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## CHOATE ON DISCOVERY, SECOND EDITION

Cudmore Release No. 8, September 2025

This book provides practitioners with both a procedural and analytical framework for the discovery process, covering such areas as oral examination, documentary discovery and medical examinations, as well as less commonly used discovery tools such as interrogatories and inspection of property. Features include the discovery rules for all Canadian common law jurisdictions, Table of Concordance linking the discovery rules from all jurisdictions to facilitate use of case law, thematic organization so that knowledge of discovery rule number is not required by researchers, and case law summaries that are clear and concise, covering the meaningful judgments and orders that interpret the Discovery rules.

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## What's New in this Update:

This release, which updates the case law in Chapter 2 (Examination for Discovery), Chapter 3 (Discovery of Documents), Chapter 5 (Physical Examinations), and Chapter 6 (Inspection and Preservation of Property) features 26 new case digests covering topics related to the discovery process.

## Case Law Highlights:

- Chapter 5—Physical Examinations—When the Examination May Be Held—Defendants brought motion for an order compelling plaintiff to attend defence medical examinations with physiatrist and neuropsychologist, and to extend the time for services of the ensuing reports. Under section 105(2) of the Courts of Justice Act, the court maintains discretion to order a plaintiff to attend a defence medical examination. Defendants argued their non-compliance was multi-layered. Court clarified that an "intention" to schedule defence medical examinations over an eight-year period since commencement of the proceedings fell short of being a reasonable explanation for not actually arranging them. There was no evidence before the court of any request by defendants for a medical examination before April 2024. Furthermore, defendants consented to the timetabling order in 2021 whereby all parties agreed to serve expert reports in accordance with the Rules of Civil Procedure. When considered in the context of the procedural background, any disadvantage now suffered by defendants was self-inflicted. Motion dismissed. Plaintiff entitled to all-inclusive costs of \$8,500 due in 30 days: Nykilchuk v. 2244301 Ontario Inc. et al, 2024 CarswellOnt 14016, 2024 ONSC 5025 (Ont. S.C.J.).
- Chapter 6— Inspection and Preservation of Property— Extent of Inspection Tests—Plaintiffs brought motion for order under Rule 32 of the Rules of Civil Procedure, approving a protocol for destructive testing of a medical device. During an emergency procedure to remove a blood clot from EL's brain, the device broke in two: one part remained in EL's brain, the other was preserved for testing. While parties took position that plaintiffs should be permitted to perform certain testing on the device, the method, scope, and costs were in dispute. Plaintiff's evidence did not address specific concern raised by defendant as a result of a failed test: if a repeat of the test failure were to occur on the critical portion, the ability of defendant to rebut any findings by plaintiff's experts would be made impossible. Rather than a blanket approval of plaintiffs' proposed protocol, defendant proposed specific protocol be ordered which the court deemed practical. Motion

granted on terms:  $Logan\ v.\ Stryker\ Canada\ Corp.,\ 2024$  CarswellOnt 17340, 2024 ONSC 6171 (Ont. S.C.J.).