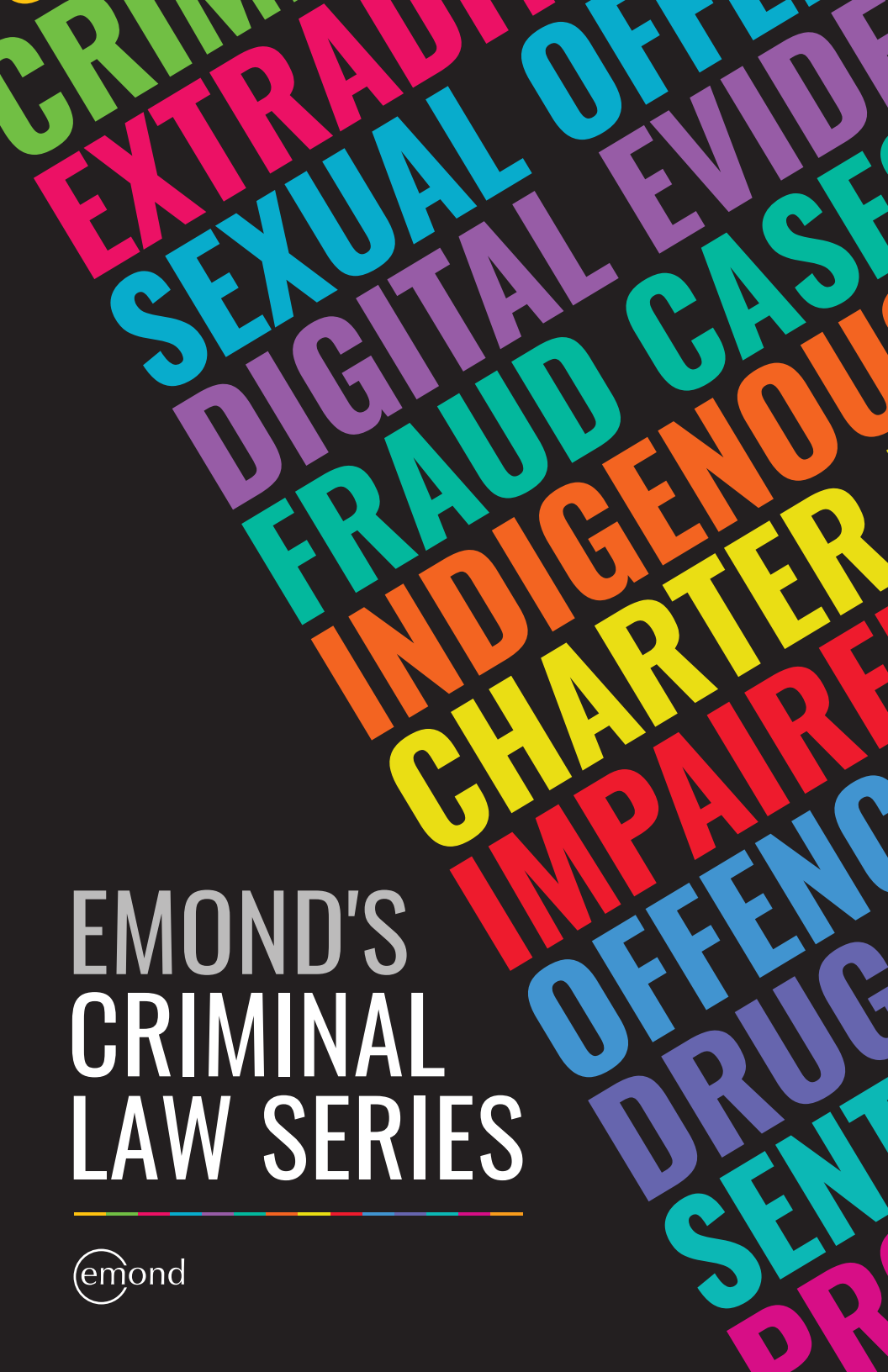
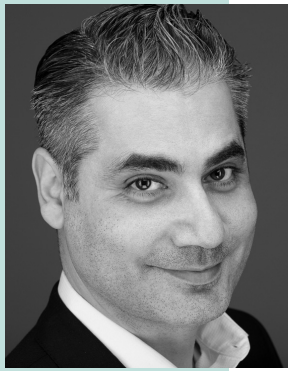

EMOND'S
CRIMINAL
LAW SERIES
emond

Contents

A Word From the General Editors

BRIAN H. GREENSPAN AND JUSTICE VINCENZO RONDINELLI

Brian H. Greenspan



Justice Vincenzo Rondinelli

Much like doting parents whose progeny far exceed their fondest expectations, the success and broad appeal of this series of practical and insightful practitioner guides has become the source of enormous pride to its publisher and to its contributors. The guiding principle of the series was that the criminal bar be effectively equipped to provide balanced and comprehensive responses, in preparation for both trials and appeals and to address unanticipated issues as they emerge in court. This practical practice-oriented approach has ensured that, whether Crown or defence, the criminal lawyer's toolbox is filled with a reliable and well-researched resource so essential to persuasive and credible advocacy.

The recognition which the series has received as recipient of the Hugh Lawford Award for excellence in legal publishing is a tribute to Emond's commitment to quality while providing readable and attractive publications. Jonathan Rudin's groundbreaking treatise on "Indigenous People and Criminal Justice," awarded the Walter Owen Book Prize by the Canadian Foundation for Legal Research, has truly elevated the contribution of the series to the advancement of the practice of criminal law.

The authors and editors look forward to the continued expansion and improvement of the project to include practice issues not yet considered, to the technological advances, and to the insurance that the guides remain current and responsive to legislative and urisprudential change.

"The success and broad appeal of this series of practical and insightful practitioner guides has become the source of enormous pride to its publisher and to its contributors."

Prosecuting and Defending YOUTH CRIMINAL JUSTICE CASES Third Edition

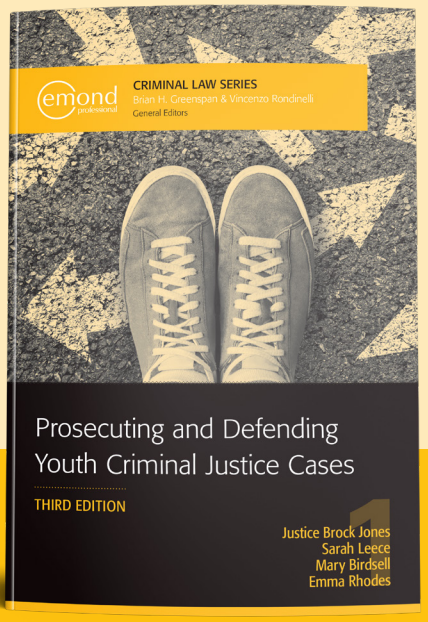
Prosecuting and Defending Youth Criminal Justice Cases, 3rd Edition

By Brock Jones, Sara Leece, Mary Birdsell, and Emma Rhodes

ISBN: 978-1-77462-535-4

Page Count: 568

Publication Date: October 2023



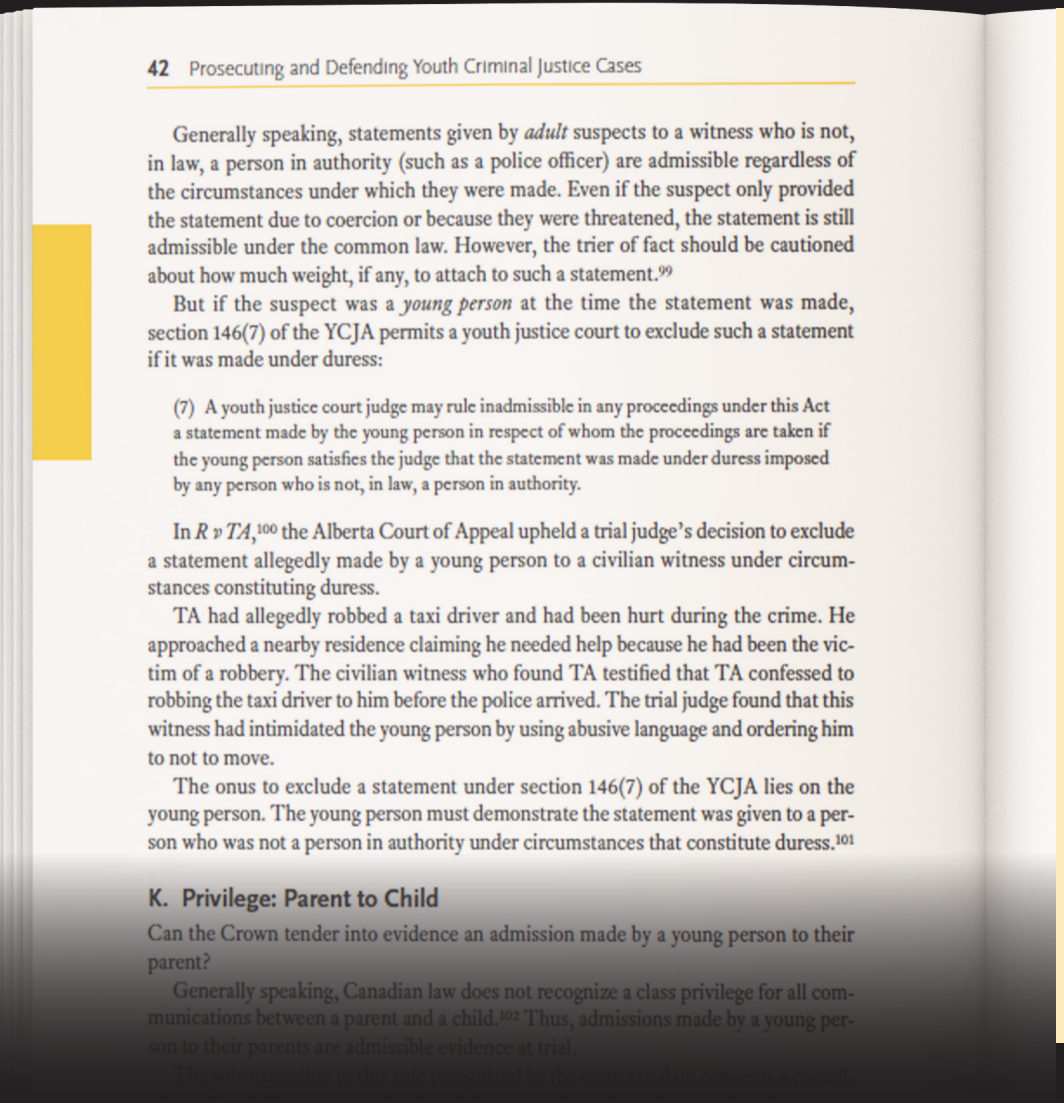
CITED BY THE SUPREME COURT OF CANADA IN THE *R v KJM* CASE

