We do not plan to be in a car accident or to have a flood in our house, but both events, and others like them, may involve us in legal situations that will require careful planning. If our car insurance company rejects a claim for the loss of a computer that went missing at the time of the accident, or the water company will not take responsibility for a defective sewer system, we may need to start legal proceedings. Because there are many steps on the path to justice, legal planning will give us the best chance of obtaining a favourable result whether we are involved in litigation or other legal activities. Legal planning will be useful both for the purpose of achieving everyday legal objectives such as making a will and opening a business, and in rarer situations such as seeking judgment from a court or tribunal. This chapter is concerned primarily with the processes and procedures of decision-makers when resolving legal disputes. Planning for and following the required steps in litigation is like reading and deciphering a map of the road to justice.

Studies in many jurisdictions have found that most people do not understand legal processes and procedures very well. Mass media is partly to blame, by focusing on trials without showing the laborious investigation,
documentation, and preparation that leads up to them. It is therefore understandable that people may expect to commence a claim and get a decision from a judge without any delay. Actual legal procedures are not only unglamorous for TV viewing, they are also complex and numerous. Ronald W. Staudt and Paula L. Hannaford studied civil litigation procedures in the United States, and found 193 discrete functions, such as “interpret law,” “develop strategy,” or “negotiate,” that a disputant must carry out to make the civil litigation system work.1 Many courts and agencies now try to assist people without lawyers to navigate this procedural maze by providing checklists, automated court document preparation systems, workshops for litigants, and other forms of support. Nevertheless, planning and undertaking a legal case remains demanding. As observed in the United Kingdom, an individual managing and planning legal matters must: understand process and procedures; identify and avoid risks; plan ahead; manage relationships and negotiate; and be motivated to act and be persistent.2

One of the chief advantages enjoyed by lawyers and litigating parties such as insurance companies and banks is intimate knowledge of the processes and procedures of law, which they gain through training and repeat experience. These experienced actors not only know what to do when, but can plan ahead to arrange their affairs in order to secure the best possible result should a legal problem arise. Large corporations, governments, and businesses that litigate as part of their normal operations can adopt strategic plans including legal steps to further their long-range interests. Such litigants plan ahead to be involved in lawsuits; they arrange their business affairs to have the best chance of winning. Businesses may also use litigation as marketing by other means when they protect their own patents and trademarks in court and challenge those of their competitors. Frequent litigants can also plan their interaction with courts to obtain the optimum results averaged over a number of individual disputes without needing to win all cases. Such a strategy may favour the settlement of strong claims in order to avoid setting adverse precedents, and unbending opposition to weak ones in order to obtain favourable precedents from the courts. Computer programs have been developed to assist in planning and managing litigation and other legal matters.3 The patent by Heckman and his colleagues in figure 5.1 provides a glimpse of how litigation planning can be done using an automated case processing system.
In contrast, people who infrequently encounter law are at a distinct disadvantage because they not only lack knowledge of what to do when but they are also unprepared because they usually have not planned ahead for the contingency of becoming involved in legal proceedings.

CIVIL LITIGATION PROCESS

It is important to be careful when using the word civil in connection with law; the word is sometimes used to describe legal systems based on civil codes (legislation such as found in France and Germany) which use the inquisitorial process, in contrast to systems based on common law (such as in the United Kingdom and Canada) which use the adversarial process. Thus, lawyers speak of civil law systems and common law systems to describe legal systems at the national level. (Note that the province of Québec in Canada has a civil law
system in provincial law as a result of its French heritage.) Another distinction made in the law is between *criminal proceedings* and all others which are called *civil cases*. Finally, the word civil is also sometimes used to differentiate between military (martial) and non-military (civil) law and processes. Thus, we have *courts martial* (courts applying military law) and *martial law* as distinct from the civil law system that applies to civilians (non-military persons). “Civil” is thus an example of an ordinary word that has been given unique and multiple meanings in law. This problem and others that contribute to the difficulty of legal language will be considered in the next chapter.

