p. 175.

[193] *Ibid*.

evidence must be subject to the test of the opposing party at trial.

APPEAL (CHINA)

The C.C.P. provides that each civil case can be heard by a people's court at two instances, one trial and one appeal. The decision made by an appellate court is the final decision, and cannot be appealed further. An appellate people's court exercises the authority of adjudication and supervision. Another function of an appellate people's court is to examine the judicial work of a lower people's court, including the judicial style of a lower people's court, and to instruct that court on how to work from experience and to improve the quality of handling cases.

A party objecting to a decision by a trial people's court has the right to appeal to the people's court at the next highest level by submitting a written appeal to the people's court which originally heard the case, with as many copies as required for the number of appellees or their representatives.[194] The written appeal sets out the claims for the appeal and the reasons in support of the appeal. Unlike what happens at trial, an oral appeal petition is unacceptable in the appeal procedure. Even if a party directly appeals to an appellate people's court, this court shall transmit the appeal petition back to the people's court which originally heard the case, and this court shall serve a copy of the appeal petition to the appellees.[195] An appellee shall submit the defence within 15 days of receipt of the appeal petition. However,

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[194] Item 1, Art. 149, CCP.

[195] Item 2, Art. 149, CCP.

failure to submit the defence will not inhibit the process.

A party must lodge an appeal within 15 days of the date on which the written judgment from the trial court has been served.[196] During this period, the decision of the trial court is of no legal force. When the prescribed time expires, the decision is legally effective and the party cannot appeal. However, if the delay of appeal is due to force majeure or other good causes, within ten days after the obstacle disappears the party can apply for an extension of the period, which is subject to the court's approval.

The decision in a case where one party has the place of domicile within the P.R.C., while the other party does not, will not become legally effective until both time limits for lodging an appeal expire, because the time limits are different: unlike the time limit for the party having a place of domicile in China, which is 15 days, the party having no place of domicile in China has 30 days to lodge an appeal. The application for extension needs to be approved by the trial court.[197]

The people's court must rely on effective legal documents before making execution orders. Since the decision made by the trial court (except those declared unappealable according to law and, of course, those from the Supreme People's Court) has no legal force within the appeal period, the parties must wait before applying for enforcement of the decision. If one party lodges an appeal within the appeal period, the decision remains ineffective,

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[196] Art. 147, CCP.

[197] Art. 249, CCP.

therefore no execution measure can be issued.

On receipt of the appeal petition and the defence, the court which originally tried the case shall submit them, together with the complete case file and evidence, to an appellate people's court (Item 2, Art. 150). This process is unlike Canada, where all the appeal materials are prepared by the parties and their lawyers.

The appellate court can uphold a trial judgment on appeal, amend the trial judgment, or reverse it and send the case back to the original court for either a re-trial or a new judgment, amending the original one after clarification of the facts.[198] An appeal is defined as a continuing trial in the same civil case[199] and the parties can supplement fresh evidence and give further statements. Art. 151 provides that an appellate people's court shall, in relation to the claims of a case on appeal, review both the relevant facts and the original court's application of the law.

An appellant can apply for the withdrawal of his appeal before a judgment is issued by the appellate court. However the court needs to examine the application itself to decide whether such a withdrawal application is allowable, before making a ruling on the application.[200]

Mediation is an important principle in disposing of civil litigation by the people's courts, as stipulated in the C.C.P. Therefore it can also be applied in hearing an appeal. If an

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198 Art. 153, CCP.

199 Tang, *supra* note 55, at p. 261

200 Art. 156, CCP.

agreement is reached through mediation in the court, the people's court shall produce a mediation statement and the judgment originally appealed from is deemed to be reversed.[201]

A civil case appealed to the appellate court is always tried by a collegiate bench, composed only of judges.

PROCEDURE FOR SUPERVISION OVER TRIALS (CHINA)

A people's court supplies the supervisory procedure to retry a case where a definite error is found in the legally effective judgment, ruling, or mediation statement. The president of a court at any level can refer a legally effective judgment or ruling issued by his court to the judicial committee for retrial, if he finds a definite error in the judgment or ruling. Further, if the Supreme People's Court finds a definite error in a legally effective judgment or ruling of a local people's court at any level, it has the power to review the case itself or order the court issuing the judgment or ruling to retry the case. It is the same for a people's court at a higher level to a people's court at lower level.[202] However neither the retrial nor the review of the case needs to be requested by the parties to the case.

If one party considers the decision of a court to be incorrect, that party may apply for a retrial within two years after the

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[201] Art. 155, CCP.

[202] Art. 177, CCP.

decision of the court comes into effect.[203] Where a case is concluded by a legally effective mediation statement, a party applying for a retrial must prove that the mediation process violated the principle of voluntary participation, or that the content of the mediation statement violated the law.[204] The application is subject to the examination of a people's court to decide whether a retrial is allowed.

In China, the people's procurators are the state agents for legal supervision. Art. 14 of the C.C.P. provides that the people's procurators shall have the right to exercise legal supervision over the civil proceedings of any people's courts. This is one of the basic principles of the C.C.P. The people's procurators may protest effective decisions of the people's courts and upon that protest, the people's courts shall retry a case.[205]

Where a people's court decides to retry or review a case in accordance with the procedure for supervision over trials, the court shall rule to suspend the execution of the original order of the court and form a new collegiate bench to try the case.[206]

The right to appeal is an important litigation right provided by law to protect a party's interests if there are some mistakes

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[203] Art. 182, CCP.

[204] Art. 180, CCP.

[205] Art. 186, CCP.

[206] Art. 183, CCP.

inside a trial judgment. In China, the appeal is final (i.e., there can only be two adjudications of a case -- liang shen zhong sheng zhi), because it is believed that generally it can ensure that law will be applied correctly through appeal. If a party could appeal further, it might lead to delay and the legal interests of a party could not be protected.[207] If mistakes still exist in the judgment of an appellate court, they can be solved through the supervisory procedure. In the 1982 draft of civil procedure, there were no time and scope limits to a party's applying for a retrial and this was proved to be an inefficient use of judicial resources and unfavourable to the protection of the parties' legal rights and interests. Therefore the current code provides that an application for a retrial shall be submitted within two years of the judgment becoming legally effective, and the application is subject to the court's strict examination.

In civil adjudication, a People's Procuratorate exercises legal supervision through protesting an effective civil judgment. Once it lodges a protest, a people's court must retry the case. During the hearing of the case, the Procuratorate is not a party to the case. A procurator will announce the reasons and the grounds for lodging the protest, but the procurator cannot represent one party to take part in the court debate.

APPEAL (MANITOBA)

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[207] Zhang, *supra* note 26, at p. 321.

Generally all judgments and orders made in the first instance are appealable. However, some appeals are permitted only with leave from a judge of the Court of Appeal, according to the requirements of some statutes. All appeals to the Supreme Court of Canada in civil matters require that court's leave to appeal,[208] which is granted in roughly one in four cases where such leave is sought.

