Book Review
Compte rendu

Civil Litigation

Janet Walker and Lorne Sossin
Toronto: Irwin Law Inc 2010, 299 pages.

Reviewed by Barbara Billingsley*

In almost any context, it is difficult to generate interest in the study of procedural rules. That is why instruction manuals are commonly set aside in favour of "trial and error" learning and why (with the possible exception of ever-popular weight loss guides) "how to" books rarely fill the bestseller lists. It is also why civil procedure is a uniquely challenging area of law for students, academics and practitioners. Whether learning, teaching or applying the law, lawyers tend to be more interested in analyzing the facts and legal principles associated with a lawsuit than in exploring the mechanisms which govern the litigation process. So, the study of civil procedure often plays the role of sorry second cousin to the exploration of substantive legal issues.[1]

Fortunately, however, the challenge of appreciating the importance of litigation procedures and understanding basic litigation mechanisms in Canada has recently been made easier with Irwin Law's publication of *Civil Litigation* by Janet Walker and Lorne Sossin. This is an exceptionally readable treatise which provides an informative review of the fundamental steps and issues involved in civil litigation in Canada. While managing to be simultaneously thorough and concise, the authors of this book confront the challenge of engaging the reader in the study of procedure by consistently wedding the discussion of the litigation process to an explanation of the underlying themes, policy considerations and historical origins of the steps in litigation. *Civil Litigation* is a text which acknowledges that, in order to capture the reader's interest in *how* litigation operates, it is first necessary to ensure that the reader understands *why* lawsuits are used to resolve civil disputes and *why* particular litigation processes can assist or hinder this resolution.

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1 As noted by Justice Robert S Sharpe of the Ontario Court of Appeal in the Foreword to Janet Walker and Lorne Sossin, *Civil Litigation* (Toronto: Irwin Law, 2010) at xv: "As a scholarly discipline, civil procedure has languished in the shadow of its more fashionable academic cousins in the standard law school curriculum. There has been a tendency for legal scholars to focus their attention on substantive, rather than procedural, law."

In the book's Preface, Walker and Sossin state that their purpose is to fill a void in the academic literature by providing

> an introductory work on the subject of civil litigation that places it in the larger institutional, professional, and social context of dispute resolution … which explains its main aspects in a way that is informative to members of the legal community and accessible to the larger community.[2]

This is an ambitious mandate, particularly given the various factors which currently conspire to make civil procedure a complex area of Canadian law. For instance, while some civil lawsuits are heard in a court administered by the federal government, most civil litigation is conducted in courts administered by the provinces or territories. This means that, at any point in time, there are at least fourteen sets of civil procedure trial rules operating in Canada – one for each province or territory and one for the federal trial court. The challenge of explaining basic civil procedure in the context of so many separate sets of rules is exacerbated by the fact that, in recent years, legislators in many jurisdictions have been busy reforming civil procedure rules, either on a piecemeal or a wholesale basis. These reform initiatives have themselves involved a range of processes and have produced a variety of outcomes.[3] Accordingly, while the overall process of litigation is more or less constant across the country, the detailed rules of civil procedure operating in Canada are a moving target, varying both by jurisdiction and by point-in-time. Walker and Sossin deal with this problem by taking a wide view of the litigation process and by focusing on first principles. For example, rather than discussing the topic of pleadings in the context of specific rules in each jurisdiction, the authors focus on the notion that, whatever the particularities of a given rule, the guiding principle in Canada is natural justice. Pleading and service rules reflect the idea that every litigant is entitled to adequate notice of the case against him.

Throughout the text, Walker and Sossin explore such fundamental principles against a backdrop of several interrelated themes that are central to an understanding of contemporary Canadian civil procedure. These themes include:

- the relationship between substantive law and litigation procedure (one cannot effectively exist without the other);

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2 *Civil Litigation*, *ibid* at xvii.

3 For details of some recent rule reforms, see e.g. <http://www.albertacourts.ab.ca/RulesofCourt/Spotlight/tabid/310/Default.aspx>; <http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp>; <http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp>

- the notion that obtaining "justice" in the civil context may necessitate balancing a litigant's interest in obtaining recompense for a civil wrongdoing against the litigant's interest in conserving time and cost necessary to achieve that result;

- the idea that, while designed to prepare litigants for a civil court trial, pre-trial litigation procedures are also effective tools for achieving pragmatic, cost-effective and definitive results in advance of a trial.

