

CRIMINAL PLEADINGS AND PRACTICE IN CANADA

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OF THE ONTARIO AND SASKATCHEWAN BARS

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TO MY PARENTS
PAUL AND HELEN EWASCHUK

FOREWORD

By The Honourable Mr. Justice Kaufman

The number of criminal offences committed each year in Canada now exceeds two million, and the number of persons charged — some with more than one offence — has passed the 500,000 mark. Yet, unlike most other branches of the law, books on criminal procedure and practice are relatively scarce.

We have, of course, the annotated codes, useful and informative, but, by their very nature, limited in scope. There was Langelier's *Procédure Criminelle*, published in 1916, and Daly's *Canadian Criminal Procedure and Practice*, with periodic supplements by that indefatigable writer on all matters criminal, A.E. Popple. And then there was Popple's own *Canadian Criminal Procedure*, a hand-book of basic rules, unsophisticated, perhaps, but widely used by judges and practitioners.

Fortunately, in recent years, the subject has attracted wider interest: Salhany's *Canadian Criminal Procedure*, now in its third edition, Béliveau, Bellemare and Lussier's *Traité de procédure pénale*, and Friedland's and Del Buono's casebooks.

To these we now have a happy addition: "Gene" Ewaschuk's *Criminal Pleadings and Practice in Canada*. It is, as the reader will quickly discern, a monumental endeavour — a book which grew with every draft until both author and editor were satisfied that it was indeed complete. And so it is, with cases and comments on every conceivable problem, arranged in logical sequence, accessible and findable, cross-referenced and indexed. In short, an excellent aid for the practitioner, be it for instant use or research.

The profession is indebted to those who write textbooks. That debt is even greater where, as here, the author's contribution fills a void in an important yet neglected subject. I commend it to all in the field.

F. K.

Palais de Justice,
Montréal, Québec,
November 12, 1982

PREFACE

The notion of writing a textbook on criminal law, which now after the fact I consider bizarre and perhaps a bit daft, never entered my head when I first began to practise criminal law.

From 1966 until 1972 I practised criminal law as an Assistant Crown Attorney in Toronto. The pace and quality of practice were so hectic and demanding that it was all that I could do to keep up with the preparation and prosecution of my caseload and the perusal and digestion of the relevant case law.

However, the unquestioned acceptance of my lot in life changed in 1972 when I married and accepted a position as Associate Professor of Law at the University of Windsor. At that time I had the privilege of lecturing with many first-rate legal scholars. Among them were Ed Ratushny, amazingly pragmatic for a respected academic, Ron Ianni, now the Dean and "diplomat" of the Faculty, and Bernie Starkman, now senior adviser with the Federal Department of Justice at Ottawa on law and medical issues.

It was during my profitable and enjoyable stay at Windsor that I first entertained the notion of writing a criminal law text. Perhaps the professorial concern of "publish or perish" played some part in that pursuit. In any event, Ken Chasse of the Toronto "Crowns' Office" convinced me that we should collaborate on a text on criminal procedure.

However, before that goal could be realized, in 1974 I moved to Regina where I accepted a position with the provincial government as Director of Criminal Justice for the Province of Saskatchewan. The notion of writing a criminal procedure text renewed itself when I became aware of the technical criminal law practised in the province, especially in regard to criminal pleadings. It was at that time that I developed a short piece in proposition form on criminal pleadings which was eventually published in the *Criminal Reports* with its many warts, due mostly to its many typographical errors.

My odyssey ended, at least until now, with a position in 1976 with the Department of Justice in Ottawa as Director of Criminal Law Amendments.

Sometime shortly thereafter I was asked to deliver a lecture for federal prosecutors on criminal pleadings with the very learned Mr. Justice Dickson of the Supreme Court of Canada. For that lecture I had expanded my previous written materials on criminal pleadings and Howard Wetston of the department, as my father confessor, insisted that I publish those materials. I then showed my monograph to Ed Greenspan, senior adviser on criminal law to Canada Law Book Limited and renowned criminal lawyer. Mr. Greenspan somewhat sheepishly pointed out the monograph's many deficiencies and suggested that the work needed revision and major additions before it could be published. Some three years after, it is to be hoped

that the manuscript now somewhat satisfies Mr. Greenspan's high expectations and demands.

A word or two is required as to the format of the book. I am mindful of the criticism that the proposition or "factum" style format may evoke from certain "critical analysts". Each proposition undoubtedly merits full development. However, full development with an analysis of historical background, comparative differences and present social considerations often would entail pages of exposition resulting in a book many sizes larger than the present one. Instead, I have opted for the more "black-letter" statement approach which appeals to the harried practitioner looking for the quick answer to pressing technical problems. However, for the more learned, demanding and inquisitive counsel I have attempted to list cases from all provinces and even cases later overruled or rendered inapplicable by later legislation. I have also tried to explain the purpose of many procedural requirements to provide a better understanding of the concepts, principles and rules involved. As well, reference to articles and texts are given as starting points for those interested in fuller analysis of the pertinent issues.