An appeal commences with the serving and filing of a notice of appeal,[209] setting out the relief or disposition sought and the grounds of appeal within the time prescribed by law. The notice is required to be filed with the registrar of a court of appeal.

Manitoba's Court of Appeal, or a judge of the court, may on application extend or abridge the time prescribed by the rule for giving notice of appeal, either before or after the expiry of the time (see Rule 42 of C.A.R.).

Under the Manitoba Q.B.R., an appeal to the Court of Appeal does not operate as an automatic stay of execution for the judgment appealed from. The party wishing to delay the implementation needs to apply separately for a stay pending an appeal. Since there is a presumption of correctness, a stay of the trial judge's order ought not to be granted easily. The court may also impose "such terms as are just," if the stay is granted. In other jurisdictions, such as in Ontario, the rule provides that the delivery of

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208 Russell, *supra* note 61, p. 289

209 Manitoba, Court of Appeal Rules [hereinafter CAR], Rule 3

a notice of appeal automatically stays any provision of the execution order, until the disposition of the appeal. However, the party against whom the stay operates may seek to have the stay lifted by a motion to a judge of the appellate court.[210]

The appeal is perfected by the appellant's service and filing of the appeal book, the transcript of evidence, and the appellant's factum. Much of an appellate court's work deals with the documentary record or written materials created by counsel.[211]

The appeal book is a compilation of the pleadings, exhibits, and reasons for judgment, gathered together into one volume for ease of access and for easy reference. The parties are urged to reduce the bulk of the appeal book by excluding from it trial material that is not relevant to the appeal; and the appeal court may order that it be replaced by one which complies with the rule.[212]

The transcript of evidence covers the whole record of the trial. The appellant is responsible for providing the transcript of oral evidence tendered during the course of the trial, or the certified judge's notes where a transcript of trial evidence is unavailable.[213] The parties are expected to reduce the length of the transcript by restricting the evidence transcribed to that

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[210] J. Sopinka, The Conduct of an Appeal (Toronto: Butterworths 1993), at p. 64.

[211] *Ibid*. p. 141

[212] *Supra* note 44, s. 24 (1)

[213] Rule 16, CAR.

which is relevant to the appeal (Rule 17 (1)).

Both the appellant and the respondent are required to file with the registrar and serve on the other party the respective factums, which set out the statement of facts, points of issues, and arguments.[214]

The registrar will fix a date for the hearing of an appeal and give notice to the parties of the date fixed for the hearing. Counsel will usually deliver oral arguments in the hearing, but the litigant can choose to do so in person and without counsel.

Theoretically, the power of a court of appeal appears to be very broad. It may affirm the decision appealed from, reverse it, vary it, or send the case back for a new trial. However, a body of law has developed around the exercise of appellate powers in relation to various aspects of a decision appealed from.[215]

Unlike China, an appeal is not a second trial of a case. In recognition of the advantage held by the trier of fact, who has seen and heard the witnesses, appellate courts traditionally treat finding of fact with distance and deference.[216] An appellate tribunal's role is not to substitute its opinion for that reached at trial, as to the finding of fact based upon the credibility of witnesses, unless it can be established that the trial judge made some palpable and overriding errors. As far as the jury's verdict is concerned, the established principle is that an appellate court

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[214] Rules 26 and 27, CAR.

[215] Sopinka, *supra* note 210, at p. 39

[216] *Ibid.*, at p. 40

will not interfere with the findings of a jury, unless they are so entirely wrong as to justify the conclusion that either the jury did not appreciate its duty or acted willfully in violation of it.[217] Where an appeal is from a decision based solely upon the exercise of discretion, it is substantially as difficult to overturn as a clear finding of fact.[218] Similarly an appellate court will not lightly intervene to alter an award of damages unless the amount is inordinately high or low in relation to the appropriate level.[219] Almost all Canadian appeals are based upon errors of law. Another common ground within the scope of the review relates to trial judgments concerning admissibility of evidence. Furthermore if finding of the fact is an inference from established fact, rather than a specific finding based on the credibility of a witness, the appellate judge may draw a different inference and make a different finding from that of a trial judge.[220]

According to s. 26 (3) of Manitoba's Court Of Appeal Act, the appellate court may receive further evidence upon questions of fact; and the appellant who intends to apply to the court to introduce new evidence must indicate, in the notice of appeal, that intention and the nature of the new evidence. However, this situation is unusual because the leave of the court is granted only

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[217] *Ibid.*, at p. 44

[218] *Ibid.*, at p. 46

[219] Law Society of Manitoba, *supra* note 89, at p. 4-16

[220] Sopinka, *supra* note 210, at p. 43

on the ground that such new evidence was not available at trial, despite the exercise of all diligence by counsel and the parties, and because the new evidence is determinative of matters in issue.[221]

Rule 39 of Manitoba's Court of Appeal Rules provides that if an appellant unduly delays prosecution of the appeal, the respondent may on notice to the appellant, move the court to dismiss the appeal and the court may make such order as it considers just. The fundamental principle is that the litigant is entitled to have the matter decided on its merits, unless he is responsible for the undue delay which prejudices the other party. Therefore, it is inappropriate for the court to consider the merits of the appeal itself on a motion for dismissal of the appeal itself.

According to the Act, any three of the judges of the Court of Appeal constitute a quorum and may lawfully hold court. The determination of any question before the court shall be according to the opinion of the majority of the members of the court hearing the cause or matter.[222]

COMPARISON

In China, the whole file of a case from the trial court will go to the appellate court and this is the principal material which

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[221] Law Society of Manitoba, *supra* note 89, at p.4-26

[222] *Supra* note 71, ss. 14 and 15

will be subject to the scrutiny of the appellate court. On the contrary, in Manitoba, the appeal material is prepared by the counsel or parties themselves and they are responsible for reducing the bulk of material so that it is relevant to the appeal. This is the reflection of the adversarial principle of party-autonomy from another side.

In China, the appellate court will review the case in terms of both the facts and law. However in Manitoba, the finding of the facts of a trial court is generally beyond the scrutiny of the appellate court. A collegiate bench will decide a case at appeal level in both systems.

JUDGMENT, RULING, AND MEDIATION STATEMENTS (CHINA)

In handling a civil case, a people's court uses different forms for its decisions on different matters. Judgment constitutes a final disposition of substantive rights and obligations in civil litigation, while a ruling is used to solve procedural problems arising during the hearing of a case.

There are two ways for a people's court to pronounce its judgment: either immediately on the conclusion of the trial or later at a fixed date. The code provides that after a judgment is pronounced in court, the written judgment shall be issued within ten days. If a judgment is pronounced on a fixed date, the written judgment shall be issued immediately after the pronouncement (Item 2, Art. 134).

The judgment and ruling from the trial court, except those that are unappealable according to law, are not legally effective within the appeal period. If the appeal period expires and the parties fail to lodge an appeal, the trial judgment or ruling comes into legal force. The appeal period starts to run from the second day on which the party receives the court's decision.

