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CHOATE ON DISCOVERY, SECOND EDITION

Cudmore

Release No. 9, October 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), and Chapter 5 (Physical Examinations) features 29 new case digests covering topics related to the discovery process.

Case Law Highlights:

- **Chapter 2—Examination for Discovery—Costs—**Defendant brought a motion for costs thrown away after preparing for an examination for discovery that was cancelled by plaintiff's lawyer because he would not conduct the second day of the examination until the co-defendant left the room. Defendant lawyer submitted that the refusal to continue was improper, and costs of \$1,500, all inclusive, ought to be payable. There was no rule permitting a lawyer to bring a motion for costs thrown away during a proceeding. Generally, costs are determined at the end when the court knows which of the parties was successful at the trial or on the motion. Hence the general principle that "costs follow the cause" or "event". Courts do not award, and lawyers do not expect to collect, costs following each step in the litigation process. Motion dismissed: *Labow v. Durham Label Inc.*, 2024 ONSC 4585, 2024 CarswellOnt 12385 (Ont. S.C.J.).
- **Chapter 3—Discovery of Documents—Instances Where Privilege Has Been Allowed—**Landlord leased commercial space to tenants in mall for 20 years. Landlord commenced action alleging tenants abandoned lease after three years. There was documentation in tenants' materials confirming that law firm was defendants' counsel when lease was executed. Tenants removed pleading that they did not receive legal advice before signing lease and admitted to receiving legal advice regarding lease. Tenants pleaded landlord misrepresented amount of foot traffic which induced them to sign lease. Landlord's motion for production of law firm's file was granted. Trial judge determined solicitor-client privilege had been waived. Tenants appealed. Appeal allowed. Trial judge improperly concluded that tenants waived privilege by putting their mental state in issue and pleading no receipt of legal advice in their first pleading. Trial judge considered version of pleadings that no longer applied or would apply to trial issues, and improperly equated amendment of pleading with attempt to "unwaive" privilege. Amending pleading is not same as trying to retract filed document or served and filed affidavit from lawyer: *One York Street Inc. v. 2360093 Ontario Ltd.*, 2024 ONSC 4272, 2024 CarswellOnt 21881 (Ont. Div. Ct.).