I thus realize the limitations of the text. Much fuller analysis is made in some areas than in others. But that has been deliberate, given the format of the book and the fact that it aims to be more a practitioner's manual and reference tool than an ordinary text.

At present, as "General Counsel, Criminal Law" with the Department of Justice, I follow more an appellate criminal practice than a trial practice. Moreover, I continue to lecture in criminal law at the University of Ottawa, Faculty of Law and the Ontario Bar Admission Course, and advise on criminal law reform and legislation. Hence, I have attempted to blend theory and practice into the text and as well at times, but to a lesser extent, have ventured into the area of policy, *i.e.*, the social value of certain procedures and practices. The result is thus a reflection of my varied and unusual background.

Thanks must be given to many contributors. Howard Wetston and Ed Greenspan have already been mentioned. Without their encouragement, the text would never have been written. The Honourable Mr. Justice Fred Kaufman of the Quebec Court of Appeal, a good friend over the years, has given much general advice on format and specific advice on various chapters as have Judge Lloyd Graburn of the County Court of York (Ontario), a former Crown Attorney, and Marc Rosenberg, legal scholar and adviser to Mr. Greenspan and associates.

Various specialists and experts have also given generously of their time. David Frankel of Vancouver, one of Canada's recognized experts in the area of wiretap law, has aided if not directed me in developing that chapter. Likewise former Judge Reilly Watson, Canada's undoubted expert on the law of bail or, as he calls it, "release" has given unstintingly of himself on that chapter as have David Solberg on the chapter on the mentally dis-

ordered offender and Paul Chumak on the jury. Howard Morton also generously provided materials on indictable appeals.

Mention must also be made to the generosity of John Hodges, Keith Ward, Joe Pethes, Ron Fainstein, Stan Cohen, Rick Mosley, Gerry McCracken, Vincent Del Buono and Orval Troy for their review and correction of the many deficiencies the text has experienced over the years.

Finally, acknowledgment must be given to the patience of my ever-caring wife, Jeanie, who has tolerated hours of research, writings and revisions which have taken place in the family home during numerous evenings and week-ends. My children, Glen, Michael and Celeste have literally grown up with my endless manuscripts, texts and corrections.

One cannot finish without mentioning the ever loyal and devoted secretary, in this case Pierrette Bathurst, who has toiled during my obsession to correct my many mistakes and convert my language into publishable prose, as has Liz Edwards of Canada Law Book whose generous assistance and advice has greatly contributed to the final product. All errors are of course my responsibility.

The law is generally stated as of the end of October, 1982, and in certain instances later. In regard to many propositions the law may change with the whim of an appellate court, the Supreme Court of Canada or the Canadian Parliament. Thus, regard must be had to the latest reports, Weekly Criminal Bulletins, and unpublished judgments if available, in determining whether the law as stated remains valid.

In that regard, it is the intention of the publisher to issue supplements from time to time, which will be accumulative, to keep the text up to date, and these will be designed to be inserted in the special pocket at the back of the book.

I would particularly appreciate comments on corrections, oversights and areas in need of expansion and development. Already, I have decided that additional chapters are needed on the Charter of Rights, contempt, possession, extradition and all recognized common law and statutory defences.

Finally, a word of advice. Since the book is now on the press the publisher, having indulged me until the last moment, has finally cut me off from further revision, but that has not stopped me from already writing into my copy changes to various propositions.

The case of *R. v. Carpenter*, as summarized in 8 W.C.B. 287 (Ont.C.A.) has clearly qualified proposition 15.59 as it applies to police "will say" statements. Similarly, *R. v. Holmes*, summarized in 8 W.C.B. 445 (Ont.C.A.) qualifies propositions 1.98 and 23.14. The latter, another definitive judgment of Mr. Justice G. Arthur Martin of the Ontario Court of Appeal, again demonstrates why he continues to be regarded as Canada's outstanding jurist in all facets of criminal law. In that regard, I would encourage readers to likewise "pencil in" new cases, especially in their

own books, with a view to keeping up with the everchanging law in the area of "criminal pleadings and practice in Canada".

In conclusion, the writing of this book has made me more appreciative of the tremendous effort authors make in composing their texts and more tolerant of the many resultant mistakes which can be expurged, but not completely, only by innumerable hours of tedious checking and rechecking.

Ottawa
December, 1982

E. G. Ewaschuk

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