Such themes underscore the critical point that civil procedure is not an end in itself; litigation processes only make sense in the context of the larger goal of resolving a civil conflict in an effective, efficient and fair manner. Where procedural rules are used without maintaining this fundamental goal as a guiding principle, the pursuit of justice is thwarted for all parties involved. As Binnie J of the Supreme Court of Canada recently noted:

> The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight.[4]

This may seem an obvious point, but it is one which deserves reiteration, perhaps because its very obviousness means that it is easily forgotten.

With such themes in mind, Walker and Sossin follow a logical format to explain the litigation process. They begin with two chapters which serve to situate to the subsequent discussion of specific procedural steps. Chapter 1 discusses "Civil Procedure in Context," setting the stage for what follows by defining civil litigation in contrast to other forms of dispute resolution, describing the relevant court structures, and reviewing the fundamental components of the adversary system and the sources of modern day civil procedure rules. Chapter 2 examines the concepts of costs and access to justice and their impact on the development and operation of civil procedure rules. In the "real" world, while the issue of litigation costs generally comes before a court after a lawsuit or a legal issue has been resolved, cost considerations are often the driving force in a litigant's procedural decision-making. Accordingly, the discussion of costs at the start of this text is appropriate and useful because costs considerations impact on all of the litigation steps discussed in the remainder of the book.

In Chapter 1, the authors contend that the litigation process is divided into five main steps: (1) preliminary considerations regarding commencement

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4 *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, 3 SCR 535 at para 41.

of the lawsuit; (2) pleadings; (3) discovery and privilege; (4) disposition without trial and pre-trial relief; and (5) trial. This standard chronology of civil litigation appropriately serves as the structure for the bulk of the book, with the exception of the trial step, which is not discussed in any detail.[5] Chapter 3 addresses preliminary considerations involved in commencing litigation, such as standing, limitation periods and service requirements. Chapters 4, 5 and 6 discuss matters related to pleadings including the type and content of pleadings, restrictions and requirements for joining parties and claims, and the general requirements of a class proceeding. Chapters 7 and 8 deal with discovery and privilege in turn and Chapters 9 and 10 respectively explain the mechanisms for obtaining disposition without trial and pre-trial relief. The book concludes with Chapter 11, which offers an explanation and critical analysis of recent civil justice reform initiatives.

Although it covers all of the fundamental steps involved in civil litigation, this book is not a litigation handbook. For the most part, details of rules and litigation mechanisms available in specific Canadian jurisdictions are not discussed. The text is not bogged down with rule numbers or case law citations.[6] Instead, each chapter is devoted to discussing the relevant litigation step in fundamental terms, occasionally providing examples of specific rules, but more often emphasizing the themes outlined above and reminding readers of the common purpose behind the rules of the civil litigation process in every Canadian jurisdiction. For instance, when explaining pre-trial discovery, Walker and Sossin note that this process is designed to facilitate the adversarial process employed by Canadian courts:

> In general, the adversary system is one in which each party prepares and presents its case independently and in an adversarial way. However, the parties must cooperate with one another in exchanging information in the discovery process to ensure that the relevant issues are joined at trial and that each party has a fair opportunity to present its case and to answer the case presented by the other side.[7]

Further, without stressing comparative elements, where it is helpful to understanding a particular step in the context of the overall litigation process, the authors do contrast the rules operating within different jurisdictions within Canada or compare Canadian procedure with that of

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5 It is appropriate to leave out trial procedure because the rules of trial process are generally matters of evidence which operate independently of the pre-trial litigation steps.

6 Although the Table of Cases is fifteen pages long and is estimated to include 350-400 cases, the case authorities are referenced in the text itself to illustrate general principles or to provide examples of broad application.

7 *Civil Litigation*, *supra* note 1 at 167-68.

the United Kingdom and the United States. For instance, again in the context of discovery, the authors point out that the Canadian tradition of restricting oral discovery to the litigants themselves stands in contrast to the litigation tools available elsewhere:

> … only in rare situations will the court order non-parties to provide information or testimony in advance of trial and only upon meeting a stringent test of necessity. This is in contrast with the relatively routine process in the United States of deposing non-parties and multiple representatives of corporations who are parties in the proceeding. This scope for discovery is also in contrast, however, with the scope provided under the rules that apply in the English courts in which documents are exchanged pursuant to judicially mandated levels of disclosure but potential witnesses are not examined before trial.[8]

Overall, *Civil Litigation* is a useful text because it provides the reader with a clear explanation of the fundamental steps involved in litigating a civil dispute in Canada along with an understanding of the purpose and philosophy underlying each of those steps, and the issues which may arise in following each step. This is useful information for those learning civil procedure and a valuable reminder for lawyers and judges applying the rules of civil process. In short, this book is a fitting addition to the publisher's series on the Essentials of Canadian Law.

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8 *Ibid* at 168.