

PRACTICE ON MOTIONS AND REFERENCES. By D.A. Peppiatt & R.B. Linton. Butterworths, 1988. Pp. 128. (\$42.95)

Attendance at a Master's motion for a beginning counsel or articling student can be at times confusing and intimidating. To the uninitiated, Masters' motions may appear to have their own unwritten code of procedure and conduct. It is a common articling experience to appear before the Master only to be reprimanded for the incompleteness of the motion record, procedural inadequacies or a legion of other possible mistakes. The fact that the Rules of Civil Procedure and the practice directions of the Masters' office provide instructions regarding the materials and procedures for motions is often insufficient to answer the numerous questions of the inexperienced advocate.

PRACTICE ON MOTIONS AND REFERENCES by Master Peppiatt and Master Linton appears to have been written to assist students, beginning counsel and counsel who do not appear frequently before the Masters and to provide a thorough review of the procedural requirements of such appearances. The idea is very sound: to provide a good reference work to the very busy Masters' courts. Many of its contents, of course, will be applicable to motions before other courts. The book achieves its purpose to a considerable degree.

The work contains two sections: one by D.A. Peppiatt and one by R.B. Linton. Its strengths lie in the wisdom of the two authors, both very senior and respected Masters in Toronto who provide a thorough analysis of basic procedural issues. The book is concise. While this is admirable, it could benefit from a more expanded treatment in several areas as some interesting issues are discussed only briefly. Furthermore, the format and editing of the book could have been improved much to its benefit. While it gains the insights of two separate authors, it suffers from having two distinct and at times disjointed styles and formats. In effect, there are two separate books. A greater effort at integration and a stronger hand in editing would result in a more readable and useful work.

The book commences with a discussion of the Masters' jurisdiction. This issue is a logical starting point as it is essential for persons appearing before the Master to turn their mind to the issue of jurisdiction each and every time a motion is to be brought. As Master Peppiatt points out at the opening of the book, the first question that counsel must ask before embarking on a motion is: What court or what judge or officer within a court has the jurisdiction to grant the relief sought?

This first chapter is a good example of why the book meets with mixed success in achieving its goal. While it correctly points out the importance of the jurisdictional issue when moving before a Master, it begins inappropriately with a theoretical discussion of the constitutional jurisdiction of the Masters. The discussion is quite interesting, but it is a complicated place to begin a book on Masters' motions. It is unfortunately easy for the reader seeking practical advice to quickly leave the theoretical aspects to move on to the more mundane later chapters. In

doing so, a reader would not benefit from several of the author's useful observations contained later in the chapter. Some restructuring or the use of headings to direct the reader would have been of benefit here.

The second chapter, "Evidence on Motions", contains similar strengths and weaknesses. The chapter contains a very useful discussion of the author's analysis of the procedural requirements. Master Peppiatt fully canvasses the various requirements and issues involved in the Rules of Civil Procedure. However, this chapter also would have benefitted from subheadings, in addition to a more thorough analysis of certain issues. For example, the restrictions upon cross-examination provided in Rule 39.02 are mentioned at pages 24 and 25. The rule essentially provides that a party who is cross-examined upon an affidavit shall not subsequently deliver an affidavit or conduct an examination under Rule 39.03 without leave. At page 25 the author states:

Moreover, the Rule provides that such leave can only be granted in order to permit the party who requests it to respond to any matter raised upon the cross-examination. This Rule is likely to be strictly construed so that, if the evidence to be responded to is already in the affidavit leave will be refused even though it is also dealt with on the cross-examination.

This is an important procedural point on motions and would have borne a more thorough analysis. A close reading of Rule 39.02(2) appears to leave a discretion in the court to grant leave in circumstances other than where the court is satisfied that the party ought to be permitted to respond to material raised on the cross-examination. Master Peppiatt is accurate in suggesting that the policy of this Rule is to limit a war of affidavits, and it appears the Rule has already done so, but one can envision circumstances in which leave will be sought by an applicant in situations other than responding to matters raised on the cross-examination. A discussion of these issues would have been very useful to the profession as the problem arises with some frequency. The chapter contains other minor difficulties — for example, the text of Rule 39.02(1) and (2) is set out at both page 22 and 24 of the chapter. Such repetition could have been eliminated with more editorial control or review.

The further chapters written by Master Peppiatt review Motions Without Notice, Contested Motions, Costs, Advocacy before the Master and Family Law Matters. All of these chapters contain thorough discussions of the important rules and practical items of advice from the learned Master. In the Motions Without Notice chapter, he stresses the importance of full disclosure on *ex parte* motions. For both ethical and tactical reasons such disclosure is essential. The time of appearance in Toronto is also clearly pointed out — anyone who has appeared at the *wrong* time knows how essential this advice is! It is interesting to note that the chapter on Contested Motions included subheadings — useful both for the casual reader and the advocate in search of a quick answer.

One of the highlights of the book is a chapter entitled "Advocacy Before the Master". The chapter is brief but contains many helpful points of which all counsel may need reminding from time to time. For example,

the Master reminds counsel to be fully conversant with the evidence and the material, and then continues to remind counsel to ensure that the material before the Master is complete. (Many readers no doubt have seen or attended at a motion on objected questions when the full transcript is not available but is needed to explain the context of a particular question.) The best advice, however, is contained at page 65 in three short sentences:

To do this [be a persuasive advocate] requires a knowledge of the facts and of the applicable law. This requires thorough preparation;

In today's world of long trial lists and high litigation expense counsel have an obligation to consider carefully the practical implications of interlocutory motions. Complete preparation and the consideration of settlement when it is advantageous to your clients are both hallmarks of good advocacy.

In Part II, Master Linton addresses the practice on references. This section contains a concise and complete guide to procedure on references, as well as some valuable advice. Headings were used in this section and prove useful in organizing the material for the assistance of counsel.

An example of his wise counsel is found at page 77. Master Linton reminds persons seeking an order of reference to ensure an appropriate provision for costs is placed in the order. He points out that, unless care is given to ensuring that the Master is given discretion to award costs, the Master will either lack the necessary jurisdiction or may be forced to award costs to the party receiving costs at first instance even though they may not be successful on the reference.

The book has made a useful attempt to provide much-needed guidance on the procedure at motions and references. It contains many sage items of advice from two very experienced and senior Masters and also contains a practical and thorough analysis of the relevant rules by the author. Unfortunately, the book appears not to have reached its full potential. This could have been achieved by more judicious editing and further analysis of some of the issues raised by the authors. Nevertheless, the book is a must for every articling student contemplating attending at a motion before the Masters' court and will be useful for any practitioners who are appearing as an advocate before these courts.

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