"[This text] will provide invaluable assistance to those who are involved in a *Youth Criminal Justice Act* matter for the first time and those who have extensive experience. It covers such essential issues as judicial interim release and sentencing, as well as the arrest, detention, and questioning of young persons. Chapter 10 (Sentencing) contains an extensive review of a difficult issue which commonly arises in Youth Court: 'Mental Health, Learning, Brain Injury, and Developmental Issues.' In addition, [it] considers the important issues of the privacy rights of young persons and publication bans, as well as the difficult issue of access to youth records. In a timely addition, it includes an appendix considering the impact upon young people of the newly enacted *Cannabis Act*."

—The Honorable Wayne Gorman, Provincial Court of Newfoundland and Labrador

Shop online at u.emond.ca/cls-pb01

Table of Contents



42 Prosecuting and Defending Youth Criminal Justice Cases

Generally speaking, statements given by *adult* suspects to a witness who is not, in law, a person in authority (such as a police officer) are admissible regardless of the circumstances under which they were made. Even if the suspect only provided the statement due to coercion or because they were threatened, the statement is still admissible under the common law. However, the trier of fact should be cautioned about how much weight, if any, to attach to such a statement.[99]

But if the suspect was a *young person* at the time the statement was made, section 146(7) of the YCJA permits a youth justice court to exclude such a statement if it was made under duress:

> (7) A youth justice court judge may rule inadmissible in any proceedings under this Act a statement made by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was made under duress imposed by any person who is not, in law, a person in authority.

In *R v TA*,[100] the Alberta Court of Appeal upheld a trial judge's decision to exclude a statement allegedly made by a young person to a civilian witness under circumstances constituting duress.

TA had allegedly robbed a taxi driver and had been hurt during the crime. He approached a nearby residence claiming he needed help because he had been the victim of a robbery. The civilian witness who found TA testified that TA confessed to robbing the taxi driver to him before the police arrived. The trial judge found that this witness had intimidated the young person by using abusive language and ordering him to not to move.

The onus to exclude a statement under section 146(7) of the YCJA lies on the young person. The young person must demonstrate the statement was given to a person who was not a person in authority under circumstances that constitute duress.[101]

K. Privilege: Parent to Child

Can the Crown tender into evidence an admission made by a young person to their parent?

Generally speaking, Canadian law does not recognize a class privilege for all communications between a parent and a child.[102] Thus, admissions made by a young person to their parents are admissible evidence at trial.

The sole exception to this rule recognized by the courts to date concerns a consul-

Features:

- Practice advice from Crown, defence, and policy perspectives.
- Updates to sentencing chapter, including mandatory minimum sentences, deferred custody and supervision orders, adult sentencing applications, IRCS, sentencing, and treatment of Indigenous and racialized young persons.
- Updates regarding bail, youth records and privacy, the admissibility of youth statements, and more.
- Updates on the the application and development of Charter rights for young persons, including new discussion of excessive delay in youth court proceedings.
- Coverage of the *Cannabis Act* and how it impacts young persons.

Key Insight: Children and a "Propensity to Lie"

What if a child is known to lie regularly? How does this affect the credibility of their courtroom evidence?

In *R v Levert*, the complainant was a child who alleged he was sexually abused by the accused, who was a friend of his foster mother. In cross-examination, the complainant's foster mother gave evidence about the complainant's propensity to lie. Defence counsel argued that this was a crucial piece of evidence that undermined the credibility of the complainant. The Court of Appeal disagreed, stating that the "fact that the complainant, like most children, was capable of lying about trivial matters was of little assistance to the jury in their task of deciding whether he was lying in court under oath about these serious allegations."

Adapted from Prosecuting and Defending Youth Criminal Justice Cases, 3rd Edition, Page 193

Read a sample chapter at **u.emond.ca/cls-pb01**

Excerpt from *Review of Prosecuting and Defending Youth Criminal Justice Cases*

By Daniel Goldbloom

For The Defence, (March 2017) Vol. 37 No. 4, The Criminal Lawyers' Association Newsletter

The text guides practitioners through the particular challenges that arise in representing young people, such as the duty to report child protection concerns with respect to one's own client, how to deal with a client's parents who have a special role under the YCJA, and even how to interview a young person. In the context of sentencing, the book explains how to best address systemic racism, the impact of child welfare services, and the effects of fetal alcohol spectrum disorder, among other issues. The authors also include checklists, precedents, suggested interview questions, references to relevant police policies and provincial child protection legislation, and comparisons of YCJA and *Criminal Code* provisions that will prove invaluable to defence counsel. For each stage of a YCJA proceeding, the authors detail specific practice considerations for Crown and defence counsel alike. For the defence, these provide effective potential arguments and prompts for information gathering from the client. For the Crown, they involve guidance on important ethical considerations and exercises of prosecutorial discretion. Both are useful to defence counsel in persuading the Crown of a particular course of action.

Excerpt from *Book Review: Prosecuting and Defending Youth Criminal Justice Cases*

By Heather Wylie, Law Librarian, Alberta Law Libraries

Excerpt from CLLR, Volume 42.1 (2017)

The book comes close to a step-by-step guide to procedure with straightforward answers to practical questions; also, wherever possible, information is presented in the form of checklists and tables. For example, the chapter on bail hearings includes advice on what happens next when parents do not or will not attend bail hearings. It sets out the qualities of a good (in other words, successful) plan of release. Finally, it discusses what makes a good, responsible person, or surety, and provides a checklist of questions to put to that person at the hearing.

Table of Contents

C. Supreme Court of Canada Appeals

As discussed in Chapter 11, Appeals to the Supreme Court of Canada, even though the *Criminal Code* provides no further rights of appeal to the Supreme Court of Canada in summary conviction matters, the court has held that it has jurisdiction to hear such appeals under section 40 of the *Supreme Court Act*.[16] Appeals under section 40 require leave of the court, which is generally only granted in cases that raise novel legal issues of "national importance" (see Chapter 11).

III. Extraordinary Remedies and Appeals from Judicial Review Decisions

A. Historical Origins

The superior courts also have broad inherent supervisory jurisdiction over "inferior" tribunals and government officials, including provincial court judges and justices. This supervisory jurisdiction has deep historical roots in English common law. The so-called prerogative writs originated as written orders by the monarch to his or her subjects, but over time they evolved into judicial orders issued by the monarch's courts—the "Court of King's Bench" or "Queen's Bench"—to direct the conduct of other government officials and tribunals. The Canadian superior courts have inherited this power, and the orders they make when they exercise this supervisory authority are still commonly referred to by their traditional names. The four most common such orders in criminal cases are:

- *certiorari*, which directs the lower court to send its record in a case to the higher court for review—if the higher court sees fit, it may quash any orders made by the lower court and remit the case to the lower court for further proceedings;
- *mandamus*, which directs the lower court or government official to perform some duty or act;
- prohibition, which directs the lower court or government official to refrain from acting; and
- *habeas corpus*, which requires that a prisoner be brought before the court so that the court can assess the legality of his or her detention.

Features:

- Practical advice on appeals.
- Concrete guidance on drafting an appeal factum.
- Model appeal factums and motions of appeal.
- Oral argument strategies.

Key Insights: Dangerous and Long-Term Offender Appeals

Dangerous and long-term offender designations are part of the sentencing process, but appeals from these designations are governed by a special statutory provision, Criminal Code section 759. Appeals under section 759 differ from ordinary sentence appeals under sections 675(1)(b) and 687 in a number of respects. The statutory terms contain some significant differences. In *R v Currie*, the Supreme Court of Canada held that in view of the "broad language" of section 759, dangerous offender appeals should be decided based on a "standard of reasonableness" rather than under the more deferential standard applicable in ordinary sentence appeals, although Lamer CJ also cautioned that "s. 759 cannot be interpreted as calling for the equivalent of a trial denovo on the dangerous offender application" and that "[s]ome deference to the findings of a trial judge is warranted." In addition, section 759 expressly permits an appellate court to order a new hearing in the trial court, a remedial option that is not available in ordinary sentence appeals governed by section 687: see *R v Sipos*. The court has also read in the power to dismiss dangerous offender appeals despite the commission of a legal error by the sentencing judge; the equivalent of the curative proviso found in section 686(1)(b)(iii).

Adapted from Criminal Appeals: A Practitioner's Handbook, Pages 98 and 99

Read a sample chapter at u.emond.ca/cls-pb02

Reviews and Testimonials

Excerpt from Testimonial of *Criminal Appeals: A Practitioner's Handbook*

By Richard C.C. Peck, QC, Peck and Company

The authors have tackled the complexities and nuances of appellate practice and put together a book that is well-structured, comprehensive, and comprehensible. In doing so, they have brought to bear on the topic their considerable practical experience as appellate advocates leavened with just the right amount of academic insight.