The judgments or rulings from an appellate court and of the Supreme People's Court are legally effective as soon as they are pronounced.

The parties must comply with the effective decision of the court and cannot appeal further. Neither can sue the same cause again. At the same time, a people's court cannot deliver a new

decision on the same case, and neither can it alter nor set aside a legally effective decision without going through the specified procedure.

A judgment must be in a written form. However a procedural ruling can be delivered either in writing or orally. A written ruling must be signed by a judge and court clerk and affixed with the seal of a people's court. Details of an oral ruling should be entered in the court records.[223]

According to the C.C.P., a written judgment must set out the finding of facts of the court, reasons in support thereof, the applicable law, the results of the judgment and the assessment of costs for the litigation.[224] None can be dispensed with.

The written judgment is one of the most important exercises of judicial authority for both the Canadian and Chinese courts and is the major work of a judge. However, unlike what occurs in Canada, the party or the counsel to a party do not draft the formal order for signature by the judge after the judge has issued either oral or written reasons for the decision.

If the parties to a civil action reach an agreement under the mediation conducted by a people's court, excepting those provided by law, that people's court must produce a mediation statement which sets out the claims of the action, facts, and mediation results. Once served on all the parties concerned, and signed and accepted by all these parties, a mediation statement has legal

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[223] Art. 140, CCP.

[224] Art. 138, CCP.

force just the same as a judgment, and the parties cannot lodge an appeal. [225]

ORDERS (MANITOBA)

The terms "judgment" and "order" are used in various senses, but in the broadest sense they include any decision of a Canadian court on any issue between parties to a civil proceedings properly brought before that court.[226] Under the Queen's Bench Rules in Manitoba, "order" means an order of the court and includes a judgment. "Judgment" is usually defined as meaning a decision that finally disposes of an application or action on its merits and may include a judgment made in consequence of the default of a party.

The judge will either deliver an oral decision at the end of the trial or will reserve his decision for consideration and give his decision at a later time. Unless it provides otherwise, an order is effective from the date on which it is made (Rule 59.01), without the necessity of its being drawn up and signed. It is binding on anyone with knowledge of its terms.

In a situation where there is no concern regarding enforcement or appeal of an order, it may not be necessary to prepare a formal

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[225] Art. 89, CCP.

[226] The Canadian Encyclopedic Digest (Ontario), vol. 18, 3d ed. (Toronto: Carswell, 1988), at p. 57 para. 1

written order.[227] The pronouncement of the decision of the court constitutes the judgment of the court. However, the reasons for judgment do not constitute a judgment of the court, and in many cases, especially those involving procedural questions, the written reasons for a court decision are not even delivered.

Although Rule 59.03(1) provides that any party affected by an order may prepare a draft of the formal order, in practice the successful counsel will draft a formal judgment after the delivery of the decision and forward it to all other parties represented at the hearing, for approval of its form. Orders are generally signed by the registrar unless the court has ordered that the order be signed by the judge or master who made it. If the counsel preparing the draft order obtains the approval from all other parties as to the form of the order, he shall leave it with the registrar for signing. If he cannot obtain that full approval, he may obtain an appointment to have the order settled and signed by the judge or officer who made it (Rule 95.04). Once the order has been signed, its original copy shall be filed and entered, and the appeal period starts to run.

A judgment pronounced with consent of the parties is to be regarded as a judgment after a hearing on the merits[228] and it is as valid and binding as any ordinary judgment. The Court of Queen's Bench Act provides that an order that is made with the consent of the parties is not subject to an appeal, except by leave

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[227] Law Society of Manitoba, *supra* note 89, at p. 3-15

[228] *Supra* note 226, p.95 para. 81

of the judge making the order.[229]

According to the Court of Appeal Act, s. 40.(5), unless the court otherwise orders, the certificate of the decision of the Court of Appeal shall be dated as if the date on which the judgment appealed from was delivered, and judgment takes effect from that date. But, by leave of the court or a judge, the certificate may be antedated or postdated.

THE EXECUTION OF JUDGMENT (CHINA)

A party to an action must comply with legally effective documents; if not, the opposing party can apply to a people's court that has jurisdiction to enforce the judgment.

The judgment or ruling of a foreign court will not be effective in China unless a people's court rules to recognise its validity, after the people's court has reviewed the foreign judgment or ruling in accordance with the provisions of international treaties concluded or acceded to by China, or where the principle of reciprocity exists in Chinese law. If the enforcement of the foreign judgment or ruling is required, an order will be issued and enforced pursuant to the C.C.P.[230]

The party must apply for execution within the prescribed time, by submitting the application and legal documents to the execution

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[229] *Supra* note 130, s. 90 (1)

[230] Art. 267, CCP.

division of a people's court. According to Art. 219, where either or both parties are individuals, the time limit is one year; while if both parties are legal persons, or other organisations, the time limit is six months. The application for execution should specify the name of the subject of enforcement, quantity and its location, as well as the financial situation and property condition of the party subject to execution.

The C.C.P. also provides that a judge may refer the case directly to the execution officer for enforcement.[231] This situation is rare and only applies to family law cases involving recovery of alimony, cost of maintenance, or upbringing. The purpose of the provision is to protect the interests of society and the rights of the parties who lack the ability for self-protection. The judge needs to submit a document of referral of execution to the court's president for approval, before he submits it to the execution division.

If a person or property subject to execution is located in another jurisdiction, a people's court can entrust the other people's court in that locality to enforce the judgment. The entrusting court must issue a letter of entrustment specifying the situation of the person or property subject to execution, the entrusting items, and the requirements to the entrusted court, together with the legal documents.[232]

The C.C.P. provides that the execution orders shall be

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[231] Art. 216, CCP.

[232] Art. 210, CCP.

performed by an execution officer. In China, this is called the court's execution division (zhi xin ting). It is parallel to other judicial offices, such as the criminal division, civil division, etc., within a people's court.

The execution measures provided by the C.C.P. are as follows:[233]

1. To seal, confiscate, freeze, auction or sell off a portion of the property of the party; and to search the party and his or her residence or a place where property is thought to be concealed.

The C.C.P. provides that articles of daily necessity for the judgment debtor and family dependents shall be exempt from execution. However, unlike what is regulated in the Manitoba Execution Act, it is only a general rule; and there are no details as to how much should be exempted, as is defined in Canadian law.

A people's court shall issue a ruling if adopting any of the aforesaid measures. Any person concealing, transferring, selling, or damaging property already sealed up or distrained, or transferring already frozen assets may be subject to a monetary fine, or detained, or pursued for criminal liability according to law by a people's court, depending on the seriousness of the circumstances.

2. To investigate the state of a party's savings and to freeze or transfer the savings deposits; to confiscate or withhold part of the income of the party.

