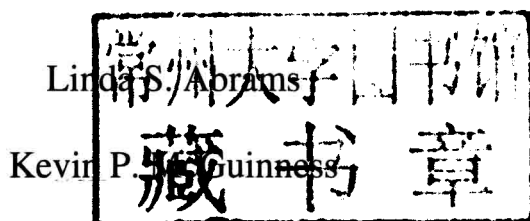


CANADIAN
CIVIL PROCEDURE LAW

Second Edition



LexisNexis®

Canadian Civil Procedure Law, Second Edition

© LexisNexis Inc. 2010

July 2010

All rights reserved. No part of this publication may be reproduced, stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the Copyright Act. Applications for the copyright holder's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorized act in relation to a copyrighted work may result in both a civil claim for damages and criminal prosecution.

Members of the LexisNexis Group worldwide

Canada	LexisNexis Canada Inc., 123 Commerce Valley Dr. E. Suite 700, MARKHAM, Ontario
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst und Verlag Orac, VIENNA
Czech Republic	Orac, sro, PRAGUE
France	Éditions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A
USA	LexisNexis, DAYTON, Ohio

Library and Archives Canada Cataloguing in Publication

Abrams, Linda (Linda S.)

Canadian civil procedure law / Linda Abrams, Kevin McGuinness. — 2nd ed.

Includes index.

ISBN 978-0-433-46445-7 (bound).—ISBN 978-0-433-46446-4 (pbk.)

1. Civil procedure—Canada. 2. Court rules—Canada. 3. Trial practice—Canada. I. McGuinness, Kevin Patrick II. Title.

KE8349.A73 2010

347.71'05

C2008-901698-X

KF8816.ZA2A73 2010

Printed and bound in Canada.

**CANADIAN
CIVIL PROCEDURE LAW**

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,

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.

TABLE OF CONTENTS

<i>Dedication</i>	v
<i>Preface to the Second Edition</i>	vii
<i>Preface to the First Edition</i>	ix
<i>About the Authors</i>	xi
<i>Table of Cases</i>	xxxiii
Chapter 1: Introduction	1
1. The Study of Civil Procedure	1
2. Civil Procedure and the Common Law	4
(a) The Common Law Legal Tradition	4
(b) The Roots of the Common Law	5
(c) The Adversarial System	6
(d) A Remedy-based System	7
(e) The Nature of Procedural Law	8
3. The Legal Context of Civil Litigation	11
4. Evolution of the Court System	14
(a) The Evolution of the English Court System	14
(i) The Court of Common Pleas	15
(ii) The King's Bench	17
(iii) The Exchequer	21
(iv) Other Superior Courts	22
(v) The Star Chamber	22
(vi) Open Procedure	24
(vii) Local Courts	25
(viii) The Court of Chancery	26
(ix) Assizes	28
(x) The Writ System	30
(b) Evolution of the Court System in Ontario	37
(c) The <i>Courts of Justice Act, 1984</i>	40
(d) The Ontario Court	41
(e) Other Provincial Courts	45
(i) Nova Scotia	45
(ii) Newfoundland	46
(iii) Manitoba	48
(f) Federal Courts of Canada	50
(g) American Procedural Reform	53
5. The Rule of Law and the Civil Courts	54
6. The Present Superior Court and Its Jurisdiction	66
7. Trials and the Investigative Process	70
(a) The Litigation Process	70
(i) The Rule of Law	71
(ii) Proceedings Against the Crown	73
(iii) Claims Against Non-residents	75