The book consists of 11 chapters beginning with "The Nature of an Appeal and Statutory Jurisdiction" and ending with "Appeals to the Supreme Court of Canada." In between, whether it be procedural or substantive, the authors have left no stone unturned. This work is a well-spring of information, as readily seen on a quick review of the table of contents and index. Further, the text is replete with pinpoint references to the reigning jurisprudence in all relevant areas.

Finally, the book contains a series of appendices which include model factums and various notices of application to serve as structural and procedural guides. As noted earlier, no stone has been left unturned.

Excerpt from Review of *Criminal Appeals: A Practitioner's Handbook*

By Amy Kaufman, Head Law Librarian, Queen's University

Excerpt from Canadian Law Library Review, (2018) Vol. 43 No. 1, Canadian Association of Law Libraries

Although the book moves quickly, it gives clear explanations and often employs the helpful strategy of stating a complex procedural rule [and] then giving an example. The authors go beyond explaining important steps and concepts to imparting valuable advice throughout. For example, they observe that lawyers new to criminal appellate work might want to start with sentence appeals, as they "tend to have shorter records, oral argument is brief, and the types of arguments made more closely resemble advocacy in criminal courts" (p. 94).

[This] is a succinct, well-written, well-organized guidebook for appellate work in criminal cases. It delivers on its promise of being a practitioner's handbook in both content and design.

Table of Contents

The most common types of Charter challenges are those with respect to evidence that is seized in Canada and statements made in Canada by the person sought. This evidence must be scrutinized by the extradition judge to ensure that it is compliant with the Charter. The onus remains on the person sought to establish the Charter breach.

1. Voluntariness of Statements by the Accused in Canada

Where the ROC relies on a statement by the person sought that was taken in Canada, the onus is on the requesting state to prove that the statement was voluntary. This may be proven through a *voir dire* or through the ROC. Where the person sought raises a challenge on this point, a voluntariness *voir dire* will be held to determine whether the statement was in fact voluntary.[139]

The ROC need not include the entire statement; a summary of the statement will suffice. There must be evidence that the summary of the statement is incomplete and inaccurate before the court will exclude the statement.[140]

2. Section 10(b) of the Charter

The ROC may set out that the person sought was advised of their rights and provide a summary of how the person was questioned by the police in order to satisfy the court that the taking of the statement complied with section 10(b) of the Charter. The person sought may, however, seek also to assert that their section 10(b) Charter rights were violated when the statement was taken in Canada. The same case law that applies domestically applies here.[141]

3. Section 8 of the Charter

The person sought may also argue that materials that are relied on in the ROC and that were seized in Canada were gathered in a manner that violated the section 8 Charter rights of the person being sought for extradition. Such evidence is usually obtained in two manners: either pursuant to a search incident to arrest or pursuant to a search warrant. Canadian law applies to this Charter analysis.[142]

139 *Mohamed (Re)*, supra note 34 at paras 44-46; *Kindler* (ONSC), supra note 29 at paras 164-

Features:

- In-depth analysis of relevant case law.
- Sample forms and materials used in extradition proceedings.
- Information on treaties and their role in the process.

Key Insight: What Is the Authority to Proceed?

The authority to proceed is the document that shapes the focus of the extradition hearing. It sets out the Canadian offence or offences identified by the minister's delegate corresponding to the conduct that is set out in the extradition request. The 1999 *Extradition Act* introduced the authority to proceed. This took away the necessity of the extradition judge to look at or consider the foreign offence in determining whether there was sufficient evidence to justify committal. When an extradition request is received, counsel for the minister of justice at the International Assistance Group (IAG) reviews the extradition request and determines whether the treaty requirements and section 3(1) of the Act are satisfied. Counsel for the minister must consider the law of the foreign state to be satisfied that the alleged conduct described in the request is criminal and that the associated penalty meets the requirements of section 3(1) of the Act. Counsel for the IAG also identifies the Canadian offence or offences that correspond to the conduct in the request. The authority to proceed is signed by counsel from the IAG, not the minister of justice, as is the case with a surrender order. Courts have held that there is nothing improper in the minister delegating his or her authority to counsel for the IAG to issue the authority to proceed. If the authority to proceed is not signed, that is a fatal flaw and there would be no basis to hold an extradition hearing.

Adapted from Prosecuting and Defending Extradition Cases: A Practitioner's Handbook, Page 146

Read a sample chapter at u.emond.ca/cls-pb03

Excerpt from Testimonial of *Prosecuting and Defending Extradition Cases*

By Richard Kramer, General Counsel, Department of Justice

"The book includes useful documentary precedents, references and leading extradition jurisprudence across Canada and is organized to follow the multiple-step process of an extradition proceeding."

Prosecuting and Defending Extradition Cases is a top-notch legal resource that is long overdue. Extradition is a specialized area of law that is both nuanced and particular, yet one that few practitioners have the opportunity to learn in-depth before they find themselves in it. Even seasoned criminal law practitioners and the most experienced jurists face an enormous learning curve when approaching this area of law for the first time. The authors have created an incredibly practical guide. The book includes useful documentary precedents, references and leading extradition jurisprudence across Canada and is organized to follow the multiple-step process of an extradition proceeding. These features make it incredibly useful to those who litigate and preside over extradition cases. That the book is presented from both the Crown and defence perspectives only underscores its value. It is a balanced, clearly executed, and thorough guide that will undoubtedly become the "go-to" resource for anyone who deals with extradition in Canada.

Prosecuting and Defending SEXUAL OFFENCE CASES Third Edition

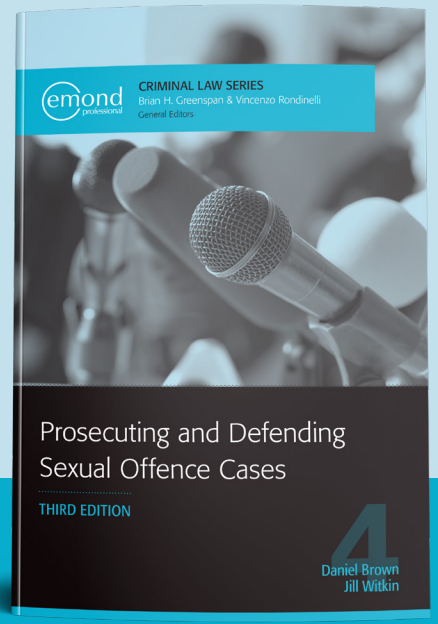
Prosecuting and Defending Sexual Offence Cases, 3rd Edition

By Daniel Brown and Jill Witkin

ISBN: 978-1-77462-665-8

Page Count: 720

Publication Date: May 2024



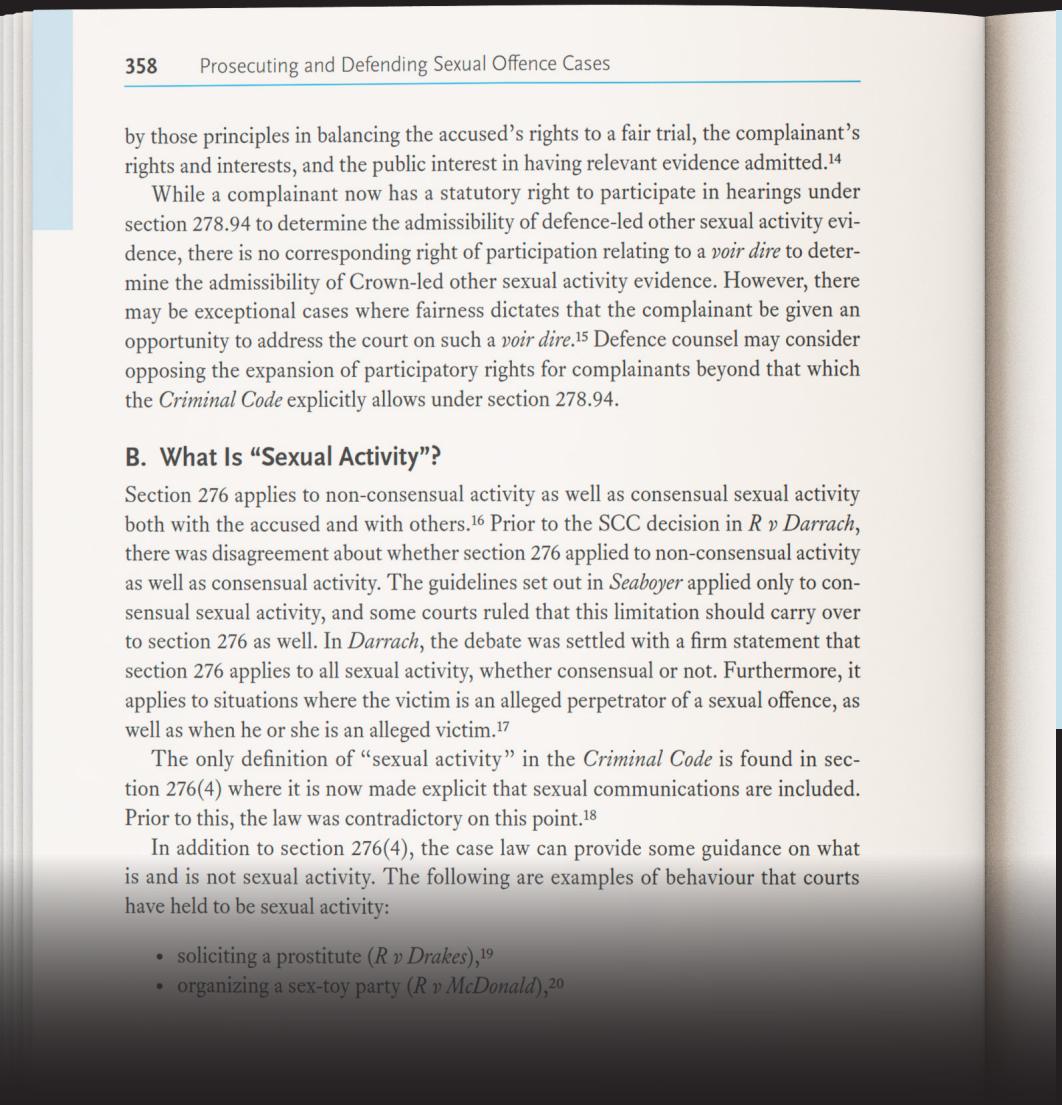
"The sheer volume of chapters and the range of topics covered in this book aptly highlight the complexity of defending and prosecuting sexual offences and the range of intricate legal issues that are at play in such trials.