Within common law systems, non-criminal proceedings follow the civil litigation process. Civil *process and procedure* is different from *criminal process and procedure*. You will also find that the word “process” is sometimes used to describe a legal document notice of which must be given to someone, what is known as *service of process* (giving notice with a legal document), a task performed by the *process server* (person who delivers the notice). Process is important to people in disputes, sometimes even more than the final outcome. This is the finding of a large body of research based on the concept of *procedural justice*. If people view legal procedures as being fair, they are also likely to be more trustful of the legal system, which contributes to its legitimacy in the eyes of the public.

Researchers have identified several features that the public expects from procedural justice. John Thibaut and Laurens Walker proposed that people are concerned with how much control they have within the procedures they must follow, and distinguished control over the process itself from control over the result. In situations where there is a *conflict of interest* they proposed that the parties should have a high degree of control over the process, but not over the final decision. In situations where the dispute is primarily a *conflict of facts*, they suggested both elements of control are best left with an impartial *third party* (judge or adjudicator). Tom Tyler’s research showed that people evaluate the perceived motives and ethics (including respectfulness) of officials when evaluating the fairness of procedures. These requirements of procedural justice are one way to evaluate legal processes and procedures. A critical legal studies perspective can be used to examine common civil litigation processes with this in mind.

Just as legal structures and systems are focused on courts and judges, legal process is focused on trials in which judges preside. In a common law adversarial system, a trial is a single, continuous oral *hearing* at which the disputing
parties (or their lawyers) present all of their evidence (information about disputed facts), and make their arguments (also called submissions). At the conclusion of a trial, the judge makes a decision either immediately (oral judgment) or judgment is reserved (to be delivered later). (In an inquisitorial system, judgment is arrived at through a series of hearings in which the judge relies mostly on written records.) The civil litigation process is therefore the series of steps taken for the purpose of preparing for a trial. It also includes those steps to be taken if a judgment given at trial is appealed to a higher court.

In an adversarial litigation process, the disputing parties are responsible for taking the required steps, subject to supervision by a judge, who settles disputes over whether the proper procedure has been followed. The responsibility placed on the parties continues at trial, where each side chooses the evidence they wish to present to the judge. An adversarial legal process therefore resembles a tennis match where one side takes a step toward trial and triggers the other to respond.

In an inquisitorial system, the judge is the one who takes the steps leading to judgment, and who obtains and selects the evidence used in making the decision. Another difference between the two types of process is that a jury may be used in adversarial proceedings, but usually not in inquisitorial ones. Juries, however, are becoming rarer in common law jurisdictions. Processes in adversarial and inquisitorial courts are becoming more alike as a result of common law judges gaining more powers to manage the conduct of litigation, chiefly for the purpose of speeding up the process. This innovation in adversarial processes has been called managerial judging.

There are four basic stages in the adversarial version of civil legal process:

1. **Pleading**—the preparation and filing of documents with the court that describe the claims made and the legal issues in dispute, and the written response by the other side.
2. **Discovery**—mutual disclosure by the parties of information that may be presented as evidence at trial, often accompanied by written or oral questioning of the other side to gain further information.
3. **Trial**—or settlement without trial by agreement between the parties.
4. **Appeal**—asking a higher court to overrule (reverse) an incorrect judgment.
The function of the pleading and discovery stages are to prepare a record of the legal issues to be decided at the trial, and to give each party notice of the evidence that will be presented by the other side. Since the beginning of the twentieth century, more emphasis has been placed by the courts on the disclosure (discovery) process in order to prevent what has been called trial by ambush. This term describes the situation where one party becomes aware of evidence for the first time at trial, and is therefore unprepared to present contrary evidence in response. The surprised party may lose the case or have to request an adjournment (temporary halt) of the trial, causing delay and increased expense.

Although it is designed to avert trial by ambush, the process of discovery has itself been criticized for being unjust and inefficient. It is often prolonged, and generates a significant proportion of lawyers’ fees in many lawsuits. Lawyers have been accused of using discovery to wear down opponents with endless requests for information and documents, and of abusing parties through oral pretrial questioning (known as examination for discovery). Perhaps more inquisitorial intervention by judges will help to avoid these problems.