According to the C.C.P. the amount of funds investigated, frozen, or transferred shall be within the scope of the obligation

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[233] Chapter 22, CCP.

for which the party is liable; and necessary living expenses for the said party and family dependents shall be exempt from confiscation or withholding. However, no detailed amount is regulated in the C.C.P.

A ruling from the people's court is also needed when any aforesaid measure is taken. Besides, an execution assistance notice shall be issued. Banks, credit co-operatives, and any other units concerned must comply with these legal documents. If they refuse, according to the provision of the C.C.P., a people's court, in addition to ordering them to fulfil assistance obligations, may also impose a fine on these units, and on the persons in charge of the units or those directly responsible for the refusal.

3. To enforce the delivery of property or negotiable instruments.

4. To enforce eviction from a building or from land.

In this case, the president of the people's court shall sign and issue a public notice notifying the party concerned to comply within the time limit.

5. To coerce a party subject to execution to perform a designated act. The C.C.P. provides that if a party fails to fulfil the act prescribed in a judgment, ruling, or other legal document, the people's court may enforce execution or may commission a relevant unit or another party to do so at the expense of the disobedient party.

In addition, according to Art.102, a people's court may fine or detain any person, including the responsible person of a unit,

who refuses to carry out a legally effective judgment or ruling of the court. If the act constitutes a crime, the court may also pursue criminal liability in accordance with the law.

The C.C.P. also provides for the Bankruptcy Repayment Procedure (for enterprises with a legal person status). In accordance with Art.201, a people's court shall arrange for relevant state agencies and personnel to form a liquidation committee to be responsible for the custody, sorting out, appraisal, disposal, and distribution of bankrupt property. The liquidation committee may carry out a necessary civil action in accordance with the law. The liquidation committee shall be responsible to, and submit reports on, its work activities to a people's court.

Difficulty in executing judgments[234] (zhi xing nan) is a prominent problem in the recent judicial practice and has caused a lot of attention and discussions. There are broad historical and social reasons for the problem. The following are some chief reasons.

1. The Maoist ideology still has an impact on civil proceedings.[235] His famous dichotomy between "people" and "enemy" requires that coercion be applied to an enemy while "methods of democracy", such as persuasion and education, be applied to people. Civil cases are labelled as the disputes among people. Therefore, in execution of civil judgments, some judicial officers feel

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[234] D. C. Clarke, "The Execution of Civil Judgment in China", (1995) 141 The China Quarterly, at p. 67.

[235] *Ibid.*, at p. 69.

reluctant to use coercive measures.[236] For the same reason, some parties only think that criminal judgments are coercive, while the civil judgments are not. Therefore they often think that they can ignore civil judgments and not perform the judgments conscientiously.

2. The conflicts among local interests cause local protectionism (di fang bao hu zhu yi). What happens is that in the entrusted execution, the entrusted court, starting from the local interest, may delay or even not enforce the outside court's judgment if it is not favourable to the locality. While in direct execution, an outside court might lack enough local support and assistance to get its judgment enforced.[237]

3. Legislation concerning execution of judgment can fail to keep up with economic development, so that some problems cannot be solved by law. The C.C.P. strengthens the execution measures, such as the reinforcing of procedures for freezing and seizure.[238] It also imposes higher requirement on the entrusted court to carry out the execution.

4. Execution of judgments is often influenced by economic policy. The enforcement of judgments against the large and medium-sized state-owned enterprises is a good example. The large and medium-sized state-owned enterprises are the economic lifelines of China. To protect their legal rights and interests is an important

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[236] *Ibid.*

[237] *Ibid.* at p. 71.

[238] *Ibid.*, at p. 78.

economic policy in recent years. When enforcing civil judgments against them, courts are not supposed to stress execution "one-sidedly" and neglect other factors, but have to "at the same time pay attention to the unity and stability in society, to stablizing relations of socialist ownership, and to developing the socialist economy."[239] Therefore, sometimes the execution can be very difficult.

Whether a legally effective judgment can be performed by the parties is an important mark of the legalisation standard in a country. "When judgments are not executed, the law is worth nothing."[240] However, if execution depends only on the power of the courts, this may not be enough to solve the problem.

ENFORCEMENT OF ORDERS (MANITOBA)

Under Manitoba Rules, examination in aid of execution is available for a judgment creditor to obtain information about the judgment debtor's ability to satisfy the judgment. A creditor may examine either the debtor or any person who has knowledge of the matters, after obtaining an order from the court. Rule 60.17 (4) provides that only one examination may be held in a twelve month period in respect of a debtor in the same proceeding, unless the court orders otherwise. A creditor is authorised to inquire into

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[239] *Ibid.* at p. 74.

[240] *Ibid.*, at p. 65.

all matters pertinent to the enforcement of the order.

According to "The Reciprocal Enforcement of Judgments Act", where the Lieutenant Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside Canada for the enforcement therein of judgments given in Manitoba, he may by order declare it to be a reciprocating state for the purposes of this Act[241]. Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to the registering court, which means the Court of Queen's Bench in Manitoba, within six years after the date of the judgment, to have the judgment registered. On such application the registering court may order the judgment to be registered (s 3 (1)). Registration may be effected by filing the order, and an exemplification or certified copy of the original judgment, whereupon the original judgment is entered as a judgment of the Manitoba Court of Queen's Bench (s. 3 (7)). The out-of-province judgment, from the date of the registration, is of the same force and effect as if it had originally issued in the Manitoba Court on the date of registration, and execution proceedings may be taken thereon accordingly (s.7).

After a judgment is obtained, a judgment creditor may start enforcement proceedings. The measures of enforcement are as follows:[242] if the judgment is an order for payment or recovery of

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241 Reciprocal Enforcement of Judgments Act, R.S.M. 1987, c. J20 s. 12(1).

242 Rule 60, QBRM.

money, it can be enforced by writ of seizure and sale, garnishment, or appointment of a receiver.

1.The Writ of Seizure and Sale

This writ process is the usual method for enforcing a judgment for payment of money and is issued to the sheriff. He is thereby empowered to seize an execution debtor's unencumbered property which, when sold, will satisfy the amount of the trial court's award. A judgment creditor is entitled to have a writ of seizure and sale at any time within six years of the date of the order. After six years have elapsed, the judgment creditor must obtain leave of the court. The writ of seizure and sale expires after a prescribed time, but it is renewable.

In The Execution Act[243], detailed exemptions of the individual judgment debtors from the writ of seizure and sale are set out, including necessary household furnishings and appliances to the value of $4,500.00; food and fuel for the debtor and family are protected for six months, or an equivalent cash value; etc.

2. Garnishment

The method of garnishment permits an execution creditor to seize or attach a debt owed by a third party (a garnishee) to the debtor. The common targets for garnishment after judgment are the debtor's wages or bank accounts.