This is essential reading for any lawyer conducting such a trial. It is methodical, intellectual, and precise in its analysis of the central issues that are often litigated in the context of sexual offences. Moreover, the fact that the guidance comes from an author team that includes a prosecutor and a defence lawyer makes it that much more valuable; it is even-handed and forensic. The book helpfully covers the various steps in these cases, including evidence collection, procedural trial issues, evidence, and substantive law. The authors have collected in one book the most current and essential law necessary to the profession in prosecuting and defending sexual offence cases."

—Marie Henein, LLB, LLM

Shop online at u.emond.ca/cls-pb04

Table of Contents



358 Prosecuting and Defending Sexual Offence Cases

by those principles in balancing the accused's rights to a fair trial, the complainant's rights and interests, and the public interest in having relevant evidence admitted.[14]

While a complainant now has a statutory right to participate in hearings under section 278.94 to determine the admissibility of defence-led other sexual activity evidence, there is no corresponding right of participation relating to a *voir dire* to determine the admissibility of Crown-led other sexual activity evidence. However, there may be exceptional cases where fairness dictates that the complainant be given an opportunity to address the court on such a *voir dire*.[15] Defence counsel may consider opposing the expansion of participatory rights for complainants beyond that which the *Criminal Code* explicitly allows under section 278.94.

B. What Is "Sexual Activity"?

Section 276 applies to non-consensual activity as well as consensual sexual activity both with the accused and with others.[16] Prior to the SCC decision in *R v Darrach*, there was disagreement about whether section 276 applied to non-consensual activity as well as consensual activity. The guidelines set out in *Seaboyer* applied only to consensual sexual activity, and some courts ruled that this limitation should carry over to section 276 as well. In *Darrach*, the debate was settled with a firm statement that section 276 applies to all sexual activity, whether consensual or not. Furthermore, it applies to situations where the victim is an alleged perpetrator of a sexual offence, as well as when he or she is an alleged victim.[17]

The only definition of "sexual activity" in the *Criminal Code* is found in section 276(4) where it is now made explicit that sexual communications are included. Prior to this, the law was contradictory on this point.[18]

In addition to section 276(4), the case law can provide some guidance on what is and is not sexual activity. The following are examples of behaviour that courts have held to be sexual activity:

- soliciting a prostitute (*R v Drakes*),[19]
- organizing a sex-toy party (*R v McDonald*),[20]

Features:

- A new chapter dedicated to the practice and procedure for sexual offence appeals, including discussion of indictable appeals, summary conviction appeals, bail, common grounds, complainant rights, fresh evidence, and Crown appeals.
- Extensive updates pertaining to new legislation, including the Bill C-51 and Bill C-75 amendments to the *Criminal Code*.

Key Insight: Proof of Previous Convictions If the Accused Does Not Testify

If the accused does not testify, but still puts their character in issue through other witnesses, the Crown is permitted to adduce evidence of the accused's prior convictions through section 666 of the *Criminal Code*. Where proof of previous convictions takes place under section 666, it is not clear whether the rules of *Corbett* apply, and the convictions should be vetted so that they are not unduly prejudicial. The defence will likely argue that *Corbett* does, or should, apply and that, even if it does not apply in the formal sense, the spirit of the decision should be adhered to. The Crown may take the position that once the accused has placed their character in issue, the accused is not permitted to sanitize previous bad character by having prior convictions excluded. Furthermore, the Crown could argue that Corbett only applies to cross-examination of an accused on their criminal record and has no application to admission of evidence under section 666, since that section only applies if the accused does not testify.The trial judge always retains the discretion to exclude evidence that would impact on a fair trial and impede the fact-finding process.

Adapted from Prosecuting and Defending Sexual Offence Cases, 3rd Edition, Pages 254 and 255

Read a sample chapter at u.emond.ca/cls-pb04

Reviews and Testimonials

Excerpt from Review of *Prosecuting and Defending Sexual Offence Cases: A Practitioner's Handbook*

By Brock Jones, BA, MA, JD

Excerpt from For The Defence, Vol. 38, No. 5

The reader is provided with concrete suggestions on how to handle questioning of expert witnesses in a variety of areas and explanations of the most common hypothetical scenarios that could reasonably be thought to apply in any given case. It is, quite frankly, the best material for lawyers I have ever read on the subject matter.

Excerpt from *Book Review - Prosecuting and Defending Sexual Offence Cases: A Practitioner's Handbook*

By Kasia Kieloch

Excerpt from Robson Crim Legal Blog

Daniel Brown and Jill Witkin's *Prosecuting and Defending Sexual Offence Cases: A Practitioner's Handbook* provides a detailed overview of all aspects of sexual assault cases through prosecutor and defence perspectives. Daniel Brown is lead counsel at Daniel Brown Law and practices criminal, constitutional, and regulatory law. He has appeared before all levels of court in Ontario as well as the Supreme Court of Canada. Jill Witkin is a Crown Attorney in Ontario. She does trial and appellate work on cases relating to sexual assault and domestic and child abuse. Brian H. Greenspan and Justice Vincenzo Rondinelli are amongst the foremost criminal law experts in Canada and are editors of this book series. The authors and editorial team have extensive criminal law experience related to sexual offence cases.

The handbook brings together the topics of criminal law, evidence, criminal procedure, and the Charter to walk through all aspects of sexual offence cases from the first contact with prosecution and defence counsel to sentencing. It leaves readers with a complete understanding of how the various pieces of the criminal law system fit in with and apply to sexual offence cases. By comparing and contrasting the roles and tasks of the prosecution and defence, the work provides for a more holistic understanding of how sexual offence cases are to be handled.

Table of Contents

accountability and maintain a constant running bank of disclosure that can be easily accessed and reproduced, avoiding the problems of tracking changing counsel, lost documents, and confusion over who asked for or received what and when. On small scale cases, digital disclosure should continue to improve functioning, expediency, and transparency.

IV. Disclosure of Digital Data: Video Statements, In-Car Cameras, and Surveillance Footage

Even routine criminal cases increasingly rely on some form of digital evidence. For example, in impaired cases, police in-car camera audio and visual recordings of roadside stops and breath room videos are standard. Police booking hall video, videotaped complainant or witness statements, 911 recordings, and videotaped searches may frequently form a part of the Crown's disclosure in everyday assault, drug, and property crime cases. In Toronto, and elsewhere across the country, police officers are experimenting with body-worn camera systems that can produce even more routine digital data in all manner of cases.

Depending on the type of data involved, different disclosure challenges may arise. "Videotaped" (or more accurately, digitally recorded) statements are extremely routine and parties have managed disclosure with relative success. Depending on the sensitivity of the statement, the audiovisual version and/or a transcript may be provided to counsel in an unrestricted fashion along with other disclosure, or may be subject to specific conditions for use and destruction or return. The *Public Prosecution Service of Canada Deskbook* provides that Crown counsel must provide defence with an "appropriate opportunity" to privately view and listen to witnesses' statements and may provide copies of such statements, with or without conditions.[17] Where conditions are deemed appropriate by the prosecutor and not agreed to by the defence, counsel may seek judicial orders to ensure proper protection of disclosure. This kind of concern and disclosure management is not new.

State-produced digital disclosure will have some consistency of format, at least within one jurisdiction. So, for example, the in-car cameras, where used, will be preserved and disclosed in a particular format that Crown offices will presumably be equipped to "read" and display for use in court. Though, of course, technical prob-

Features:

- "Questions to Consider" sections outlining key factors for framing arguments on digital evidence access and admissibility.
- Checklists detailing various considerations for counsel when presenting evidence and submissions in a digital format.
- A summary of law enforcement's search and seizure powers for accessing digital data in the hands of third parties.

Key Insight: Search Warrants—Section 487

A threshold issue is whether individuals have a reasonable expectation of privacy for their information when it is stored with third parties. If so, then law enforcement conducts a search within the meaning of section 8 of the Charter by requesting the disclosure of such information, and the search must be reasonable as a constitutional matter or the evidence is in jeopardy of being excluded.

In the case of third-party searches and seizures, individuals do not own the physical space in which the information is stored. Therefore, territorial privacy is not engaged. But as Binnie J. pointed out in *R v Tessling*, section 8 of the Charter also protects informational privacy, which is defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Thus, there is no bar to section 8 protection simply because the custodian of the information is a third party. Rather, the courts must look to the totality of the circumstances to determine whether a reasonable expectation of privacy exists.

Adapted from Digital Evidence, 2nd Edition, Pages 60

Read a sample chapter at u.emond.ca/cls-pb05

Excerpt from *Advocacy in the Information Age*

By Lonny J. Rosen, CS

Excerpt from The Advocates' Journal, Fall 2018

"For anyone doing trials or hearings in the digital age, *Digital Evidence: A Practitioner's Handbook* is an indispensable aid."

Whether a proceeding is in the criminal, regulatory or civil realm, more and more of the evidence is in digital format: texts, social media postings, electronic copies of videos and photos, medical records, Blackberry PINs—the list goes on. But even as the number of documents in a typical proceeding has increased exponentially, counsel's obligations to marshal the evidence, to address issues of privilege, authenticity, admissibility and relevance, and to assess the probative value of the evidence [have] not been altered. Not only are counsel challenged to identify, gather and present a greater number of documents than ever before, but the evidence is also increasingly in unfamiliar formats. Where these formats are digital, Chan and Magotiaux have counsel's back.