Procedural rules direct the parties in what they must do as they move through the stages of the civil litigation process toward trial. They are the subject of the next section.

CIVIL PROCEDURE

Procedures for civil litigation are usually set by the rules of court adopted by judges within a particular jurisdiction. Parties to a lawsuit are expected to follow these rules in preparing for trial, and disputes about whether someone has followed the rules are decided by judges who issue interlocutory orders (those rendered before final judgment). The purpose of procedural rules is to ensure that litigation is conducted “in accordance with the principles of fundamental justice.” The Constitution of the United States includes a similar requirement that legal proceedings follow due process.

* The examples in this section are taken from the Alberta Rules of Court in force from November 2010. They are based on extensive study and careful revision; accordingly, they reflect current recommended best practice for common law courts. Further, an attempt has been made to express them in plain language.
Purpose and intention of these rules

1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way. \(^7\)

Courts accept that if strict application of a procedural rule would, in certain circumstances, go against these fundamental principles, then the rule should be waived or its requirements relaxed. Judges have the power to enforce rules of court in a flexible way, but must always keep the rights of both parties in mind. In some cases, it may be unfair to the other side to excuse one party from following the rules.

Rule contravention, non-compliance and irregularities

1.5 (1) If a person contravenes or does not comply with these rules, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

(a) to cure the contravention, non-compliance or irregularity.

... 

(4) The Court must not cure any contravention, non-compliance or irregularity unless

(a) to do so will cause no irreparable harm to any party,

Note: Here, “cure” means to reverse any adverse effects of not complying with a rule.

A look at the table of contents of the *Alberta Rules* shows that they are basically organized in chronological order, following the stages of the civil litigation process. In the pleading stage they set out how parties are to be selected, identified, and named.
Actions by and against sole proprietors

2.5 (1) If a person carries on business or operates as a sole proprietor under a name other than the person’s name, the person may bring or be the subject of an action in that name.

(2) If an action is brought by or against a person in the person’s business or operating name, a party may serve a notice requiring the person to disclose, in writing, the legal name of the person carrying on the business or operation.

A plaintiff begins a lawsuit (an action) by preparing, filing, and serving a Statement of Claim (or just Claim), and the defendant responds in the same way with a Statement of Defence (or just Defence). The required contents of pleadings are specified to ensure the other side is not taken by surprise.

Pleadings: general requirements

13.6 (2) A pleading must state any of the following matters that are relevant:

(a) the facts on which a party relies, but not the evidence by which the facts are to be proved;

(b) a matter that defeats, or raises a defence to, a claim of another party;

(c) the remedy claimed, including

   (i) the type of damages* claimed,

   (ii) to the extent known, the amount of general and special damages claimed, or if either or both are not known, an estimate of the amount or the total amount that will be claimed,

   (iii) a statement of any interest claimed, including the basis for the interest, and the method of calculating the interest, and

   (iv) costs,** including any known special costs.
(3) A pleading must also include a statement of any matter on which a party intends to rely that may take another party by surprise. . . .

* Damages are an amount of money to be awarded as compensation; general damages are an estimate, with the final amount decided by the judge; special damages are exact amounts already spent or lost by a party.

** Costs are those expenses of pursuing the lawsuit that the court allows the successful party to collect from the other side. They usually do not cover all of the expenses of hiring a lawyer. Special costs are exact sums of money that have been paid, such as medical expenses and fees.

Rules of court always provide that pleadings should be served (delivered) to opposing parties to ensure they have adequate notice of every step in the proceedings and sufficient time to respond.

The *Alberta Rules* adopt the approach of *managerial judging* by stipulating that the parties have the primary responsibility to prepare for trial expeditiously, but that the court also has a role in managing the litigation process.

Ways the Court may manage action

4.11 The Court may manage an action in one or more of the following ways, in which case the responsibility of the parties to manage their dispute is modified accordingly:

(a) the Court may make a procedural order;

(b) the Court may direct a conference under rule 4.10 [Assistance by the Court];

(c) on request under rule 4.12 [Request for case management], or on the initiative of the Chief Justice under rule 4.13 [Appointment of case management judge], the Chief Justice may appoint a case management judge for the action;
(d) the Court may make an order under a rule providing for specific direction or a remedy.