(b) The Adversarial System.....	76
(i) Generally.....	76
(ii) Strengths and Weaknesses of the Adversarial System.....	78
(iii) Jury Trials.....	78
(c) The Parties to a Proceeding	79
(i) Description of the Parties.....	79
(ii) Responsibility of the Parties	80
(iii) Nature of Trial Process	82
(d) Proceedings in Open Court.....	84
(e) Critique of the Civil Process.....	85
Chapter 2: The Civil Courts	89
1. Courts and Civil Justice Process	89
(a) The Nature of a Court	89
(b) The Fairness of the Process	92
(c) Types of Courts	94
(d) Jurisdiction.....	96
(i) Generally.....	96
(ii) Courts Having Equity and Common Law Jurisdiction	100
(1) Inherent Jurisdiction	101
(2) The Nature of Judicial Discretion.....	104
(3) Jurisdiction and Seisin	107
(iii) Proceeding in the Wrong Forum.....	111
(iv) Appellate Courts and Courts of Original Jurisdiction.....	111
(1) In General	111
(2) The Privy Council.....	114
(3) The Supreme Court of Canada.....	119
(4) The Nature of the Appeal Process	124
2. Judges and Masters	134
(a) Role of a Judge	134
(i) The Implications of the Adversarial Process	136
(ii) Bias and Recusal.....	140
(b) The Office of Master	154
(i) Generally.....	154
(ii) Jurisdiction.....	155
(iii) Varying or Setting Aside an Order of a Master	158
3. Judicial Independence.....	159
(a) Criticism of Judiciary	163
(b) Appointment and Removal of Judges.....	166
(c) Salary of Judges.....	167
(d) Number of Judges	168
(e) Judicial Immunity	169
4. <i>Stare Decisis</i> in the Courts of Civil Jurisdiction.....	178
(a) Rationale for the Doctrine.....	180
(b) Application of the Doctrine	182
(i) Generally.....	182
(ii) Foreign Courts of Common Law	185

(c) Avoiding the Application of the Doctrine	188
(i) Archaic Principles of Law	188
(ii) Changing Social and Economic Conditions.....	192
(iii) Distinguishing Cases on their Facts	193
(iv) <i>Per Incuriam</i> Decisions	194
(v) Legislation Supreme	194
(d) Application of the Doctrine in Appellate Courts	194
(e) <i>Obiter</i> in the Supreme Court of Canada	196

Chapter 3: Foundation Principles and Concepts 199

1. The Law of Civil Procedure.....	199
(a) A Codified Area of Law	199
(b) The Scope and Limits of the Rule-Making Power.....	200
(c) Procedural and Substantive Law.....	204
(d) Securing a Just Result	207
(e) Proportionality	213
(f) Rules of Court Across Canada.....	215
2. The Accrual of a Cause of Action.....	216
(a) Generally	216
(b) Live Dispute (Moot Cases)	219
(c) Proceedings that May Be Instituted Only with Leave	220
(d) Standing	223
(e) Capacity and Rights Acquired and Wrongs Committed Prior to Birth.....	229
(f) <i>Res Judicata</i> , Issue Estoppel and the Concept of Collateral Attack ..	232
(i) Overview.....	232
(ii) The Collateral Attack Principle	235
(iii) Interlocutory Proceedings	239
(iv) Discretion to Permit Re-argument	242
(v) Judicial Immunity	244
(g) <i>In Rem</i> Actions and Judgments.....	244
3. The Role of the Lawyer in the Civil Process	246
(a) The Meaning of “Lawyer”	246
(b) Representation by a Lawyer	251
(i) The Duty of a Lawyer.....	252
(ii) The Authority of the Lawyer	253
(iii) Establishing Authority	253
(iv) The Liability of a Lawyer	254
(1) Generally	254
(2) Applicable Standard of Care.....	257
(3) Professional Negligence	259
(4) Professional Judgment	264
(v) Change of Lawyer.....	265
(vi) Non-Lawyer Agents.....	270
(vii) Unrepresented Litigants	272
(c) Litigation and Professional Ethics	275
(i) Generally (the Retainer).....	275