Excerpt from *Digital Evidence: A Book Review*

By Anne Marie McElroy, McElroy Law

Excerpt from McElroy Blog, December 2017

The book is, frankly, a much-needed resource for practitioners who appear in courtrooms on criminal matters. Given the slow pace of technological advances in the criminal courts, lawyers are often tasked with the role of educating judges with respect to novel issues in digital evidence. And when the issue may be novel to the lawyer themselves, it is critical to know what questions to ask.

Table of Contents

III. Pre-Charge Considerations from a Defence Perspective

A. Pre-Charge Consultation

Before turning to the issue of bail, it may be helpful to first consider the situation where the person being investigated for fraud reaches out to criminal defence counsel before the police are involved or charges are laid. It is not unusual for fraud investigations to come to the attention of the person being investigated in advance of the police investigation. For example, if the person works for a company that believes it has been defrauded, the company may undertake an internal or external audit to investigate any concerns about financial impropriety. Alternatively, a regulatory body such as the Canada Revenue Agency, the various provincial securities commissions, the Financial Services Regulatory Authority of Ontario, or CIRO which now has authority over the Mutual Fund Dealers' Association may launch an investigation. Accordingly, the person who is the subject of these inquiries may be aware that their conduct is under review and consult with defence counsel. So, what can defence counsel do under such circumstances?

The first step for defence counsel is to meet with the client and take a full, comprehensive statement from them about the structure of the corporate body, the client's role in that structure, and the specifics of what has occurred that has led to the investigation. This is no time to "hold off" from seeking information from the client, as may be done by some counsel once a client has been charged with a criminal offence to preserve a strategic avenue in the criminal litigation. If defence counsel is consulted at this stage, they need to understand the details of what occurred in order to properly understand the scope of the problem and, potentially, to ward off criminal charges.

Of course, a statement from the client will be only part of what defence counsel must consider. Counsel must also review the relevant documentation that touches on the issue. This may include corporate records, financial statements, minutes of meetings, etc. It will be important for counsel to work closely with the client to understand what records may be relevant and how to access those records. In some cases, where the client does not have access to those materials because of their position in the

Features:

- A new chapter on cyber fraud in Canada, covering business email compromise, artificial intelligence, ransomware attacks, and more.
- A new chapter on money laundering in Canada.
- New discussion on the admissibility of electronic documents and handwriting comparisons.
- New content on criminal breach of trust and breach of trust by a public officer.
- New guidance on professional misconduct and regulatory bodies.

Key Insight: Bank Accounts

Many fraud trials involve complainants, often members of the community, who have given their bank account statements to the investigating officer at the time they filed their complaint with the police. These bank statements may be referred to in the course of a videotaped interview, and hopefully the police will have properly numbered the pages and assembled the documents in a document brief for the purposes of the interview. If this is done correctly, the statement can be clear and helpful. Unfortunately, many inexperienced counsel could assume that, because the account is technically the property of the complainant, the bank statements are admissible through the complainant without further proof. Nothing could be further from the truth. Bank documents, and especially account statements, always reflect actions on the part of complainants with an out-of-court third party. These actions may occur as account withdrawals and deposits, so it is crucial that the record-keeping on the part of the bank be accurate; thus, a bank witness is essential to the proper admissibility of bank records unless a proper affidavit from the bank accompanies the bank documents.

Adapted from Prosecuting and Defending Fraud Cases, 3rd Edition, Page 101

Read a sample chapter at u.emond.ca/cls-pb06

INDIGENOUS PEOPLE AND THE CRIMINAL JUSTICE SYSTEM

Second Edition

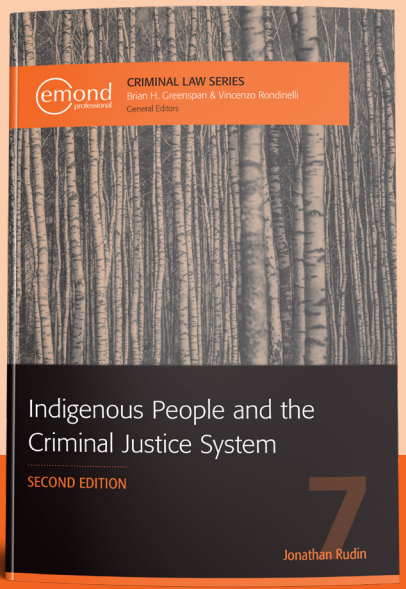
Indigenous People and the Criminal Justice System, 2nd Edition

By Jonathan Rudin

ISBN: 978-1-77462-358-9

Page Count: 400

Publication Date: July 2022



WINNER OF THE 2019 WALTER OWEN BOOK PRIZE

"Chapter 4 is in many ways the heart of the book because it examines the Supreme Court's landmark decisions in *Gladue* and *Ipeelee*. It also provides historical context to these important decisions as well as a detailed but accessible analysis of them that will benefit defence lawyers, prosecutors, and judges alike. Readers will even learn why capitalizing "Aboriginal" in judgments is important.

Jonathan Rudin's critically important work provides practical and valuable guidance that will help us better understand why Indigenous people appear so frequently in our courts for sentencing. Even more importantly, this book should inspire us to understand how, in appropriate cases, different sentences and different treatment can achieve better results for Indigenous people and for all of us who have the good fortune to live on this land."

—Justice Harry S. LaForme, Ontario Court of Appeal

Table of Contents

7

46 Indigenous People and the Criminal Justice System

XVI. The Overarching Themes—Overrepresentation and Colonialism

After reviewing the commissions and inquiries summarized in this chapter, one can see three broad themes emerge. The first is that the overrepresentation of Indigenous people in prisons is a serious and long-standing concern. The second is that the cause of this overrepresentation is best understood as arising from the impacts of colonialism. And the third conclusion, echoed by almost all the reports, commissions, and inquiries, is that ultimately the answer to addressing the alienation of Indigenous people from the justice system is the development of distinct Indigenous justice systems.

As noted in Chapter 1, the creation of distinct Indigenous justice systems is outside the scope of this book, and so the focus here will be to look at Indigenous overrepresentation over time, and also to look more deeply into the causes of this overrepresentation.

Discussions regarding the overrepresentation of Indigenous people in the criminal justice system focus on numbers and the interpretation of data. Before launching into an examination of that data, it is important to set out what reliance should and should not be placed on the numbers. While some caution is due in extrapolating conclusions based on specific pieces of information, the significance of the overrepresentation data is what they show as a general trend. Getting lost in the minutiae can lead to ignoring these important issues.

To draw any conclusions regarding overrepresentation of any group in the criminal justice system, one requires two pieces of data: first, the percentage of the particular group of the overall population, and, second, the proportion of the group among those in the criminal justice system. Overrepresentation occurs when we see more members of a particular group enmeshed in the criminal justice system than one would expect based on their percentage of the population. The assumption behind this type of analysis is that, all things being equal, groups should be represented in the criminal justice system in roughly the same proportion they are represented in the general population.

For this reason, care must be taken in looking at figures that say, for example, that Indigenous people make up 25 percent of the prison population in a province. The

Features:

- A chapter devoted to FASD, including diagnosis, symptoms, important cases, and insights into working with FASD-affected clients.
- A chapter on the evolution of the Gladue principles and their impact on sentencing, bail, corrections, and parole.
- Expanded discussion on R v Anthony-Cook and plea bargains.
- An in-depth analysis of the Supreme Court's landmark decisions in *Gladue, Williams, and Ipeelee.*

Key Insight: Asking the Question

For defence counsel, the first issue that they must determine is whether their client is an Indigenous person. That is not as easy as it might initially seem. One cannot determine if someone is an Indigenous person based on how they look or on their first or last name. The reality of the social dislocation that has taken place in Indigenous communities means that there are some Indigenous people who have grown up in Europe and speak accented English and some who carry the names of their adoptive parents or a non-Indigenous birth parent—this suggests an ancestry at some distance from Canada. Some Indigenous people may appear to be African Canadian, others Caucasian. It is important not to fall victim to one's own stereotypes of what one thinks an Indigenous person should look like. It is also not enough to simply ask every single client whether they are an Indigenous person. First of all, what specifically is counsel asking? Section 35 of the Constitution Act, 1982 defines the Aboriginal peoples of Canada as Indian, Inuit, or Métis. Each term can have a specific, and sometimes contentious, meaning.

Adapted from Indigenous People and the Criminal Justice System, Second Edition, Page 60 and 61

Read a sample chapter at u.emond.ca/cls-pb07

Excerpt from A Brief Review of What a Book Can Do

By Lisa Silver, Assistant Professor, University of Calgary, Faculty of Law

Excerpt from Ideablawg, October 2018

First a note about Jonathan Rudin who has dedicated his life's journey to the recognition of our legal failures in our relationship with Indigenous people. His pathway through this book has been straight and true as he himself created legal institutions and legal principles, through his professional work at Aboriginal Legal Services, to ensure no Canadian forgets these failures. He has worked hard to turn these failures into positive developments. This book is indicative of his work and a testament to it.

Meaningful change can be found in this book. Woven between the pages are suggestive kernels of knowledge that each of us can take back to our law practices, courtrooms, and law schools. There is, for example, a telling passage on Aboriginal English (and French), taken from the groundbreaking work of Australian Socio-linguist Diana Eades, which can leave one with the kind of "aha" moment needed to create innovative approaches to intractable problems. There are many such veil-lifting moments in this book.