The proceeding may be started by serving on the garnishee a notice of garnishment. A garnishee served by the notice must respond either by paying into the court the full amount shown in

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[243] R.S.M. 1987, c.E160, s. 23(1)

the notice, or paying into the court a lesser amount, or no amount; and filing with the court a completed garnishee's statement disputing his liability to pay the full amount. If the garnishee fails to respond, the court may make an order on motion against the garnishee for payment of the amount owing to the debtor.

The Garnishment Act[244] provides that 70% of wages are exempted from garnishment, provided that a judgment debtor without dependents shall be allowed an exemption of not less than $250.00 per month and a judgment debtor with dependants shall be allowed not less than $350.00 per month.

3. Appointment of a Receiver

A receiver is a third party having no interest in the assets of the debtor, appointed by the court having equitable jurisdiction on the motion of an interested party or parties. The receiver's function is to receive and hold the property. A receiver will not be appointed where there is another remedy available to the creditor.

4. Enforcement of Order for Recovery of Personal Property

An order for the recovery of personal property may be enforced by a writ of delivery. If the property is not delivered under the writ, the order may be enforced by a contempt order.

5. Enforcement of Order for Possession of Land

An order for the recovery or delivery of the possession of land is enforced by a writ of possession. A writ of possession is issued only with leave of the court. The execution of a writ of

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[244] L.R.M., 1987, c. G20, s. 5.

possession is done by a sheriff.

6. Enforcement of Order to Do or Abstain from Doing Any Act

The enforcement can be furnished by issuing a contempt order against the person refusing or neglecting to obey the order requiring him to do or to abstain from doing an act. In addition to a contempt order, the court may order the act to be done at the expense of the disobedient person, by the party enforcing the order or any other person appointed by the judge.

COMPARISON

In China, judgment must be in a written form and must include reasons for the decision. However, in Manitoba, a written order is not always necessary and in some cases, the written reasons are not even delivered.

When it comes to the enforcement of judgment, though, the names of the judgment enforcement measures provided in the C.C.P. are different from those provided in the Manitoba Q.B.R., but the nature of the measures provided in both laws are quite similar.

REFORMING THE CIVIL ADJUDICATION MODEL IN CHINA:

FROM AN INQUISITORIAL TO AN ADVERSARIAL MODEL

A. The Political Context

A brilliant assertion can illustrate this context precisely:

> If you believe in the Anglo-Saxon common law tradition, that the individual is the important unit of our society, and the state exists to serve him, then it seems that the adversary system is preferable. If you hold a corporate view of society, that is to say, that the community is the important unit, and that the citizen must be primarily considered as a part of the corporate unit, then it seems you should champion the inquisitorial system. [245]

As mentioned in the Introduction, feudal domination in China lasted for more than two thousand years, during which there was virtually no distinction between criminal law and civil law, and no independent civil adjudication system either. Confucianism has remained as the dominant ideology in Chinese society until this century. Respect for centralised authority was highly stressed, with an emphasis on social harmony and order, even at the price of sacrificing individual interests and desires. The government interfered in private affairs comprehensively to protect its own interests, therefore restricting the individual's will for civil litigation. In the modern era, when establishing a civil adjudication system, China's legislators imported the more authoritarian ideology of inquisitorial systems. When the People's Republic of China was established in 1949, discouragement of civil litigation

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[245] Watson, *supra* note 33, at p. 125

continued under the influence of a socialist collectivist ideology.[246]

Procedural law reflects cultural and social institutions and is closely tied to the political system.[247] It takes its shape and colour from the larger social and political contexts within which it operates.[248] At the end of the twentieth century, the fast development of democratic politics in China, on the one hand, requires growing respect for the individual as an important unit of society, which necessarily leads to the assurance of more democratic political rights and to more open litigation rights in civil adjudication. On the other hand, it demands a continuing supervision and restriction on state power. When it comes to judicial proceedings, it requires reforms that will avoid judicial abuse and arbitrariness. An adversary system is the product of democratic politics, reflecting the spirits of individualism and open argumentation. China is already forming a democratic environment, which enables parties to exercise their litigation rights sufficiently and reduces excessive judicial interference, so that the principles of judicial fairness and due process of law can be realised.

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[246] A. Hy. Chen, An Introduction to the Legal System of the People's Republic of China (Toronto: Butterworths, 1993), at p. 168.

[247] E.C. Stiefel and J.R. Maxeiner, "Civil Justice Reform in the United States - Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?" (1994) 42 American Journal of Comparative Law, at p. 156

[248] Watson, *supra* note 33, at p. 87

B. The Economic Context

Since 1978, a great economic reform has happened in China and the country is now in a transitional period from a centrally planned economy to a more diffused market economy. This produces the diversity of economic relationships which need to be regulated by formal contracts, requiring laws that respect and enforce contracts, ultimately by state power. It imposes the rule of law to adjust or guide economic activities, instead of administrative orders. Fierce market competition requires the use of legal rules of general applicability to protect equally the rights and interests of various economic subjects. To realise this goal and to respect party-autonomy, the role of law courts should be that of an impartial umpire when resolving disputes. Rather than seeing this as a loss of the central state's power, it should be seen as a re-definition and re-direction of it, to develop a strong law of contracts.

The adversarial ideology fits and fulfils the theory of a market economy, which believes that if each individual strives to promote his self-interest, an optimum allocation of resources will result.[249] On this procedural point, the adversarial system stands for competitive presentation of evidence and argument[250] in a public forum. It emphasises self-interest, individual initiative, and the competitive participation of the parties. However the traditional mode of civil adjudication in China has been character-

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[249] *Ibid.*, at p. 125

[250] Hazard, *supra* note 43, at p. 124

ised as having too much judicial interference and as stressing an executive-political role in judicial proceedings. This fetters the parties in any dispute, to exercise litigation rights and result in a certain biased trial style in court. Obviously it does not adapt easily to the requirements of a market economy.

C. Other Contexts

One aspect that cannot be ignored might be the influence of North America, especially the United States, in China. The open door policy not only leads to frequent Sino-American contacts in economics and commerce, but also bring about other exchanges, including legal education exchanges. According to statistics, more than half of the Chinese who have gone abroad for legal study have gone to the United States since 1978.[251]

The popularity of English also exerts some influence. Since the late seventies, English instead of Russian became the required course in most schools and universities in China. Far more people learn English than any other foreign language and this facilitates people to study the legal systems in English-speaking countries.

In addition, a country ruling by law requires legal institutions, especially the courts, that enjoy high social status. In the common law countries, courts and judges always possess superior prestige in society. In China, this situation waits to be improved. The needs for change may serve as an invisible motivation in China to pay more attention to the common law adversarial

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[251] Edward, *supra* note 31, at p. 58.

system.