(ii)	Barratry, Champerty and Maintenance	277
(iii)	The Rules of Professional Conduct.....	278
(iv)	Failure to Keep Client Informed, to Follow Instructions, <i>etc</i>	279
(v)	Duty of Competent Representation.....	280
(vi)	The Lawyer's Duties Are Owed to the Client.....	281
(vii)	Courageous Advocacy	282
(viii)	Maintaining the Integrity of the Judicial System	283
(ix)	Improper Treatment of the Court	287
(x)	Disclosure of Contrary Authority	288
(xi)	Dealings with Witnesses	290
(xii)	Undertakings.....	291
(xiii)	Communicating with Another Lawyer's Client.....	292
(xiv)	Possibility of a Dangerous Situation	292
(xv)	Counsel Should Not Appear as a Witness	293
(xvi)	Delivery of Material to the Client	294
(xvii)	Withdrawal from Service	295
(xviii)	Conflict of Interest	297
	(1) General Principles.....	297
	(2) Removal of a Lawyer.....	298
(xix)	Judicial Notice of the Law	313
(d)	Privilege and Confidentiality	315
	(i) Privilege and Confidentiality Distinguished	317
	(ii) Legal Professional Privilege	320
	(iii) Timing of the Duty of Confidentiality	323
	(iv) The Limits of Privilege	324
	(v) Litigation Privilege	328
	(vi) Implicit Waiver and Loss of Privilege upon Disclosing the Receipt of Legal Advice	331
(e)	Law Societies.....	338

Chapter 4: Commencement of a Civil Proceeding..... 341

1.	Introduction.....	341
2.	The First Steps	342
	(a) Authority to Commence Proceeding.....	342
	(b) Potential Litigants.....	343
	(c) Joinder	343
	(d) Sovereign Immunity	347
	(e) Vexatious Litigants	350
	(f) Estate Claims	352
	(g) Relator Proceedings.....	352
3.	No Formal Pre-Action Protocol	353
4.	Cases Involving Constitutional Issues	354
5.	Bars to Relief	354
	(a) Statutory Notice Requirements.....	354
	(b) Limitation Periods	355
	(c) <i>Ex Turpi Causa</i>	359

6. The Procedure for Commencing a Proceeding	375
7. The Style of Cause (or Title of Proceeding)	379
8. Representation Orders	382
9. Class Proceedings	385
10. Claims By Third Parties, Assignment and Subrogation.....	385
(a) Subrogation.....	387
(b) The Origin of the Right of Subrogation	388
(c) Statutory Modification of the Subrogation Concept	390
11. Allegations of Wrongdoing against a Lawyer	391
12. Proceedings <i>in Forma Pauperis</i>	392
13. Notice of Constitutional Question.....	393

Chapter 5: Statutes of Limitation..... 395

1. Introduction.....	395
(a) No Common Law Limitations	397
(b) The Nature of Limitations Legislation.....	401
(c) The Modern Limitations Framework.....	403
(i) No Need for Prejudice	406
(ii) Federal Court Proceedings	407
(iii) Bankruptcy, Liquidation and Limitations	407
(d) For and Against the Notion of Limitations Legislation	408
2. Scope of the Act.....	411
(a) Real Property Claims	412
(b) Appeals and Judicial Review	413
(c) Quasi-Criminal Proceedings	413
(d) Limitations Legislation as Substantive Law	414
3. Limitation Periods.....	419
(a) Basic Limitation Period	419
(i) How Defence Adjudicated	420
(ii) How Appropriate Is a Two-Year Limitation Period?.....	421
(iii) Discoverability	423
(1) Common Law	423
(2) The Statutory Approach Under the 2002 Act	425
(3) Non-Applicability of Common Law Doctrine of Discoverability.....	428
(4) Demand Debts and Guarantees	428
(5) Defendant Misconduct.....	429
(b) Ultimate Limitation Period	431
(i) The Concept of an Ultimate Limitation Period.....	431
(ii) The Cost versus the Benefit	432
(iii) Cultural Property.....	434
(iv) Persons Under a Disability, <i>etc.</i>	435
(c) Laches.....	436
(d) No Limitation Period	436
(i) Declaratory Orders.....	437
(ii) Enforcement Proceeding	439
(iii) Support Orders.....	440