Excerpt from Indigenous People And The Criminal Justice System: A Book Review

By Anne-Marie McElroy, Criminal Defence Lawyer

Excerpt from McElroy Blog, September 2018

The book also addresses different areas of criminal law that affect Indigenous clients, such as bail, firearms prohibitions, dangerous offender applications, and review board hearings. These areas provide guidance as to how counsel might properly address the background factors in order to more persuasively advocate for their clients. The book further contemplates how the principles in *Gladue* might be expanded to other areas, including corrections and trials themselves.

Table of Contents

12. Breach of Confidential Informer Privilege

Confidential informer privilege is an "ancient and hallowed protection which plays a vital role in law enforcement."[141] Any breach of the privilege could potentially put the informer's life at risk. Accordingly, even an inadvertent breach will be treated extremely seriously by the court. In *R v XY*,[142] the accused had disclosed his prior activities as an informer to the police in a post-arrest interview. Although the police had turned off the primary recording system, a secondary system recorded the interview and a transcript was disclosed to the defence. Although the Crown moved swiftly to remedy the breach when alerted by defence counsel, the accused was attacked in custody by a prisoner who had learned from disclosure in another case that he was a "rat." The trial judge declined to stay the proceedings, but a stay was imposed on appeal. The court observed that "[t]o characterize the police and prosecutorial conduct in breach of the informer privilege as anything less than gross negligence is to ignore reality."[143] Neither the police nor the prosecution took any steps to verify the accused's claim to informer status or protect the privilege until after the breach was brought to their attention. The court was satisfied that this was one of the "clearest of cases" meriting a stay.

By contrast, in *R v Bains*,[144] the accused's complaint was that police affidavits used to obtain a wiretap against him failed to properly protect the identity of confidential informers relied upon by the police. The appeal court held that while the accused had standing to allege an abuse of process in these circumstances, there was no prospect of the accused obtaining a remedy and the trial judge made no error in refusing to embark upon a *voir dire*.[145] While the protection of informer privilege is a crucial systemic value independent of any particular accused, there was simply no impact on the accused's own interests capable of justifying a remedy.

13. Breach of Solicitor–Client Privilege

The Supreme Court has held that the privilege enjoyed by a client of a professional legal adviser against disclosure of communications made in furtherance of seeking or receiving legal advice is protected by the Charter.[146] Solicitor–client privilege is

Features:

- Checklists of the threshold technical requirements for remedies under sections 24(1), 24(2), and 52(1) of the Charter.
- Practical guidance on asking the court to strike down a law and obtaining the benefit of such a declaration issued by a different court.
- Explanation of lesser-known Charter remedies, including *habeas corpus*, costs against the Crown, the impounding of seized property, and the residual discretion to quash a search warrant even though it passes a *Garofoli* review.

Key Insight: Stages in a *Habeas Corpus* Application

There are two adjudicative stages in a *habeas corpus* application, each having different procedural requirements and burdens of proof. The process begins with a claimant filing a written application in the provincial superior court, along with supporting documentary evidence. The order sought should be described as "a writ of *habeas corpus* with certiorari in aid."

At the first stage of the review a judge considers the application materials, possibly in the absence of the claimant, and decides whether to issue the writ. If the legal criteria are met for the issuance of the writ, then it must be granted.

If granted, the writ requires that the detained person be brought before the court. Once the claimant is in court, the second stage of review occurs. The onus is then on the authorities detaining the person to justify the legality of the detention.

Adapted from Charter Remedies in Criminal Cases: A Practitioner's Handbook, Page 148

Read a sample chapter at **u.emond.ca/cls-pb08**

Excerpt from *Book Review: Impaired Driving and Other Criminal Code Driving Offences*

By Jonathan Rosenthal

Excerpt from For the Defence, Vol. 39, No. 4, 2019

As an authoritative, complete guide to criminal driving offences, it is essential reading for defence lawyers and prosecutors alike in this new era. Similar to most of Emond's Criminal Law Series, anchored by criminal law heavy-weights Justice Enzo Rondinelli and Brian Greenspan, it offers clear and concise guidance on the practical and procedural aspects of motor vehicle—or should I say "conveyance"— litigation.

Together the authors have managed to effectively provide a truly balanced and fair review of all the pressing issues. Peter Keen is an experienced assistant Crown attorney and Karen Jokinen is an equally experienced defence lawyer. They include both Crown and defence perspectives, supported by complete and competing case law. It is rare to read such a balanced, detailed, and practical approach to criminal law.

Excerpt from *Book Review: Impaired Driving and Other Criminal Code Driving Offences*

By Kyla Lee

Excerpt from Vancouver DUI Lawyer Blog, January 2019

As a serious practitioner of impaired driving law, I can say that this book is a fantastic addition to any library. It is great for the beginner who needs to learn quickly about impaired driving, but there are gems in there that will benefit even the most experienced impaired driving counsel. The structure of the book is smart; each chapter is a specific issue and it stands alone, so if you have a particularly complex case on refusal to provide a sample, or a serious question about what the meaning of "conveyance" is, you can flip to that particular chapter and read through the issue in only twenty or so pages. This saves having to search the whole text for one nugget buried somewhere in the book.

IMPAIRED DRIVING AND OTHER CRIMINAL CODE DRIVING OFFENCES

Second Edition

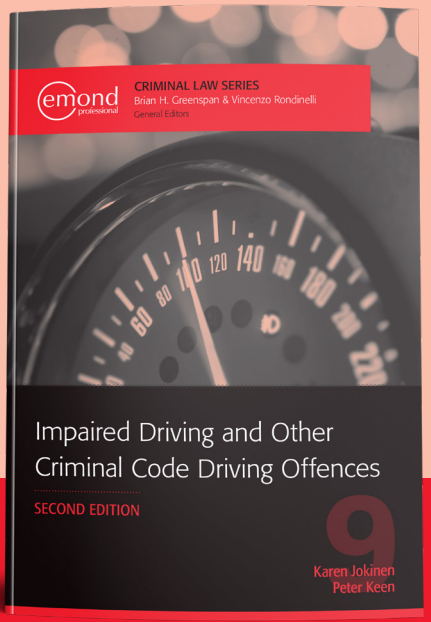
Impaired Driving and Other Criminal Code Driving Offences, 2nd Edition

By Karen Jokinen and Peter Keen

ISBN: 978-1-77462-370-1

Page Count: 616

Publication Date: March 2023



"In this commendable work, the authors have created an ideal "briefcase book" that provides the reader with a clear, concise, and balanced review of the new provisions, including the reformulated criminal driving offences, the expanded police powers relating to roadside stops, screening and evidentiary demands, and the evidentiary provisions that will now guide the prosecution and defence of charges. The authors are careful to flag areas that may give rise to future constitutional challenges. They note the provisions that will likely be subject to legal argument and judicial interpretation. They reference key precedents decided under the old provisions and suggest how they may assist in understanding the new provisions. They also provide a wealth of practical tips and knowledge that can be amassed only by having prosecuted and defended hundreds of these cases over the years."

—Justice Joseph Di Luca, Superior Court of Justice, Newmarket, Ontario

Table of Contents

III. Criminal Negligence: A Challenging Area

In 1990, Justice Sopinka described criminal negligence law as "one of the most difficult and uncertain in the whole of the criminal field," and this concern is still echoed in appeal decisions today.[5] Academic commentators have struggled with the issue and pointed out that it is difficult to determine whether the "marked and substantial departure" standard should be considered an aspect of *actus reus* or *mens rea*.[6] Indeed, in *R v Beatty* itself, while the majority felt that the "marked and substantial departure"[7] standard was an element of *mens rea*, the minority felt that this was an issue of *actus reus*.

IV. Descriptions of Actus Reus and Mens Rea

There are currently different approaches to analyzing the *actus reus* and *mens rea*. Under the Manitoba approach, these are distinct inquiries. In the Ontario and British Columbia approach, the analysis of *actus reus* and *mens rea* is linked.

A. Manitoba Approach: Tayfel and Beatty—Actus Reus and Mens Rea Are Distinct

According to the Manitoba Court of Appeal in *R v Tayfel*, the *actus reus* and *mens rea* of criminal negligence causing death are distinct.[8] The court based this decision on the language used by the Supreme Court of Canada in *Beatty*. However, it is important to note that *Beatty* was a dangerous driving case, so the *actus reus* and *mens rea* discussion by the court is in the context of that dangerous driving scenario.

The court in *Beatty* ruled that the *actus reus* of dangerous driving is to be determined by the words of the statute.[9] The court's description of the *actus reus* and *mens* rea of dangerous driving was as follows:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place."

Features:

- Outlines and explanations of new legislations.
- Detailed differences between impaired driving, drinking and driving, and drugged driving.
- Detailed information about fines and sentencing, including corollary consequences, such as consequences found in provincial highway traffic legislation.
- Exploration of the strengths and weaknesses of arguments often presented by Crown and defence in these types of prosecutions, including alternatives to these arguments (when possible).

Key Insight: E-bikes

The advent of e-bikes has spawned litigation over whether they should be considered motor vehicles. The reason for the litigation is the battery on some e-bikes can be charged by pedalling the bike. E-bikes can also be propelled using only the pedals and not the battery. The Supreme Court of Canada's decision in *Saunders v The Queen* is determinative. An inoperable motor vehicle or a vehicle that has run out of gas is still a motor vehicle, even when it cannot be self-propelled. What matters is the nature of the vehicle, not how it is being used at the time. An e-bike is still a motor vehicle under the *Criminal Code* regardless of whether it is being propelled by the pedals, regardless of whether it has run out of battery power, and regardless of whether the battery can be charged using muscle power.

