BOOK REVIEWS

DISCOVERY IN CANADA, by Clare E. Choate, Carswell, Agincourt, 1978, 420 pp., $42.00.

Discovery in Canada is a fairly recent, and very valuable contribution to the library of the practicing lawyer. Cataloguing for the first time a majority of the Canadian, and many of the English decisions on this confusing subject, it provides ready access to the recurring and often complex questions which arise in this most important of pre-trial procedures.

It has been observed that a series of headnotes arranged horizontally is a textbook, a series of headnotes arranged vertically is a digest, and a series of headnotes arranged topically is an encyclopedia. With that in mind, it is difficult to characterize Mr. Choate's book except to put it slightly to the left of a digest and to the right of a textbook. For example, the author does not limit himself to a recitation of the decided cases, but includes a liberal portion of excellent advice. If attention were given to the following, most, if not all, discoveries would be vastly improved:

> The advisability of careful preparation for the examination cannot be given too much emphasis. Full preparation is imperative for there may be no second opportunity before trial. Read the file, the brief, and the pleadings, and review the law. (p. 11)

Nor is the book limited to examination for discovery alone, for although that is an important part of the pre-trial discovery process, it is by no means all of it. The section on discovery of documents is comprehensive. While few counsel neglect to conduct an examination for discovery, the service of a Notice to Produce Documents is in all too many cases lacking altogether. As most cases involve at least two or three crucial documents, and as many cases turn on their documents, the manner in which these important clues to reality are disclosed by each side to the other deserves careful attention. Some of the complexities in this area, highlighted by Mr. Choate's book, deserve careful exploration. For example: most counsel would likely tend to be liberal when deciding what to produce. That may, however, contain hidden pitfalls. Choate cites *Ritholz* v. *Manitoba Optometric Society* (1958) 66 M.R. 266 as follows:

> If a document is listed by a party, it is assumed to be relevant, and its relevancy cannot later be denied by that party.

Does that mean, then, that counsel may one day choke on his own liberality and should therefore be sparing in his production of documents? Consider this: *St. Regis Timber Co.* v. *Lake Logging Co.* (1947) 3 D.L.R. 56 (B.C.C.A.):

> When a document is refused on the ground of irrelevancy, the examining counsel has the right to ascertain by cross-examination whether the document is in fact relevant.

Is the matter put to rest by Alberta Rule 198?

Mr. Choate's chapter in interrogatories is, unfortunately, of no use in this province. Interrogatories, the classic British form of discovery, is in use alongside of oral discoveries in some provinces. Alberta has not yet absorbed that valuable procedure and the reading of the chapter makes one wish that we had. Simply stated, interrogatories are written questions of fact addressed by one party to another. While less useful than oral discovery in most cases, they can replace discoveries in simple cases, and

supplement them in others. The Manitoba Court of Appeal stated the advantage succinctly in *Grierson* v. *Osborne Stadium Ltd.* [1933] 1 W.W.R. 634 at page 301:

> A party should be encouraged to attempt to get his discovery through the inexpensive method of interrogatories rather than by the costly procedure of *viva voce* examination.

Those lawyers and litigants who have waited months and sometimes years for the completion of examinations for discovery will find the optional system of interrogatories a welcome alternative. Enlightening reading in this chapter may well encourage some modification of the Alberta Rules.

Mr. Choate's work is concluded with brief chapters on physical examinations and the inspection of preservation of property—procedures noted more for their rarity than complexity. Nevertheless, these areas fill out the scope of the work and include valuable information.

The strength of *Discovery in Canada* is that it is the only source book available on the topic in this country. That, too, is its major weakness for one will readily find many conflicting decisions within the covers of the book and Mr. Choate has given us no guidance to their reconciliation. We can, however, be grateful enough that we have the book at all to overlook this defect.

The spectre of litigation without discovery is appalling. That of litigation over discovery is worse. Discovery should smooth the path of litigation and must rely, to a large extent, on the mutual goodwill of counsel. A little knowledge can indeed be dangerous, but it is to be hoped that a lot of knowledge, such as provided by Mr. Choate's book, will not become a tool in the hands of those who would like to indefinitely postpone the trial of the case on its merits.

As is commonly known by any lawyer who practices in the courts, by far the vast majority of today's litigation is resolved before trial, but only after the discovery stage. Increasingly, discovery has become not only *a* tool but *the* tool, not only for resolving discrepancies in evidence, and in assessing the strengths and weaknesses of both one's own and one's opponents' cases, but also in settling the conflict itself. Conducted often in ignorance of all but the most fundamental rules of discovery procedure, successful discovery depends most often upon the goodwill of participating counsel. However, in those hopefully rare cases where disputes arise either because of unreasonable or antagonistic counsel or in cases of serious and important disputes of law, rules and precedents for discovery have been historically difficult to find without exhausting effort. While, therefore, one hopes not to see counsel arriving for discovery with his file under one arm and Mr. Choate's book under the other, this volume will nevertheless provide a useful guide when reason and goodwill cannot prevail.

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