Cases and Materials on Criminal Law and Procedure

FIFTH EDITION

Edited by

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Preface to the Fifth Edition

This new edition contains a number of changes, but has not altered the basic structure of the casebook. The purpose of this new edition is simply to keep up with changes in the law as well as to attempt to improve the presentation of the materials. Once again I am grateful to my colleagues across Canada for their many helpful comments. I would also like to record my indebtedness to John Unger, a student in the Faculty of Law, for his able assistance and to Patricia Dawson and Julia Hall for their expert secretarial help.

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PREFACE TO THE FOURTH EDITION 1974

A new edition was required because of the many changes in criminal law and procedure since the last edition. There have been new procedures (e.g., on bail and wire-tapping); new proposals (e.g., by the English Law Commission and the Canadian Law Reform Commission); and, not to be minimized, new section numbers brought about by the new edition of the Revised Statutes of Canada. The basic structure of the book has, however, remained the same. In addition to the usual additions and substitutions, the order of a few chapters has been changed and a few sections have been expanded. Once again I am grateful to the many law teachers throughout Canada for their helpful comments and suggestions. In addition to those listed in the previous editions, I would like to thank Professors William Angus, Bernard Green, Daniel Hurley, Allen Linden, Sydney Usprich, and Stephen Waddams. I am also indebted to Leslie Rose and John Zinn who assisted me in preparing this new edition, and my secretary, Patricia Dawson, who so ably coped with typing the many changes required for this edition.

PREFACE TO THE THIRD EDITION 1970

This edition follows the same format as the last one. I have added an index and some new cases, statutes and other materials. Certain sections, in particular the materials on pre-trial procedures and parties to offences, have been expanded. References to the *Ouimet Report*, which many law teachers will use as a teaching aid for the next few years, have been inserted throughout the book. The important Supreme Court of Canada case of *Drybones* has been added as an addendum.

In addition to those law teachers mentioned in the Preface to the last edition, I would like to thank Professors B. M. Barker, P. T. Burns, R. G. Fox,

John Hogarth, M. E. Hughes, J. C. Levy, E. F. Ryan, D. E. Sanders, S. A. Schiff, P. C. Weiler, and John Willis for their helpful comments and suggestions. I am also indebted to Robert Bruser and Peter Jewett, both entering their second year in the Faculty of Law, for their help in proofreading, to Donna Day, for her secretarial services, and to the editors of the University of Toronto Press for their editorial assistance.

PREFACE TO THE SECOND EDITION 1968

This book, designed for the basic criminal law course given to Canadian law students, is a revised version of a temporary set of materials used last year in a number of Canadian law schools. The teaching and practice of criminal law have undergone substantial change over the past few years. These materials attempt to reflect this development. Such areas as the relationship between law and morality, criminal procedure, and sentencing – formerly often reserved for an optional course in the third year – are examined here. No chapter is devoted to specific substantive offences; rather, an attempt has been made to cover many of the more important offences, such as murder, manslaughter, rape, and robbery, through the selection of cases used throughout the book.

I am greatly indebted to Professors R. J. Delisle, B. A. Grosman, R. S. Mackay, A. W. Mewett, J. D. Morton, Q.C., and R. R. Price for their many helpful comments and suggestions. In addition, I am grateful to Dean R. St. J. Macdonald for his constant support; to Miss Joyce McClennan, the Secretary of the Faculty of Law, for her kind co-operation; to Sydney Usprich and Dan Webster, both recent graduates, and Eric Salsberg, presently attending the Faculty of Law, for their valuable assistance in proofreading; and to Deidre Coote, Gale Fauteux, and Denise Wright for their secretarial assistance.

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I also express my appreciation to Miss Francess Halpenny and Miss Prudence Tracy of the University of Toronto Press for their editorial assistance. Finally, I thank my wife for her continuing interest and encouragement.

This book is dedicated to the memory of a great teacher and scholar, Dean C. A. Wright.