Rules, such as producing records held by one party, that define the permissible scope of requests for information place limits on the discovery stage of litigation.

When something is relevant and material

5.2 (1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Procedure at trial is governed by rules specifying the order in which the parties should present their evidence and argument.

Order of presentation

8.10 (1) Unless the Court directs otherwise, the order of presentation at a trial is as follows:

(a) the plaintiff may make one opening statement and, subject to clause (b), must then adduce evidence;

(b) the defendant may make one opening statement either immediately after the plaintiff’s opening statement and before the plaintiff adduces evidence, or at the conclusion of the plaintiff’s evidence;
(c) when the plaintiff’s evidence is concluded, the defendant may make an opening statement if the defendant has not already done so immediately after the plaintiff’s opening statement, and the defendant must then adduce evidence, if any;

(d) when the defendant’s evidence is concluded, the plaintiff may adduce evidence, if any, to rebut the defendant’s evidence;

(e) when the defendant’s evidence and the plaintiff’s rebuttal evidence, if any, are concluded, the plaintiff may make a closing statement, followed by the defendant’s closing statement, after which the plaintiff may reply;

(f) if the defendant adduces no evidence after the conclusion of the plaintiff’s evidence, the plaintiff may make a closing statement, followed by the defendant’s closing statement, after which the plaintiff may reply.

Rules regarding appeals specify how they are to be commenced and what documents must be filed with the appeal court. Other rules of court concern matters such as how documents should be prepared; how documents are to be served; procedures to compel witnesses to appear at trial; and how the costs of the proceedings and the lawyers are dealt with. The examples from the Alberta Rules are representative of typical rules of court concerning the main stages in the civil litigation process—pleading, discovery, trial, and appeal. Today, the rules of most courts are available online.

CRIMINAL LITIGATION PROCESS

Before moving into the criminal litigation process, a few comments on terminology are in order. The party who starts a civil lawsuit is called a plaintiff, and the party who is sued is called a defendant. In criminal matters, the party who commences the proceedings (a police officer or government lawyer) brings a charge against an accused (the person alleged to have committed a criminal offence). The initiating party in criminal litigation is called the prosecutor or, in countries such as Canada for whom the Queen is the head of state, the Crown.
In legal documents, the Crown is usually referred to by the Latin name, Regina (Queen). This is why the title of documents relating to criminal cases takes the form of R. (Regina) v. X (the Crown versus the accused, “X”). (The word versus is not used when speaking of court cases—“and” is substituted instead, as in “The Crown and X”.)

Now, in its basic format, the criminal litigation process in common law systems is essentially the same as the civil version. The adversarial process normally requires an oral trial where witnesses testify in person before the judge and may be questioned by all parties. This type of proceeding is more appropriate for criminal matters because the stakes are higher for those involved. The prospect of conviction and imprisonment can lead people to be dishonest and tamper with witnesses—these things are less likely to occur in civil proceedings. A common law adversarial trial that allows cross-examination of witnesses (questioning by an opposing party) is thought to be very effective in testing the credibility (believability) of witnesses’ testimony (oral statements in court). This type of trial process is therefore useful for discovering the truth (or more accurately, who is lying) about criminal acts. The same type of process may not be necessary in many civil proceedings.

There is, however, one significant difference between civil and criminal legal proceedings. In criminal matters one side is the state, which has immense resources (such as detectives, wiretaps, and forensic scientists) at its disposal. The accused is often a single, frequently poor, individual with few resources and no lawyer. The “scales of justice” appear to be weighted heavily in favour of the state facing such an ill-equipped adversary. For this reason, most Western countries have adopted laws governing criminal litigation processes that are intended to give an accused person a better opportunity for a fair trial. These laws do not apply to civil proceedings. Laws benefiting an accused person reflect the legal system’s historical role as protector of the individual against official power.