Adapted from Impaired Driving and Other Criminal Code Driving Offences: A Practitioner's Handbook, Page 198

Read a sample chapter at u.emond.ca/cls-pb09

Prosecuting and Defending
OFFENCES AGAINST CHILDREN
Second Edition

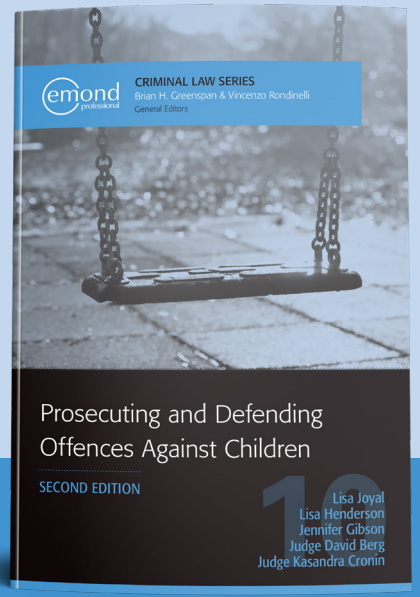
Prosecuting and Defending Offences Against Children, 2nd Edition

By Lisa Joyal, Jennifer Gibson, Lisa Henderson, David Berg, Kasandra Cronin

ISBN: 978-1-77462-373-2

Page Count: 735

Publication Date: June 2023



"[This] is the first Canadian text to provide an overview of the offence provisions in the *Criminal Code* that are used to prosecute such allegations. The *Handbook* explains in helpful detail the key elements of each of the offences and the more commonly proffered defences. In addition, the *Handbook* explains the procedural steps and elements from allegation to resolution. By describing so clearly what every Crown and defence counsel need to know when dealing with child offences, this work provides a much-needed resource.

The experienced authors—Lisa Joyal, Jennifer Gibson, and Lisa Henderson (Crown counsel); Emily Lam (defence counsel); and David Berg—collectively have experience in every aspect of child abuse and the criminal law. They explain in readily comprehensible language the sometimes complex or obtuse concepts, be they evidentiary, substantive, procedural, or practical in the application of the criminal law to offences against children."

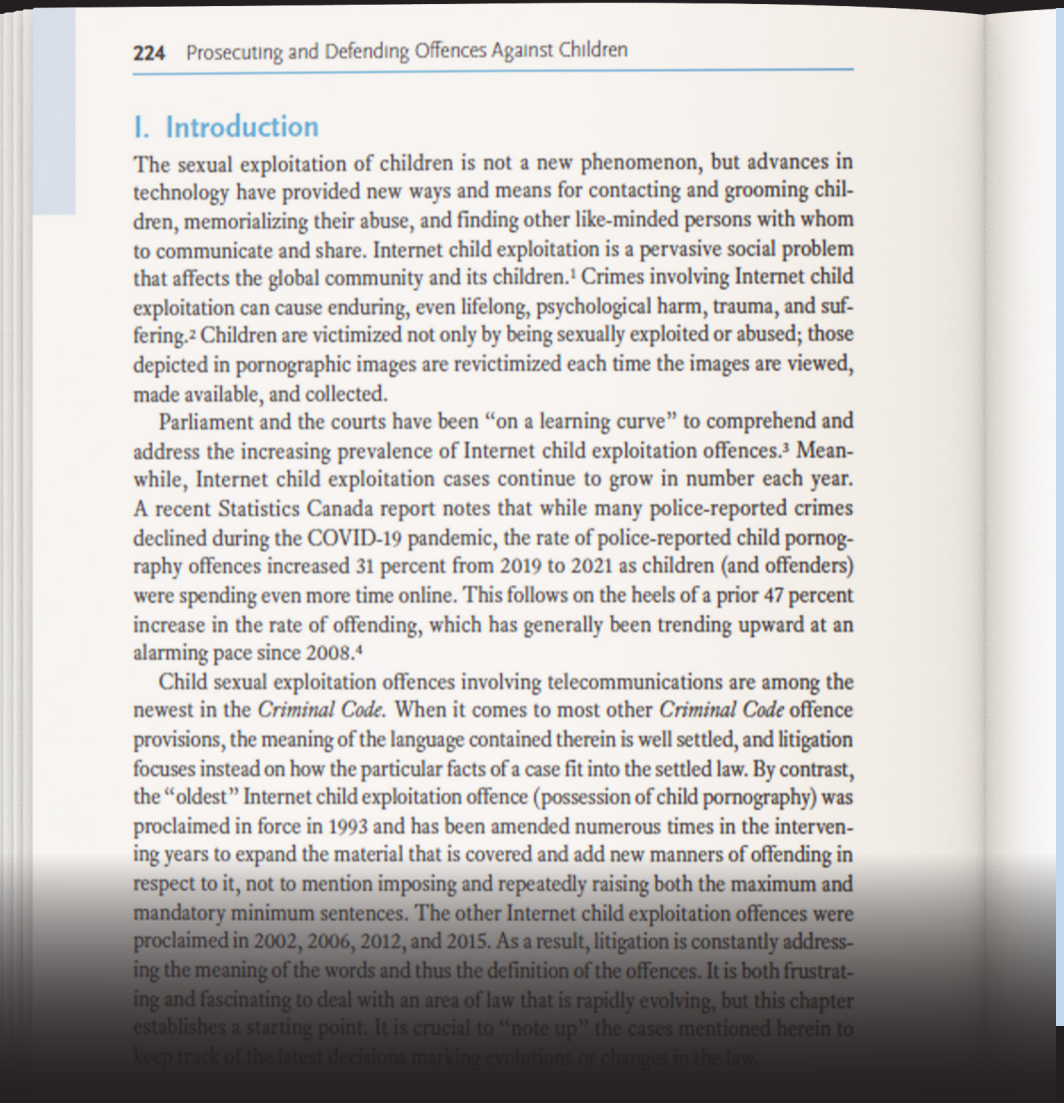
—The Honourable Susan E. Lang

Shop online at u.emond.ca/cls-pb10

Table of Contents

10

10



224 Prosecuting and Defending Offences Against Children

I. Introduction

The sexual exploitation of children is not a new phenomenon, but advances in technology have provided new ways and means for contacting and grooming children, memorializing their abuse, and finding other like-minded persons with whom to communicate and share. Internet child exploitation is a pervasive social problem that affects the global community and its children.[1] Crimes involving Internet child exploitation can cause enduring, even lifelong, psychological harm, trauma, and suffering.[2] Children are victimized not only by being sexually exploited or abused; those depicted in pornographic images are revictimized each time the images are viewed, made available, and collected.

Parliament and the courts have been "on a learning curve" to comprehend and address the increasing prevalence of Internet child exploitation offences.[3] Meanwhile, Internet child exploitation cases continue to grow in number each year. A recent Statistics Canada report notes that while many police-reported crimes declined during the COVID-19 pandemic, the rate of police-reported child pornography offences increased 31 percent from 2019 to 2021 as children (and offenders) were spending even more time online. This follows on the heels of a prior 47 percent increase in the rate of offending, which has generally been trending upward at an alarming pace since 2008.[4]

Child sexual exploitation offences involving telecommunications are among the newest in the *Criminal Code*. When it comes to most other *Criminal Code* offence provisions, the meaning of the language contained therein is well settled, and litigation focuses instead on how the particular facts of a case fit into the settled law. By contrast, the "oldest" Internet child exploitation offence (possession of child pornography) was proclaimed in force in 1993 and has been amended numerous times in the intervening years to expand the material that is covered and add new manners of offending in respect to it, not to mention imposing and repeatedly raising both the maximum and mandatory minimum sentences. The other Internet child exploitation offences were proclaimed in 2002, 2006, 2012, and 2015. As a result, litigation is constantly addressing the meaning of the words and thus the definition of the offences. It is both frustrating and fascinating to deal with an area of law that is rapidly evolving, but this chapter establishes a starting point. It is crucial to "note up" the cases mentioned herein to keep track of the latest decisions marking evolutions or changes in the law.

Features:

- A new chapter on forensic interviewing of children, focusing on forensic interviewing protocols, child development, child memory, child trauma, and more.
- A new chapter on defence perspectives, outlining the main considerations that counsel need to keep in mind at each stage of child abuse cases.
- Coverage of every *Criminal Code* provision regularly used to prosecute allegations of child abuse.
- Current and comprehensive content useful for legal practitioners as well as police services, children's aid societies, witness preparation organizations, social workers, educational institutions, and other professionals who work with children.

Key Insight: Prepare the Child for the Use of Social Media in the Courtroom

A child witness needs to be made aware that defence counsel will likely have examined the child's social media presence. In addition, if the accused is someone who knows the child well, the accused will often have access to a child's social media account information and posts (e.g., Instagram, TikTok, YouTube) and may even potentially have access to a child's text, Snapchat, or email message history over a lengthy period of time. The child and caregiver should be advised at the earliest opportunity that the defence will likely be monitoring any publicly available social media. The Crown must be careful not to give legal advice about the situation, but there is nothing improper about alerting the witness and caregiver to the potential situation that their presence on social media will be monitored.

Adapted from Prosecuting and Defending Offences Against Children: A Practitioner's Handbook, Page 26

Read a sample chapter at u.emond.ca/cls-pb10

Excerpt from *Prosecuting and Defending Offences Against Children: Book Review*

By Cheryl Milne

The authors of *Prosecuting and Defending Offences Against Children: A Practitioner's Handbook* are described as a team composed of Crown, defence, and judiciary, bringing comprehensive expertise to the topic. While aimed at anyone seeking a comprehensive understanding of how criminal law applies to cases involving the abuse of children, they in fact accomplish a more modest and achievable task. It provides an overview of the elements of the various offences and possible defences with reference to both the leading cases in respect of each, as well as cases that provide the nuance for both effective prosecution and defence in this challenging area of law. To this foundation, the book also adds the expertise of the authors in preparation for trial, including the preparation and questioning of child witnesses.