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CHAPTER ONE

Introduction to Procedure

I. SCHEME OF THE CRIMINAL CODE

The Canadian Criminal Code, a federal statute, came into force on April 1, 1955 and is found in the Revised Statutes of Canada, 1970, chapter C-34, as amended. The Code contains 25 Parts, which in general can conveniently be divided into the following major categories:

A. General Principles, Part 1;
B. Offences, Parts 2-11;
C. Procedure, Parts 12-25.

II. CLASSIFICATION OF OFFENCES

All offences under the Criminal Code can be categorized according to the procedure employed for trying the case: "summary" (an offence triable by the summary conviction procedure) or "indictable" (an offence triable by indictment) or both, for certain offences, with the Crown having the choice of procedure. The distinction between felony and misdemeanour was abolished in Canada in the 19th century. (The United States still maintains the distinction; England has recently eliminated it.)

In the summary cases, which are less serious than the indictable ones, the magistrate tries the accused according to a procedure set out in Part 24 of the Code. An indictable offence may be one of three types: offences over which the magistrate has absolute jurisdiction (because these offences cannot normally be tried by indictment, it is somewhat anomalous to call them indictable offences); offences over which the magistrate has jurisdiction only with the consent of the accused — if this consent is not given, a preliminary hearing is held by the magistrate to see if the case is substantial enough to warrant committal for trial to a higher court; and, finally, cases such as murder and treason, over which the magistrate has no jurisdiction.

The indictable offences over which the magistrate has absolute jurisdiction (i.e., the accused *cannot* elect to be tried by a higher court) are set out in section 483 of the Code. Consider whether there are any offences in s. 483 which you think should allow the accused the right to a trial by jury. Assaulting a police officer was removed from section 483 in 1972. Why?

At the other end of the scale are those serious indictable offences set out in s. 427 of the Code which *must* be tried by a jury presided over by a judge of the Supreme Court of the Province, trial division. Consider whether there are

any offences which should be added to or taken away from s. 427. In 1972 certain offences such as rape and manslaughter were removed from the exclusive jurisdiction of a Supreme Court judge with a jury; note, however, that an accused who elects to be tried by jury will have a trial by a Supreme Court judge and jury in these cases unless he elects otherwise. (See s. 429. 1.)

For the remainder of the indictable offences (i.e., those not set out in s. 483 or 427) the accused may elect to be tried in one of three ways: by a magistrate; by a judge without a jury, most often a County Court judge without a jury (normally referred to as the County Court Judges Criminal Court), but it may in certain provinces be a Supreme Court judge without a jury (see s. 482); or by a judge *with* a jury (usually a County Court judge, but occasionally a Supreme Court judge — e.g. in certain complicated securities cases, or in certain cases if an accused is in custody awaiting trial by a County Court judge and jury, the sitting of which may not take place for some time).

The right of an accused to change his election is set out in sections 490-492 of the Code.

Section 484 (2) of the Code sets out the following words which are put to the accused before he elects: "You have the option to elect to be tried by a magistrate without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. How do you elect to be tried?" In *Karpuk* (1962) 133 C.C.C. 108 the Ontario Court of Appeal quashed a conviction because the accused had been given the election in these words: "Upon this charge you have the option to elect to be tried forthwith by the Magistrate, or you may elect to be tried by a judge without a jury, or you may elect to be tried by a court composed of a judge and jury. How do you elect to be tried? By a Magistrate this morning or at a later date by a judge or judge and jury?" Is such a result overly technical?

If the accused elects to be tried by a judge or by a judge and jury (or if he must be so tried under s. 427) the magistrate will hold a preliminary hearing (in accordance with Part 15, Procedure on Preliminary Inquiry) and decide whether there is sufficient evidence to justify a committal for trial (see s. 484 (3)). Note that under s. 485 the magistrate may decide to hold a preliminary hearing even though the offence is within the absolute jurisdiction of the magistrate or the accused elects to be tried by a magistrate. Can you think of any cases where he might do this?

In some cases a preliminary hearing can be by-passed; section 505 of the Code allows the Crown to avoid a preliminary hearing by bringing a charge directly to trial. Is this a desirable provision?

In the past a case which was to be tried by a jury first went before a "grand jury." The grand jury has been eliminated in England, and, as set out in s. 507, is not now necessary in any province except Nova Scotia. (Of course the grand jury is still an important institution in the United States.) Briefly, the procedure followed was (and still is in Nova Scotia) for the prosecutor to prefer what was referred to at this stage as a "bill of indictment" before a grand jury (see s. 504); the grand jury heard witnesses and if they decided that there was a sufficient case to warrant a trial they declared that it was a