



# CRIMINAL PROCEDURE IN CANADA

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## **Criminal Procedure in Canada**

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*For Melissa, Brodie, Cooper and Violet. SP*

*For my parents, Egidio and Anna. VR*

*For Georgina, Oscar and Claire. JS*

# FOREWORD

The publication of *Criminal Procedure in Canada* is the culmination of an ambitious project to house under one roof all aspects of criminal procedure which govern the investigation, detection and prosecution of crime in Canada. Criminal lawyers, criminal law academics and criminal law students are all beneficiaries of this first truly comprehensive treatise on what is self-described as a “tough subject for the uninitiated”.

The introductory portion of the text, which deals with “Overview and Basic Concepts” is a breathtaking dash through virtually “all you ever wanted to know about criminal procedure in Canada”. The authors, who combine a rare blend of academic analysis and scholarship with practical in-court experience, provide a useful primer for the uninitiated which, nevertheless, contains sufficient detail to provide meaningful assistance to practitioners, journalists, court watchers and invaluable lessons for members of law enforcement.

The reader is almost immediately struck by the depth and breadth of the research upon which the manuscript is based. The extensive footnotes complement rather than compete with the text and provide a worthwhile review, not only of the relevant jurisprudence, but as well, a précis of significant historical and current academic articles. The authors are neither timid nor equivocal in the expression of their views by critically analyzing judicial reasoning, in demanding a more disciplined focus on underlying policies, in questioning the expansion of police powers and in their lament for the trend toward limiting meaningful *Charter* scrutiny.

Following the extensive overview, which could conceivably have been published separately as a freestanding guide, the authors embark upon a detailed analysis of “Criminal Investigations”, “Pre-trial Procedures”, “The Trial” and “Post-Trial Procedures”. The comprehensive and exhaustive treatment of virtually every significant aspect of criminal procedure guarantees its place as an indispensable addition to every criminal law library and, at the same time, precludes the realistic possibility of any rival publication in the foreseeable future. The Table of Contents, which canvasses every issue “fit to print”, is tantamount to an extensive index of almost every potential procedural issue which the practitioner is likely to confront. Yet at every turn, the text provides clarity and insight while dynamically issuing challenges to rarely disputed entrenched principles. Perhaps the enduring contribution of this text is that it offers a springboard for creative thinking on procedural issues by providing a convenient and thorough examination of the material while exploring deficiencies in the existing case law.

The wealth of information which is provided in an exceptionally readable and organized format ensures that *Criminal Procedure in Canada* will become required reading in short order and will undoubtedly add several pounds to the weight of trial bags carried by conscientious criminal lawyers across the country.

Brian H. Greenspan

October 2011

## PREFACE

The inspiration for this project was our collective experience as criminal procedure teachers, scholars and practitioners. Although there are a number of existing textbooks on criminal procedure in Canada, we believe there is a pressing need for a fresh approach.

Canadian criminal procedure is an especially challenging subject for the novice. The main source of confusion is the absence of any central repository for the myriad rules governing the criminal process. A comprehensive legislated code of criminal procedure is long overdue in Canada. Unfortunately, that sort of wholesale law reform seems unlikely. As a result, piecing together a complete picture of the criminal process will continue to require recourse to a variety of sources: the *Canadian Charter of Rights and Freedoms*; a number of legislative enactments (most importantly, the *Criminal Code*); the case law interpreting and applying the relevant constitutional and statutory provisions; and an extensive body of judge-made "common law".

This book's principal aim is to present the rules emanating from these sources in a clear, cohesive and comprehensive manner. There are three main features of the book that we believe assist in doing just that.

First, rather than organizing the subject around particular statutory or constitutional provisions, we have chosen a chronological structure. The relevant rules and procedures are introduced and explained in the very same sequence that a person investigated and prosecuted would ordinarily experience them. We believe that this format results in a more logical and intuitive organization, useful to both novices and experts.

Second, recognizing the *Charter's* revolutionary impact on the criminal process, we have woven our discussion of it into the very fabric of the book. In other words, the *Charter* is not treated like an insular event with its implications simply tacked on at the end of each chapter. Instead, its innumerable effects are addressed seamlessly throughout the book.

Third, rather than writing a book directed exclusively at novices or experts, we have attempted to do both. Our aim has been to write a text that will be equally useful to students, lawyers and judges — giving the novice the context necessary to appreciate the significance of the detail, while digging deep on specifics so that experts will still find the book a useful resource. We have consequently tried to keep the text concise and uncluttered, while reserving much of the finer detail and supporting references for the footnotes.

All of that said, we have aimed to do more than simply describe the law governing the Canadian criminal process. Where there are gaps in the existing doctrine (and there are many) we make suggestions as to how they could best be filled. We also offer constructive criticism of existing rules in hopes of

advancing future reform. These proposals and critiques are informed by our own research and experience, as well as by a rich tradition of criminal procedure scholarship (both legal and socio-legal) in Canada, the United States and elsewhere. We are particularly grateful to the many excellent scholars of Canadian criminal procedure upon whose work we have relied throughout the book.

This book has taken nearly five years to write. As we have discovered, writing a textbook on a topic as expansive as criminal procedure is a monumental undertaking. A project of this nature would simply not be possible without the assistance and support of a great many people.

We would like to thank all of the students who have assisted us in carrying out the extensive research that was necessary to complete this project. From the Faculty of Law at the University of Alberta, that has included: John Devlin, Julia Herscovitch, Mathieu LaFleche, Melissa Fleck, Jonathan Maryniuk, Sarah McClune and Caeleigh Shier. From Osgoode Hall Law School that has included: Jen Aubrey, Richard Diniz, Maija Martin, Kristen Morris, Audrey Ngo-Lee, Matthew Shogiley, Stephen Simpson and Lori Anne Thomas.

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Lastly, it is necessary to say a word about the timeliness of the research found in this book. Unfortunately, criminal procedure is a moving target. Every day, important decisions are released by the courts, and every year Parliament enacts new legislation that makes both small and large changes to criminal procedure. Readers should therefore note that the research in this textbook is intended to reflect the law as it stood in May 2011.

Steven Penney  
Vincenzo Rondinelli  
James Stribopoulos  
September 2011



## ABOUT THE AUTHORS

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