Canadian Civil Procedure Law

Kevin P. McGuinness

CANADIAN CIVIL PROCEDURE LAW

Second Edition

Linda S. Abrams

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Second Edition

DEDICATION

To honour our fathers,
Ian Abrams (Z"L) and
Patrick McGuinness

PREFACE TO THE SECOND EDITION

While very little time has passed since the publication of the first edition of this work, there have been very substantial changes in the law of civil procedure since the first edition was released in July 2008. The most significant of the changes result from the extensive amendment to the Ontario *Rules of Civil Procedure* effected by O. Reg. 438/08, which is widely referred to as the Osborne Regulation in reflection of the fact that most of the changes were derived from the Report of Coulter A. Osborne on Civil Justice Reform.[1]

By the time of the release of this edition, these amendments will have been in effect for several months. The Osborne Regulation (which was some 37 pages in length) constitutes the most extensive amendment to the *Rules* since the present regime came into effect in 1985.

The Report on which they are based brought forward widespread recommendations touching upon such aspects of civil procedure as Small Claims Court, the availability and process of simplified procedure, the summary disposition of proceedings under Rules 20 and 21, the increasing presence of unrepresented litigants in the civil justice system, the use of juries in civil cases, the scope and process of discovery, the use of expert evidence, the litigation management process, many of the specific aspects of trials and appeals (including management of proceedings, and the scheduling of hearings), venue, the use of technology in the civil justice system and the costs of litigation. It is likely that the full implications of changes of this magnitude will not be understood for many years.

It soon became clear from the reports that filtered out from the Rules Committee over the past year, that changes of the scope that were being considered required an immediate update of the first edition. In preparing this edition, we have sought to capture the most important implications of the Osborne Regulation on the Ontario civil justice process. However, the new edition goes well beyond an update of the pre-existing text. We have added three new chapters to the book, covering the law of limitations, proceedings against the Crown and class proceedings. We have also added additional (albeit far from comprehensive) references to the rules of civil procedure in effect in the common law provinces of Canada other than Ontario, so as to make the book more national in scope. Each of the chapters has been significantly augmented with new material, incorporating (a) the recent significant case law; (b) some additional explanatory material to clarify or amplify portions of the text; and (c) a discussion of a number of important concepts that somehow managed to escape coverage in the first edition. Since these additions resulted in some of the chapters becoming unwieldy,

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[1] Following the publication of the *Report of the Civil Justice Reform Project* in November 2007 ("*Osborne Report*"), the recommendations made in the Report were referred to the Civil Rules Committee for its consideration. The work of the Committee was completed in December 2008, with the publication of O. Reg. 438/08. It incorporated most of the Osborne recommendations, plus a few other amendments. The revisions set out in O. Reg. 438/08 came into effect on January 1, 2010.

we have divided certain of the longer chapters into two — such as the chapter on Trial and Costs — so as to make the text more approachable to the reader.

We hope that these changes will prove useful to our readers. Despite the additions which we have made to the text, we have tried to remain within our original plan to produce a book of convenient size to allow it to be carried into the courtroom and used as a ready reference by both the bench and bar. We have also tried to keep to the plan of writing a text that offers some useful commentary for more experienced litigation lawyers, while remaining approachable by students and new entrants into this area of practice.

PREFACE TO THE FIRST EDITION

This book is intended to provide a concise and easily understood summary of the law of civil procedure, with specific reference to that law as it applies in the Ontario courts. However, we have supplemented our detailed survey of Ontario legislation and case law with a reasonably thorough study of leading cases from across Canada, the United States, England, Australia and other Commonwealth jurisdictions. We have found that very often a study of such material reveals the underlying rationale of the law far better than does a study of purely domestic sources. An understanding of the similarities and differences of the various legal systems concerned also leads to an enriched appreciation for the subtleties and nuances of our own system of law.

We have written this book so that it will be of primary assistance to general practitioners, junior barristers and solicitors, articling students and law students — although we hope that more experienced counsel (and, perhaps, even the judiciary) will also find that it provides them with a convenient survey of the law. Our goal is to allow readers to develop a general but sound understanding of procedural law, without bogging down in the complexity and detail that tend to plague barrister-oriented texts on the subject. This is not to denigrate the value of the specialist text, but great detail imparted too early in the study of a subject can tend to lead to a diminished comprehension of basic legal precepts.