Countries such as Canada and the United States have provisions within their constitutions that apply only to criminal matters. They are designed to help make criminal proceedings a more level playing field between the prosecution and the accused. Canada’s Charter of Rights and Freedoms states in part:
Chapter 5. Legal Processes and Procedures

Arrest or detention

10. Everyone has the right on arrest or detention
   (a) to be informed promptly of the reasons therefore;
   (b) to retain and instruct counsel without delay and to be informed of that right; and
   (c) to have the validity of the detention determined by way of habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right
   (a) to be informed without unreasonable delay of the specific offence;
   (b) to be tried within a reasonable time;
   (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
   (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

*Habeas corpus is a request made to a court for an order to release a person from custody.

Because these protections and assurances are in the constitution they go beyond mere procedure, and become substantive rights that an accused person can insist on. Unlike rules of court, judges have no authority to waive these provisions or apply them flexibly. These legal requirements are part of the foundation of the criminal litigation process. As further protection for an accused person, the evidence must be sufficient to prove they are guilty beyond a reasonable doubt. This standard of proof (degree of certainty) is higher than it is for civil proceedings, where a balance of probabilities (more probable than not) is sufficient to prove facts. Although the criminal standard of proof is not
expressly stated in the Canadian Constitution, it has such a long tradition in common law systems that it is considered binding in all courts.

Another protection for accused persons that has been adopted in many Western countries is the right to have a lawyer paid for by the state when charged with a serious offence. When people wish to represent themselves (or act *pro se* in U.S. terminology) in criminal proceedings, judges may need to intervene more actively to ensure a fair trial. Judges may also be inclined to forgive some errors in following correct procedure made by the accused to make sure a *self-represented* accused person is not treated unfairly because he or she lacks knowledge of law and legal process.

One difference between civil and criminal processes is that the victim harmed by a crime is not a named party in the criminal proceedings, which are solely between the state and the accused. In a civil proceeding where one party seeks compensation for injuries inflicted during a crime, the victim is a plaintiff and entitled to take full part in the process and trial. Not including the victim in criminal processes has been described as a failure of the legal system that harms both victims and offenders. The movements for *therapeutic jurisprudence* (legal processes concerned with healing rather than retribution) and *restorative justice* (rebuilding a community disrupted by crime) have sought to bring victims (and offenders) into the criminal process in new ways by giving them a more active role and voice. This is one response to the problem of access to justice for victims of crime.

Finally, *problem-solving courts* (courts that address underlying social issues) and *drug courts* (courts created to deal with the special problems associated with drug addiction) are advocated by those who wish to see changes in the criminal litigation process. Rather than focusing on punishment, the advocates of such courts envisage a legal process that involves the surrounding community in addition to individual victims, in an attempt to understand and deal with some of the underlying reasons for criminal behaviour.

**CRIMINAL PROCEDURE**

Courts generally apply the same rules of procedure in criminal cases that they do in civil ones, so far as they are relevant, and unless there are other special rules provided by law. Specific rules of procedure for criminal cases are set out for instance in Canada in the Criminal Code, Parts XV to XXII. The following
are some examples from the Code that illustrate how the adversarial process is
directed in criminal litigation.

The document prepared to start a criminal process in Canada is called an
information, based upon which an accused person may be summoned (ordered)
to appear in court or arrested and brought there. An information is the criminal
law equivalent to the statement of claim that commences a civil proceeding.

504. Anyone who, on reasonable grounds, believes that a person
has committed an indictable offence may lay an information in
writing and under oath before a justice, and the justice shall
receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable
offence that may be tried in the province in which the justice
resides, and that the person

   (i) is or is believed to be, or

   (ii) resides or is believed to reside,
within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an
indictable offence within the territorial jurisdiction of the
justice;

(c) that the person has, anywhere, unlawfully received prop-
erty that was unlawfully obtained within the territorial
jurisdiction of the justice; or

(d) that the person has in his possession stolen property
within the territorial jurisdiction of the justice.  

