

Canadian Civil Procedure Law

FIRST EDITION

Linda S. Abrams
Kevin P. McGuinness



LexisNexis

CANADIAN CIVIL PROCEDURE LAW

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July 2008

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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.

Includes index.

ISBN 978-0-433-45742-8 (bound).—ISBN 978-0-433-45744-2 (pbk.)

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

KE8349.A73 2008

347.71'05

C2008-901698-X

KF8816.ZA2A73 2008

Printed and bound in Canada.

CANADIAN
CIVIL PROCEDURE LAW

DEDICATION

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

PREFACE

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.

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