(iv)	Property Subject to Security Interests	440
(v)	Undiscovered Environmental Claims	440
4.	Application to Specific Cases	441
(a)	When Causes of Action Arise	441
(b)	Concurrent Liability	444
(c)	Continuing Contracts	446
(d)	Insurance Contracts	446
(e)	Fraudulent Conveyances	447
(f)	Assaults and Sexual Assaults	449
(g)	Proceedings Against an Undisclosed Principal	452
(h)	Defendant Misconduct	452
(i)	Limitations and the Charter	453
5.	Specially Protected Persons	453
(a)	Exceptions	453
(b)	Minors	454
(c)	Incapable Persons	457
(d)	Tolling Escape Clause	457
(e)	Claims by the Crown	458
(i)	Provincial Crown	458
(ii)	Federal Crown	463
(iii)	Exempt Crown Claims	463
(f)	Aboriginal Land Claims	464
(g)	Poverty	466
(h)	Soldiers and Other Service Personnel on Active Duty	466
6.	Statutory Revival or Extension of Claims	467
(a)	Attempted Resolution	467
(b)	Acknowledgments	468
(i)	Generally	468
(ii)	Formality	469
(iii)	Acknowledgment of Joint Debts	471
(iv)	Incidental Provisions	472
(v)	Reconciling Acknowledgement with Substantive Law	473
(c)	Part Payment and Pre-authorized Payments	474
(i)	Generally	474
(ii)	Pre-authorized Payments	474
(iii)	Appropriation of Payments	476
7.	Notice of Possible Claim	477
8.	Effect of Apology	477
9.	Procedural Considerations	478
(a)	Default Judgment	478
(b)	Adding Party	478
(c)	Misnomer and Parties Identified by Fictitious Name	482
(d)	Contribution and Indemnity	485
10.	Limitation Periods Apply Despite Agreements	485
11.	Transition	488

Chapter 6: Proceedings Against the Crown	491
1. Introduction.....	491
2. The Provincial Regime	499
(a) Crown Corporations and Agencies — Clause (b).....	501
(b) Due Enforcement — Clause (d).....	501
3. The Liability of the Crown	502
(a) Abolition of Petitions of Right.....	504
(b) Liability in Tort	505
(c) Separate Liability.....	506
(d) Property Vesting in the Crown	506
(e) Judicial Acts	507
(f) Application of Law as to Indemnity and Contribution	510
(g) Constitutional Claims Against the Crown	510
(h) Legal Proceedings Against a Minister of the Crown	512
4. Conduct of Proceedings	512
(a) Notice of Claim	512
(b) Service on the Crown.....	515
(c) Trial without Jury	515
(d) Discovery	516
(e) Interpleader	517
5. Remedies Against the Crown.....	518
(a) Injunctions and Interlocutory Relief	518
(b) Recovery of Property from the Crown and <i>in Rem</i> Remedies	519
6. Civil Proceedings Against the Federal Crown.....	519
7. Special Areas of Concern.....	523
(a) Defence of Exercise of Statutory or Other Legal Authority	523
(b) Declarative Relief	532
8. Conclusion	536
 Chapter 7: Class Proceedings	 537
1. Introduction.....	537
2. Certification	541
(a) Motion for Certification.....	542
(i) The Representative Complainant.....	545
(ii) The Class	546
(iii) Common Issue	548
(iv) Preferable Procedure.....	552
(v) Disclosure of a Cause of Action	556
(vi) Merits Test.....	556
(vii) Certain Matters No Bar to Certification.....	557
(viii) Settlement Only Class Proceedings	559
(ix) Refusal to Certify.....	559
(b) Notice of Certification	560
(i) Generally.....	560
(ii) Notice Where Individual Participation Is Required	561
(iii) Court Authority re Notices.....	562
(c) Opting Out and Participation by Class Members.....	562