In serious cases, the criminal process in Canada may include a preliminary
inquiry (hearing before trial) where witnesses are called. This procedure enables
a judge to decide whether there is sufficient evidence to justify proceeding to
full trial. A preliminary hearing is also an opportunity for the accused to benefit
from disclosure of the evidence that will be used against him; it is therefore also
a form of discovery in criminal cases. Even though a preliminary inquiry is not
held, the prosecution must still disclose to the accused the evidence to be presented at trial, with some restrictions related to sexual offences where certain kinds of evidence may be withheld. A judge may also order the prosecution to provide particulars (details of the facts the prosecution will rely on) to the accused before trial, another form of disclosure.

Statement of issues and witnesses

536.3 If a request for a preliminary inquiry is made, the prosecutor or, if the request was made by the accused, counsel for the accused shall, within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, provide the court and the other party with a statement that identifies

(a) the issues on which the requesting party wants evidence to be given at the inquiry; and

(b) the witnesses that the requesting party wants to hear at the inquiry.

Further provisions allow the accused to inspect the evidence and exhibits to be presented at trial.

Prior to trial, the prosecution is required to prepare an indictment, a final statement of the charge (or charges) for which the accused will stand trial. This may incorporate a charge not originally included in the information based on evidence given at a preliminary inquiry. The indictment is equivalent to a more detailed pleading in civil procedure.

Substance of offence

581. (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.
Form of statement

(2) The statement referred to in subsection (1) may be

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;
(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
(c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

Details of circumstances

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

The accused is not required to put his or her defence in writing—an oral plea (statement of position) of not guilty is sufficient.

Procedure at a criminal trial is similar to civil proceedings, with some specific directions to the judge regarding the order of presentations. The following rules are to be followed at a preliminary hearing, and also apply during a trial.

Hearing of witnesses

541. (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, where required by this Part, has been read, the justice shall, subject to this section, hear the witnesses called by the accused.
Contents of address to accused

(2) Before hearing any witness called by an accused who is not represented by counsel, the justice shall address the accused as follows or to the like effect:

“Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you, but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat.”

Statement of accused

(3) Where the accused who is not represented by counsel says anything in answer to the address made by the justice pursuant to subsection (2), the answer shall be taken down in writing and shall be signed by the justice and kept with the evidence of the witnesses and dealt with in accordance with this Part.

 Witnesses for accused

(4) Where an accused is not represented by counsel, the justice shall ask the accused if he or she wishes to call any witnesses after subsections (2) and (3) have been complied with.

Depositions of such witnesses

(5) The justice shall hear each witness called by the accused who testifies to any matter relevant to the inquiry, and for the purposes of this subsection, section 540 applies with such modifications as the circumstances require.

Confession or admission of accused

542. (1) Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.
At trial, the laws of evidence (rules about what evidence may be presented) give some protection to an accused person. In particular, evidence obtained illegally may be excluded in order to encourage lawful behaviour in state officials.

A recent addition to criminal procedure is the giving of victim statements at the end of proceedings, intended to help the court set an appropriate punishment by taking into account the harm that has been done by the crime.

Appeal procedures in criminal matters are similar to those in civil cases, except that the prosecution can only appeal issues of law, and not questions of fact that have been decided at trial.9

ADMINISTRATIVE PROCESSES AND PROCEDURES

Paul R. Verkuil, referring to the American context, suggests that 90 percent of what government does in relation to the individual can be described as “informal adjudication.”10 This statistic is probably also correct for most other Western countries such as Canada. Verkuil also provides a list of types of government action that shows the range of issues and situations subject to administrative processes and procedures:

1. Imposition of sanctions (penalties).
2. Ratemaking, licensing, and other regulatory decisions.
3. Environmental and safety decisions.
4. Awards of benefits, loans, grants, and subsidies.
5. Inspections, audits, and approvals.
6. Planning and policy-making.11

The challenge for a legal system is to adopt processes and procedures that are effective for this wide variety of governmental action, while being fair enough to be considered legitimate by the public. One question to be decided when a government creates tribunals and other quasi-judicial bodies is whether adversarial processes are suitable for administrative contexts. For some purposes, such as claiming workers’ compensation, an inquisitorial process has been adopted in many jurisdictions. This allows a tribunal hearing such claims to take active steps to discover and use information regarding accidents and injuries without waiting for the parties involved to act. However, when an
administrative decision primarily affects the opposing interests of two or more members of the public, as in disputes over zoning and building (development), then a more adversarial process is often appropriate.