4. One Important Point to Mention

The assumption that only the American and possibly other common-law systems of civil justice follow an adversarial model is completely misguided.[252] After comparing civil procedure between the former West Germany and the United States, Langbein concludes that both the German and the American systems are adversarial in their civil procedures, and "no one with first-hand knowledge of continental systems can disagree with this assessment."[253] After the Second World War, Japan, which follows the European inquisitorial model, adopted the adversarial system in its civil justice system. One study by R. David about English law and French law shows that both systems share important principles, one being the "principle of party-presentation,"[254] which is one of the most significant features in the adversarial theory, although French courts have a duty to apply a legal rule *ex officio* when necessary. However, the principle of party-presentation was abandoned before legal reform began in China, as well as in other socialist countries. The judges do both the evidence collection and examination, while some judges may even decide a case for reasons not advanced by the parties.

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[252] H. L. Bernstein, "Whose Advantage After All: A Comment on the Comparison of Civil Justice Systems," (1988) 21 University of California, Davis Law Review, at p. 589.

[253] *Ibid.*, and Langbein, *supra* note 117.

[254] G. Watson, *supra* note 33, at p. 118.

The European continental system is by no means the "inquistorial" system in the sense of, say, medieval ecclesiastical process. On the other hand, in the common law system, the jury trial, one major feature of this system, has been used less and less in civil cases. Some characteristics in the inquisitorial system which used to be incompatible with the common law system due to the jury trial have become attractive to the latter, such as the "judicial conduct of the fact-gathering".[255] It is stressed by some specialists in the field that "some modern developments have already lessened the gap between the two systems and predict that a trend towards uniformity will assert itself more strongly still in the years to come."[256]

From the beginning of the nineties, reform of the Chinese civil adjudication model has become the major focus for court reform, and the tendency to draw on some aspects of the theory and practice of the adversarial system has become inevitable.

THE FOCAL POINTS OF THE REFORM

By comparing the Chinese Code of Civil Procedure with the Queen's Bench Rules of Manitoba, we can see that, although the approaches applied in these two legal systems are different, some

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[255] Langbein, *supra* note 117, at p. 848.

[256] G. Watson, *supra* note 33, at p. 119.

important similar points exist:

1. In both systems, the scope of issues, the claims, and the relief sought are defined by the parties or by the parties and their lawyers. The facts without controversy between parties are generally beyond the judge's scrutiny, unless a judge reasonably believes that the admission of some fact is made by one party under threats, or that the establishment of some fact may impair a third party's or a public interest. In such instances, he can examine that fact.

2. Both parties in a dispute have the same opportunity to be heard by a court before it makes its decision. But in Canada, if the defendant does not respond to the plaintiff's pleading within a prescribed time, the court will give a default judgment in favour of the plaintiff, though the judge will review the case to determine the amount of damages or the other remedies. In China, however, a judge will still examine the case to decide whether the plaintiff's claim is justified or not.[257] Even a judgment by default must be issued on the merits of the case.

3. In both systems, a judge can only make a decision on points raised by parties and award those remedies asked by a party.

The most significant differences between these two procedures are:

(1) In China, a judge takes full charge of the proceeding, while in Canada, the parties are in active positions to push the

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[257] Watson, *supra note 33, at* p. 119. The Chinese practice is similar to the French practice while the Canadian practice is like the English practice.

proceedings forward or delay them. In Canada, when one party thinks he is ready for trial, he will set the action down and obtain a date for the pre-trial conference. On the other hand, the opposing party can move the court to set aside the date and fix another date if he is not ready. At both trial and appeal levels, if the plaintiff or appellant unreasonably delays the prosecution on an action or appeal, the opposing party can move the court for dismissal of the action or appeal.

Unlike Canada, in China, the judge will decide the date for trial when he thinks he is ready, and the concept of delay by a plaintiff or appellant is unfamiliar in Chinese practice.

(2) In China, a judge has the responsibility to investigate and collect evidence. Also, the judge conducts the direct examination of parties and witnesses before trial, although opposing parties or their lawyers are allowed to ask supplementary questions when the judge finishes questioning. The judge is also responsible for appointing experts to inform the court on technical issues, according to requirements of the case. The judge usually takes part in the inspection of property on-location, too.

On the contrary in Canada, the pretrial investigation of evidence is finished by the parties themselves, assisted by lawyers at the discovery stage. The court will not interfere unless one party makes a motion to the court. One of the most prominent features of the adversarial system is the important role of lawyers in litigation. A lawyer will assist his client in producing documents, conducting examination for discovery with the opposing

party, interviewing witnesses, and deciding which witnesses they will call at trial, including experts. The inspection of property is usually performed by the parties assisted by their lawyers. And of course, a lawyer usually plays a vital role at trial.

(3) When the dispute goes to trial, Chinese judges act as the main examiner throughout the courtroom hearing, though a party or his lawyer can question the opposing party and witnesses. Before the trial, the judge is required to do sufficient preparation, so that he can control the sequence of the whole trial by knowing what to ask and directing the procedural development.

However, in Canada, the presentation of evidence is realised by the lawyers' examination of witnesses, including the parties. The role of the judge is mainly passive and his intervention is mainly for an understanding of the evidence. Unlike China, it is the parties and their lawyers who mainly decide the structure and the presentation of a case and control the pace of the trial.

In conclusion, the crucial differences between the two systems are in these two aspects: the active role of Chinese judges compared with the relatively passive role of Canadian judges; and secondly, the central role of lawyers in the whole litigation process in Canada.

The current Code of Civil Procedure for the People's Republic of China strengthens the litigation status of parties, attaches increased importance to the parties' participation in civil litigation, and places restrictions on the judges' extensive rights of investigation, inquisition, and intervention ex officio. With

respect to legislation, the structure of the Code of Civil Procedure in the P.R.C. is changing from inquisitorialism to adversarialism assisted by inquisitorialism. But the force of tradition and old judicial habits is still strong and they display mainly three aspects:

1. Insufficient emphasis on the parties' responsibilities to provide evidence; instead, judges take over the tasks of investigation and obtaining evidence, as expressed in the maxim that "the parties open their mouths, the judges do the leg work, and the lawyers read files." (Dang shi ren dong zui, fa guan pao tui, lu shi yue juan ban an).

2. The reluctance to allow the judicial process to generate the facts during a trial. The traditional Chinese way is that, instead of finding facts at trial in court, judges tend to find and decide the facts first, at the same time try to solve the case through mediation. If these efforts fail, the judge will open a trial session, which makes most trials mere formalities.

3. The highly stressed principle of collectivism within the people's courts causes "those who try the case do not decide it, those who decide the case do not try it." (Shen zhe bu pan, pan zhe bu shen.) A judge is not an arbiter in the actual sense of resolving the particular dispute. The president and the judicial committee have the power to decide cases and not, e.g., just the ones referred by the judge.

The reform of China's civil adjudication system should start from these three aspects, by strengthening the party's responsi-

bility for providing evidence, strengthening the function of the trial process in court, and strengthening the power of the judge as the objective decision-maker.

That parties have the responsibility to provide evidence to support their assertions is a widespread judicial principle in different countries in the world. Parties know the facts best and, in a sense "own" the facts that best support their arguments and requests in any disputes. They are motivated by self-interest and have the initiative to collect evidences. Therefore, providing evidence should mainly depend on the parties, while the judges' responsibility should change from an inquisitional collecting of evidence to an examining, verifying, and evaluating of evidence.