Our focus has been on setting out the principles of procedural law that every lawyer needs to know, in sufficient detail to allow those principles to be understood in their proper context. When we began work on this book, we envisaged a book of modest length rather than comprehensive scope, so that it might serve as a practical in-courtroom tool, as well as a classroom or desktop reference. In deciding what to include in, and exclude from, the text we have continually resorted to that target for guidance. Obviously, when seeking to reduce an extensive body of legislation and case law to a reasonably brief summary, there is a risk both of oversight and over-simplification. The difficult balance that we have tried to strike is to explore a sufficient number of rules to an extent adequate to allow the reader to grasp the fundamental tenets of the law of civil procedure, while keeping the text to a manageable size.

We have not considered at all the specialized procedures set out in Rules 64 to 75 of the *Rules of Civil Procedure* (Ontario), with respect to what are therein described as "Particular Proceedings". Similarly, we have also excluded consideration of such statutes as the *Bankruptcy and Insolvency Act*, the *Divorce Act* and the *Construction Lien Act*, that substantially modify the law of civil procedure with respect to the proceedings to which those statutes pertain.

Further, we are concerned here with law, rather than with courtroom gymnastics or forensic debate. To explain the distinction: the questions of whether to make an opening statement and how to do so effectively are matters of trial technique, and are therefore outside the scope of this work. However, the question of whether a party has a right to make such a statement — and, if so, what may go in it, and what is prohibited from being included within it — are issues

that relate to the law of civil procedure, and therefore are within the scope of this text. Accordingly, we do not discuss the strategic considerations that may guide counsel with respect to the prosecution or defence of a proceeding, or effective techniques for the presentation of a case or the examination of witnesses. While an understanding of law will not necessarily turn a lawyer into a courtroom gymnast, it is necessary to have such an understanding to appear as a competent advocate. Even the most articulate debater falls short when unable to bring and present a matter properly before the civil courts. To be an effective litigator requires a knowledge of procedural law, including those laws that create the courts and the offices associated with them, or that otherwise regulate or govern the administration of civil justice, up to and including the enforcement of decisions of the courts. The present law of civil procedure echoes the former laws from which it was derived. Therefore, we have also included a discussion of the evolution of the law, so as to gain the insight that past experience affords.

The precise boundary between the law of evidence and civil procedure law is always a matter of debate. We have included some aspects of the law of evidence in this text, where they are obviously relevant to the procedural process. These include a discussion of the various rules of evidence governing the contents of affidavits, the conduct of the discovery process, and the examination and cross-examination of witnesses. We have also included a discussion of expert witnesses and their very important role in the civil justice system. However, we have not included a discussion of "pure evidence" questions, such as the parol evidence rule, the hearsay rule and the various exceptions to both. As important as these subjects may be, they must await a further text that we are now writing on the law of evidence.

About the Authors

Master Linda S. Abrams, B.A. (Toronto and Sorbonne), J.D. (Toronto), LL.M. in dispute resolution (Osgoode and Pepperdine University School of Law, California), Master of the Superior Court of Justice (Ontario).
Until her appointment to the Bench in 1999, Master Abrams was a civil litigator — first with Fasken Martineau, and later with Torys. Concurrent with her law practice, Master Abrams served on the Criminal Injuries Compensation Board (adjudicator and Vice-Chair), the Health Professions Appeal and Review Board (adjudicator), and the University of Toronto's Ethics Review Committee (reviewer). Master Abrams is a frequent speaker at CLE conferences and has been an adjunct professor at Osgoode Hall Law School for more than 10 years. Her legal writings include articles for the Canadian Business Law Journal and a text on credit union law.

Kevin P. McGuinness, LL.B. (Windsor), LL.M. and SJD (Toronto).
Kevin is the author or co-author of more than 30 books that cover several distinct fields of law. These include the leading texts in the Commonwealth on ship mortgages and the law of guarantee, and the leading Canadian text on corporate law (*Canadian Business Corporations Law*, 2nd ed., published in 2007 by LexisNexis). He is also the editor of the world's largest published collection of banking and finance precedents, a substantial collection of precedents on the sale and manufacture of goods, as well as the Canadian Forms and Precedents corporations series. He is also an authority on both the commercial and legal aspects of public procurement. Kevin taught law in Canada, England and Australia for 10 years, and has over 19 years of legal experience in both provincial and municipal government, private practice and as in-house counsel to major corporations.

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