The Alberta Law Reform Institute has identified some of the principles that should guide the design of administrative processes and procedures:

- flexibility; tribunals should be able to mould their process to suit their particular needs
- inquisitorial powers may be appropriate for some purposes
- processes and procedures must remain fair and just
- efficiency of operation is to be taken into account
- processes and procedures must be effective.  

Courts have a supervisory role over administrative processes and procedures to ensure they follow the basic requirements of procedural justice. In Canada, an administrative decision may be challenged in court in two ways: through judicial review (examination of the record of the proceeding by a judge), or by appeal of the decision to the courts, where a right of appeal is given by law. The judgments of the courts in such cases provide guidance to administrative agencies. In particular, the courts determine what level of procedural informality will be compatible with procedural justice. Over the years, Canadian courts have expanded the description of types of administrative action that must follow these principles, but judges continue to recognize the need for flexibility and informality in administrative procedures: “the nature and extent of the procedural protections that the Court is willing to recognize are varied and depend on the nature and context of the statutory or prerogative power in issue.”

Many jurisdictions now have legislation that sets out the procedural steps to be followed by administrative agencies when making quasi-judicial decisions that affect the public. The *Administrative Procedures and Jurisdiction Act* of Alberta, an instance of this type of law, will be used in the following examples.

The first essential element of fair administrative procedure is that everyone who may be affected by a decision should be notified in advance of making it. (In civil litigation, this is done by the service of process described above.)
Notice to parties

3. When
   (a) an application is made to an authority, or
   (b) an authority on its own initiative proposes

to exercise a statutory power, the authority shall give to all parties adequate notice of the application that it has before it or of the power that it intends to exercise.

The next step is to disclose the information the administrative body will use in making its decision (equivalent to discovery in civil proceedings) and give effect to the parties’ right to be heard (give evidence and make arguments as in a civil trial).

Evidence and representations

4. Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority
   (a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,
   (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
      (i) to permit the party to understand the facts or allegations, and
      (ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,
   and
   (c) shall give the party an adequate opportunity of making representations by way of argument to the authority.
The Alberta Act goes on to provide that representations need not be made orally if written material is adequate, and there is no absolute right to cross-examine any witness, which would always be allowed in a civil trial.

Finally, the act requires a decision to be made in writing (corresponding to a judgment following trial).

**Written decision with reasons**

7. When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out

(a) the findings of fact on which it based its decision, and
(b) the reasons for the decision.

The legal provisions above are examples of how the desire for flexibility in administrative decision-making has been reconciled with the need to maintain its legitimacy by providing fair and just procedures.

The overall process of notice, followed by disclosure, participation in a hearing, and receiving a decision is similar to that followed in civil and criminal litigation. Administrative proceedings, however, typically have fewer detailed rules about how these steps are to be taken.

**Critical Analysis of Process and Procedure**

The terms *process* and *procedure* are often used interchangeably. In this chapter they have been used to refer to different things. Process means the sequence of operations (activities) that occur within the legal system when a person asserts or defends a legal right or obligation. Process is therefore a general description of the steps to be taken in a lawsuit. Procedure, in this chapter, describes the way operations in the legal system are carried out, usually according to rules. Rules of procedure give a more detailed description of what must be done in each step of a legal process.

Some have criticized adversarial legal processes for being inappropriate, ineffective (or counter-productive), and inefficient. Although not inevitable,
the adversarial process does have a tendency to stimulate aggressiveness and hostility in the disputing parties. These effects are considered particularly inappropriate in situations such as family disputes where the needs of children are in question, and some form of continuing relationship between the parents is required. Carla Hotel and Joan Brockman found that family lawyers fall within a “conciliatory-adversarial” continuum in relation to how they viewed their roles.¹⁵ More conciliatory lawyers took “a contextual approach to finding a solution to a legal problem [taking] into account the relationship between the parties” while adversarial-oriented lawyers “focused on the duty to their clients and their clients’ rights.”¹⁶ Other critics have suggested that in family matters, the adversarial process is especially hurtful to children because it tends to ignore their interests and instead focusses on the conflict between parents.