There are other problems with the traditional ways by which a judge undertakes the whole investigation and evidence collection, especially when the judge who conducts the investigation is usually the trial judge.

First, this affects the impartial appearance of a trial judge. In an action, the issue dividing the opposing parties is totally contradictory and their attitudes toward each other are often hostile. If a judge totally decides the area and extent of an examination of a witness, he controls the range and depth of an investigation. No matter how well intentioned or motivated, and how good a job he has actually done, his actions often make an impression of bias on one party, or maybe even on both parties. In English common law countries, a judge usually maintains a positive public appearance, largely because he did not participate in the

pre-trial investigation. The adversarial system attaches great importance to both the appearance and reality of impartiality.[258] The principle is that "justice not only be done, but appear to be done."[259]

Secondly, pre-trial judicial investigation risks prejudgment. It arises because in the course of his investigation, a judge is testing tentative hypotheses which will imperceptibly influence his work.[260] As well, at some early point a familiar pattern will seem to emerge from the evidence and, without awaiting further proofs, an accustomed label will be assigned to the case.[261] Sometimes it is difficult for the judge to "be patient".

Thirdly, the trial itself is always in danger of losing its meaning. Since in most cases, the trial judge is also in charge of the pre-trial investigation, that judge becomes familiar with the case before the trial. Therefore the trial becomes more like a double-checking process than a stage at which the parties present their cases. The trial becomes a mere form.

My suggestions for reform will be :

(a) To establish a mechanism which the parties can rely on to collect and produce evidence, especially one that enables the parties to learn about each other's case so that the phenomenon that "the parties move their mouths, the judges do legwork, and the

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[258] *Ibid.*, at p. 129

[259] Sopinka, *supra* note 158, at p. 121

[260] Watson, *supra* note 33, at p. 134

[261] Langbein, *supra* note 117, at p. 844

lawyers read files" can be reduced. This mechanism can be used in complicated cases. On the other hand, when it comes to simple cases, the summary procedure can be applied in which the complicated mechanism can be dispensed with, so that the case can be solved with as little formality as possible, in order to save cost, time, and make things convenient for the people.

(b) Due to unique conditions in China, the investigation ex officio by judges should remain the indispensable supplement to the principle that the parties are responsible for providing evidence. However, the judge in charge of the pre-trial investigation should be separated from the actual trial judge, because their functions are different and the judicial investigation should be strictly limited to the scope of "the needs of the actual case."

Why should China keep its judicial investigation?

First, Chinese judges traditionally have the duty to pursue not only formal truth, but also substantive truth. The formal truth means the fact that can be found, or even "created" empirically in the evidence; while the substantive truth is the broader and historical fact of what originally, actually happened. In some cases, the formal truth does not concur with the substantive truth. Chinese judges are responsible for finding the substantive truth, at least as close to the substantive truth as possible. However, in an adversarial system, the parties have the right to choose the proofs they will present for the judge's consideration.[262] They can "choose not to call a witness who would, if called, be in a

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[262] Watson, *supra* note 33, p. 122

position to shed light on the issues. The judge has no power to call a witness to give evidence."[263] Here the theory and the practice become obstacles for a judge whose duty is to determine the truth. In fact, some people in common law countries plea for more active, interventionist judicial control in choosing proofs and witnesses.

Secondly, because of the administrative management system in China, some evidence cannot be reached by lawyers or parties, such as governmental records, bank files, etc. Further, in a rapidly developing country like China, a lot of people do not have enough legal knowledge to enable them to collect evidence, especially if they cannot afford to hire a lawyer. In this case, judicial investigation provides a kind of legal aid to the parties.

One safeguard to the judicial investigation is that all the evidence collected by the judge must be presented at trial and subject to the test of rebuttal evidence by the parties at trial, before they are used as the basis for establishing the substantive truth.

In normal situations, after accepting a case, a judge will: first, summon the opposing parties to come to the court separately to give their testimonies; second, investigate; third, mediate again and again; and at last, open a trial in session. In this way, the trial is a last resort, which is not necessarily desirable.

In China, mediation is tightly connected with civil adjudi-

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[263] Sopinka, *supra* note 158, at p. 115

cation and always plays a central role in handling civil disputes. To solve civil cases through mediation has many advantages. It softens confrontations between the plaintiff and the defendant, and is therefore beneficial to the continuing relationships between the parties; it saves time and cost; the parties are more likely to comply voluntarily with the result reached by mediation. Indeed, many Western countries, including Canada and the United States, are experimenting with ways to use forms of mediation to resolve a wide range of disputes. However, the high emphasis on mediation forms the idea that "mediation is better than trial";[264] and, to a certain extent, this even causes a sense of opposition between mediation and trial. In practice, some judges interfere so much in the mediation that the parties' rights are unduly restricted. In addition, there is no formal procedure as to mediation, and the fact that a lot of civil and economic cases are solved through mediation in informal "talks" and "meetings"[265] is obviously inconsistent with the function and nature of civil adjudication. Trial is not only often ignored but also of little significance, even if it is conducted after the mediation fails, because the mediation judge will then try the case.

In order to strengthen and bring into full play the function of trial process, the trial judge should also be separated from the mediation judge. For the same reasons that a trial judge should not also conduct the judicial investigation in the same case, as

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[264] Zhang, *supra* note 26, at p. 87

[265] *Ibid.*

mentioned above, another reason is that sometimes a mediation judge is so involved inside the case that he may feel frustrated if his efforts to solve the case through mediation fail. That feeling might be brought into the trial inadvertently; and this may influence the mediation in which the parties will not feel free to reject the mediation plan suggested by the judge.

If the trial judge opens the trial directly, rather than doing significant pretrial investigation, mediation, and other preparation, the judge is more likely to reach an accurate judgment because the parties have better chances to present their cases and argue for their own positions sufficiently. Such clash is important for the emerging truth within the trial. As a consequence the goal of judicial fairness can be better realised.

However, "to open a trial directly" need not be the same as in common law countries, in which "the judge comes to the trial completely cold,"[266] where he will risk "intervention" if he asks too many of his own questions. The presentation of a case is totally through the lawyers' direct examination, cross-examination, and re-examination. Because lawyers effectively control the progress of a trial, the judge is more easily influenced by them. In addition, although theoretically a lawyer has a duty to the court not to present inaccurate evidence, he also has the duty to help his client to win the case. These two duties can be difficult to maintain in perfect harmony and it is not unreasonable

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[266] Stockwood, *supra* note 120, at p. 95

to believe that "distortion of the truth"[267] can exist in this adversarial system. Ethics is an important aspect of the legal profession in the adversarial system, where it is usually rigorously regulated by the profession's own professional society, and no ethical lawyer would allow evidence they know to be false to be given in court. There the lawyer is still a sworn officer of the court.