Certain groups have promoted alternative dispute resolution processes such as mediation, in which lawyers play a lesser role, because they believe these do not stir up the same competitiveness and hostility as adversarial litigation. Lawyers themselves have responded to criticism by adopting new forms of practice such as collaborative law or cooperative law in a deliberate attempt to counter adversarialism. Collaborative family lawyers agree with their clients to represent them in negotiations but not in a trial, thus shunning the adversarial process completely.

Other critics of the adversarial legal process note that it forces the parties to take polarized positions and present contradictory evidence, when the truth probably lies somewhere in between. According to this critique, a truly just result would take each side’s interests (needs and aspirations) into account. Adversarial proceedings that require a choice between competing arguments (the debating model) do not allow the subtleties of the parties’ different perspectives to emerge. As Carrie Menkel-Meadow puts it, “the negative and reactive thinking produced by adversarial argument may limit more open ways of conceptualizing solutions to problems.”¹⁷

Another commonly recognized failing of the adversarial process is how it encourages expert witnesses (such as doctors or engineers) to be biased according to who has employed them and therefore less useful to a judge when deciding a technical issue. Rather than being the best route to finding the truth, adversarial proceedings can exaggerate any uncertainties, require excessive amounts of evidence to be obtained and presented, and thus drive up the cost of litigation. The counter-argument to this problem is that putting
the burden of proof (responsibility to present evidence) on the parties in the adversary system results in more useful information being presented to the decision-maker than in inquisitorial models. These are the ongoing debates about whether the adversarial process is an efficient one for determining facts and resolving disputes.

Some have also criticized legal procedure itself. As a set of detailed rules, it is another level of law that must be mastered before the merits (real matters in dispute) of a lawsuit can be brought before a judge for decision. Disputes arise over whether procedural rules have been properly followed, resulting in delay and increased expense. Procedural technicalities can be used to wear the other party down so that settlement appears more attractive than trial.

Critics of legal procedure have called for more informal processes. Alternative dispute resolution procedures have become popular because of their informality compared to litigation. As Tom R. Tyler states, such alternative procedures “seek to serve the joint interest of society and the disputant in having swift and low-cost justice.” He goes on to suggest that some informal procedures also better meet the parties’ desires to have a real voice in the process. In criminal processes, informality has been introduced through restorative justice initiatives that bring victims, offenders, and the surrounding community together outside the courtroom. Whether even these informal procedures can benefit from involvement of professionals such as lawyers is also a subject of debate.

Marc Galanter, in a classic article within law and society scholarship, describes the relative advantages of “repeat players” (those often involved in lawsuits) over “one-shotters” (those rarely involved in litigation). One of the advantages enjoyed by repeat players is that they gain useful knowledge and experience of legal procedure, and they are often able to hire lawyers, who are also repeat players, to assist them. Galanter’s concern about the fairness of legal processes is now shared by many; it is one focus of the access to justice movement.

The complexity and formality of legal procedures, and the advantage of having a lawyer to deal with them are aspects of the current legal system that challenge us again to consider its accessibility and responsiveness to the needs of society. Merely changing procedural rules may not, however, have the desired effect of increasing accessibility; this reality suggests another area where critical legal studies may contribute by analyzing and evaluating
procedural innovations that may yield beneficial substantive results. Those who can plan to follow legal steps they understand have greater access to justice through law; this highlights the importance of legal literacy for developing people’s capability to navigate the twists and turns of law’s processes and procedures.

CHAPTER REVIEW

After reading this chapter you should be able to:

• explain some critiques of legal processes and procedures
• list some differences between adversarial and inquisitorial processes
• describe the main steps of a civil litigation process and explain the functions of each step
• describe the main steps of a criminal legal process and explain the functions of each step
• explain what is meant by an administrative justice process and describe its main features
• research and describe a legal process in a legal jurisdiction