Reform in China should leave the trial judge to do some proper preparation before the trial. However, if the parties are represented or are capable of presenting their cases properly at trial, he need not act as the main examiner, according to the old trial mode, because this obviously impairs the parties' capacities for participation in their own dispute. The purpose of the judge's intervention should be to clarify evidence, to minimise unproductive investigation, and to reduce irrelevant tangles and obfuscations. Let the parties present the case and test the evidence to the greatest extent. The judge's role at trial will then change from investigator and inquisitor to organiser, evaluator and umpire. Therefore, the passive position of the parties will change correspondingly and they can realise their litigation goals through their active participation at trial.

Traditionally, a judge takes charge of the proceedings and tries to persuade the parties to accept his points. After reform, the parties to a case should be in the active position of providing evidence and pushing the proceedings forward, trying to persuade

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[267] Hazard, *supra* note 43, at p. 123

the judge to accept their points. The judge would listen and guide the progress of the procedure pursuant to law, as could be defined in a reformed Code of Civil Procedure. They can then respect both parties' litigation rights to the fullest extent.

An important distinction within the judge-systems between China and western countries is that the former has a strong emphasis on collectivism, while the latter emphasise the strength of the moral quality, rationalism and legal expertise of the individual judge. An individual judge in those countries always enjoys high prestige and authority. In China, a judge's decision is generally subject to the scrutiny of the members of the collegiate bench, the approval of the president of a division or a court, and sometimes even the discussion of the judicial committee of that court. "Those who try the case do not decide it, those who decide the case do not try it."

With the deepening of judicial reform, the judge in China could display a stronger personality and become an umpire in the real sense. Every judge would then have to take responsibility for his own behaviour and decisions. At present, some courts in China are trying to create a system where a case is heard and decided by one and the same judge, who is totally responsible for that case. This change will raise the high requirements for a judge's appointment and for its procedures as well.

THE OBSTACLES PREVENTING REFORM

There are a lot of obstacles to the reform of China's civil adjudication model, and they can be summarised as follows:

A. The contradiction between theory and practice.

At present, the model of adjudication, especially in criminal adjudication, is basically inquisitorial. Proposed reform absorbs the contents principally from the adversarial system of the English common law countries. But we lack systematic studies in China regarding inquisitorial theory , adversarial theory, and their practices, as well as what the gains and losses might be. The reform of the adjudication model is just a practical exploration within the court system which is awaiting theoretical instructions.

B. The contradiction between new adjudication methods and the social-economic situation in China, as well as the development of professional legal services.

The practice of the new method depends on a sound social-economic situation and needs a strong legal profession. If China totally copies the adversarial model from common law countries without regard to the conditions unique to China, the parties' economic abilities, and their limited knowledge of legal techniques, then people may turn to other ways to resolve their disputes outside the courts, some not always based on law and reason.

In fact, the high expense and delay of litigation are already a common disease troubling the common law countries. Recently, the increased use of alternative dispute resolution (ADR), which

shifts the burden of litigation elsewhere,[268] is a reflection of the seriousness of the problem in these countries. This indicates that China's traditional emphasis on mediation can teach western countries.

The reform of the adjudication model is a stimulus to the development of a legal profession and to the improvement of China's judicial system. However, if the reforms exceed reasonable levels, it will restrain people from seeking legal protections within the system.

C. Whether the quality of judges can fit in with the new method is a tough problem in practice.

Most judges are used to the old working model, in which they have done all the investigation and have all the facts, so that some judges even draw their conclusions before the trial. They want to prevent "accidents" at trial in the court by lots of pre-trial preparations. The new method will present judges with a different approach to making decisions. The judges will be expected to take more responsibility for individual cases, to act with more independence, and not to rely on the collective decision-making model. On this point, there are differences between the present situation with Chinese judges and the requirements of the reform. However, this will be the key to the fate of the whole reform process.

D. The parties are deficient in legal and other knowledge.

The parties do not know how to collect evidence, or how to

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[268] Stiefel and Maxeiner, *supra* note 247, at p. 154

present and test evidence at trial in the court. Due to these reasons, it is even more difficult for them to get used to the new method. Restricted by economic resources, some people cannot afford a lawyer. Therefore it will still be necessary for judges to provide help and instructions to the parties in a litigation process, so that a party will not lose a good case just because he is not able to afford a competent lawyer.

CONCLUSION

The Code of Civil Procedure in the P.R.C. will draw relatively more from the adversarial model in order to improve judicial authority and protect civil rights, while at the same time it tries to keep some of the merits of inquisitorialism and the Chinese tradition. Nevertheless, some judicial traditions not well-suited to changing situations, and misunderstandings of the judicial function, especially the view of law as the instrument of class rule and class struggle, still influence the civil adjudication system. At present, reform absorbs the contents from adversarialism and gets rid of the disadvantages of inquisitorialism, especially a lot of judicial investigation and collection of evidence before trial and too much judicial inquiries at trial.

A complete adversarial system could be brought into full play only in a certain environment. It would require that the court enjoys the status of final umpire among power units within the

country and that the judge has high authority, status, and ability in society; it also needs a developed legal profession and democratic social environment. In addition, the system must be supported by reliable financial resources. All these conditions are in the historical process of forming and are not yet mature in China. Besides that, some inherent defects tightly connected with the merits of the adversarial system are: it pursues democracy and accuracy, while it is very expensive and time-consuming; it tries to be scrupulously fair, while it needs to have a lawyer as a guide through the complicated process; it strongly advocates an open court, while much embarrassment can be caused as details of one's personal life have to be exposed to the public; it requires the information to be tested by the parties at trial, especially through cross-examination, which can be an unpleasant or even bitter experience.

The two systems of procedure, the adversarial and inquisitorial, have come closer to each other in the course of this century,[269] especially with regard to civil litigation. However as to criminal litigation, they still have very different values: adversarialism emphasises democracy, rights, and individualism, while inquisitorialism puts stress on social order and state interests. The model of criminal adjudication in China is a typically inquisitorial model and the desire for reform is not as strong as in the reform of civil adjudication. There is no developing consensus on an alternative criminal adjudication and

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[269] Watson, *supra* note 33, at p. 118

this inevitably affects the reform of civil adjudication.

In addition, Chinese philosophy remains very different from what is in the common law countries. In China, state interests are paramount, personal interests, including legal persons' interests, are believed to be basically consistent with the state interest: without state interests, there would be no personal interests, and vice versa.[270] People are educated and encouraged to believe, to depend on, and to get help from the government, the courts, and other state organs because the nature and purpose of these state organs are to serve the people wholeheartedly. With the socialist philosophy and China's deep-rooted Confucian tradition, the country must observe and decide how much the adversarial theory can be accepted and applied to China's adjudication system.

As the twenty-first century dawns in China, new thoughts about law and order will continue to challenge a proud, recorded legal tradition that is at least four thousand years old.

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[270] Ma Yuan, *supra* note 1, at p. 28