The authors interestingly veer off their script in some notable areas that suggest room for creative arguments and approaches that might better protect children. In Chapter 6 on the physical abuse of children, they identify less utilized defences, such as implied consent and necessity. These potential defences help to counter arguments that s. 43 of the *Criminal Code,* which justifies the use of reasonable physical punishment by parents, is necessary to protect parents who place a child in a car seat or remove a child from traffic or other dangerous situations. The chapter also provides a comprehensive overview of the interpretation given to the section by the Supreme Court of Canada, demonstrating its rather limited use, despite some inconsistencies in subsequent case law and the criticism against the decision.

This book is an excellent, if not comprehensive, starting point for lawyers engaged in the various facets of this area or practice. It encapsulates the basic knowledge necessary for competent practice. It also begins with an acknowledgment that children have rights in this system and applies that in the practical tips for preparing child witnesses.

Prosecuting and Defending DRUG CASES Second Edition

Prosecuting and Defending Drug Cases, 2nd Edition

By Nathan Gorham, Jeremy Streeter, and Breana Vandebeek

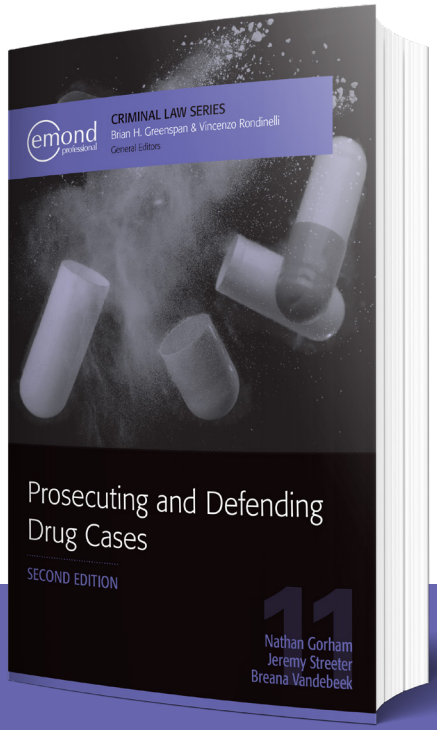
ISBN: 978-1-77462-367-1

Page Count: 408

Publication Date: September 2023

This comprehensive guide provides in-depth exploration of issues surrounding bail, disclosure, the Charter, and sentencing, alongside practice-oriented coverage of the *Cannabis Act* and *Garofoli* applications.

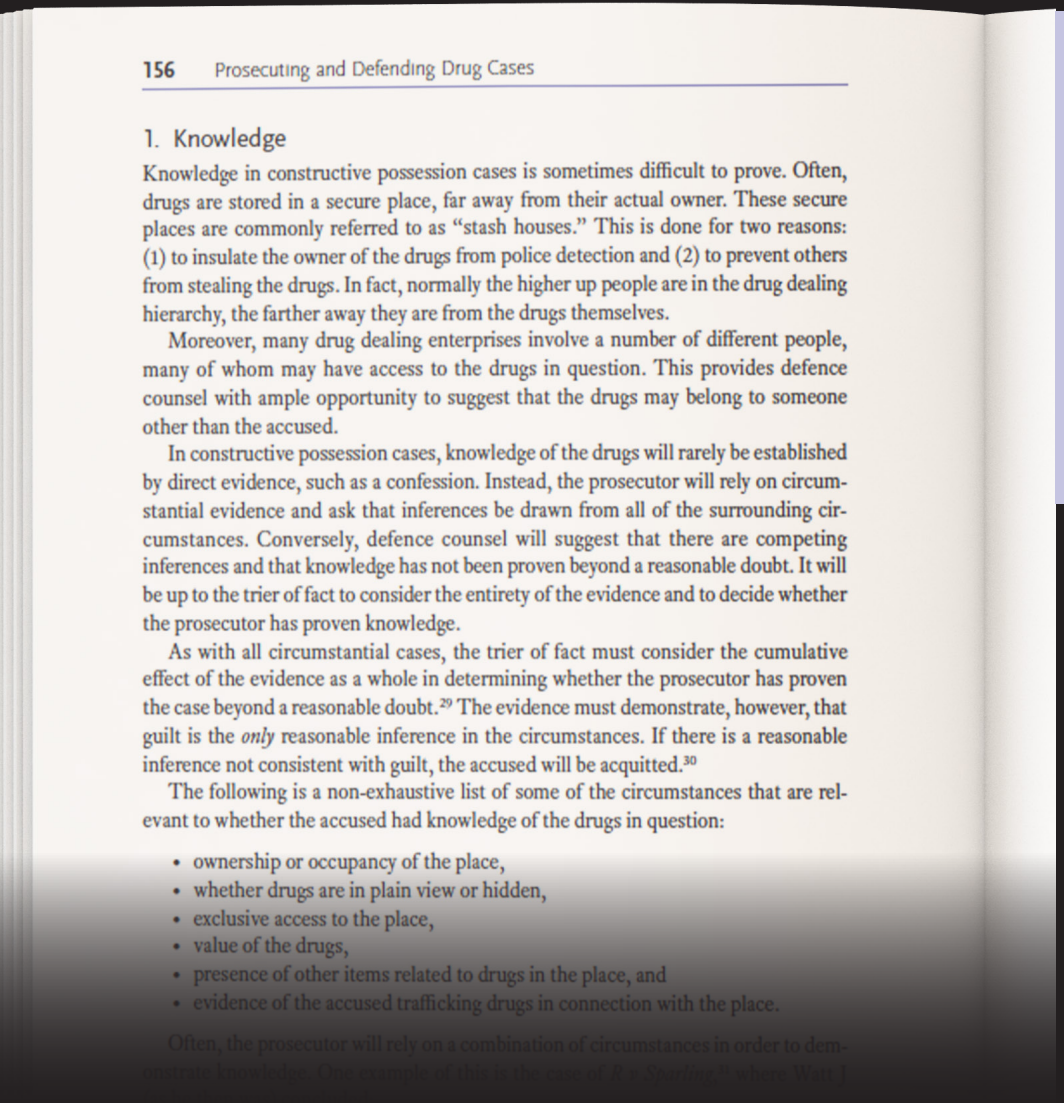
> "[It] is a worthy entry to Emond's Criminal Law Series for its discussion of the basics of drug litigation, but it also highlights areas of recent expansion and development. Whether you are a prosecutor or a defence lawyer, it is time to make room in the library for one more edition."
>
> —*Eric V. Gottardi, Partner, Peck & Company Barristers Vancouver*



Shop online at **u.emond.ca/cls-pb11**

Table of Contents

11



156 Prosecuting and Defending Drug Cases

1. Knowledge

Knowledge in constructive possession cases is sometimes difficult to prove. Often, drugs are stored in a secure place, far away from their actual owner. These secure places are commonly referred to as "stash houses." This is done for two reasons: (1) to insulate the owner of the drugs from police detection and (2) to prevent others from stealing the drugs. In fact, normally the higher up people are in the drug dealing hierarchy, the farther away they are from the drugs themselves.

Moreover, many drug dealing enterprises involve a number of different people, many of whom may have access to the drugs in question. This provides defence counsel with ample opportunity to suggest that the drugs may belong to someone other than the accused.

In constructive possession cases, knowledge of the drugs will rarely be established by direct evidence, such as a confession. Instead, the prosecutor will rely on circumstantial evidence and ask that inferences be drawn from all of the surrounding circumstances. Conversely, defence counsel will suggest that there are competing inferences and that knowledge has not been proven beyond a reasonable doubt. It will be up to the trier of fact to consider the entirety of the evidence and to decide whether the prosecutor has proven knowledge.

As with all circumstantial cases, the trier of fact must consider the cumulative effect of the evidence as a whole in determining whether the prosecutor has proven the case beyond a reasonable doubt.[29] The evidence must demonstrate, however, that guilt is the *only* reasonable inference in the circumstances. If there is a reasonable inference not consistent with guilt, the accused will be acquitted.[30]

The following is a non-exhaustive list of some of the circumstances that are relevant to whether the accused had knowledge of the drugs in question:

- ownership or occupancy of the place,
- whether drugs are in plain view or hidden,
- exclusive access to the place,
- value of the drugs,
- presence of other items related to drugs in the place, and
- evidence of the accused trafficking drugs in connection with the place.

Often, the prosecutor will rely on a combination of circumstances in order to demonstrate knowledge. One example of this is the case of *R v Sparling*,[31] where Watt J

Features:

- Up-to-date coverage of the *Controlled Drugs and Substances Act*, *Cannabis Act*, and relevant legislation.
- Updated coverage of bail conditions, including ankle monitors, consideration of the COVID pandemic, and section 493.2 of the *Criminal Code*.

Key Insight:
Circumstantial Evidence

Circumstantial evidence is important in almost all drug trials. In some areas, such as importing, much of the Crown's case may be proven by direct evidence—that is, that the accused was in possession of the drug and crossed the border. In other cases, such as possession cases where drugs are found in a house where multiple people live or have access to the drugs, the trier of fact must infer based on the circumstances whether an offence has been committed. Where the Crown's case is based on circumstantial evidence, the rule in *Hodge's Case* applies and requires that the accused be convicted only where guilt is the only reasonable inference in the circumstances. The Supreme Court in *R v Villaroman* discussed the burden of proof in the context of a circumstantial case and stated that the trier of fact must negative "other plausible theories." This means that where, on the evidence, there is a reasonable basis to conclude that the accused was not involved in the offence, an acquittal will follow. That said, the trier of fact must not consider speculative or unreasonable possibilities. In assessing whether the Crown has met its burden, the trier of fact must consider the entirety of the evidence as a whole and not assess the evidence in a piecemeal fashion. It is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt and to fail to consider the cumulative effect of the evidence as a whole.

Adapted from Prosecuting and Defending Drug Cases: A Practitioner's Handbook, Page 136

Read a sample chapter at u.emond.ca/cls-pb11

Prosecuting and Defending Drug Cases

SENTENCING

Principles and Practice, Second Edition

Sentencing: Principles and Practice, 2nd Edition

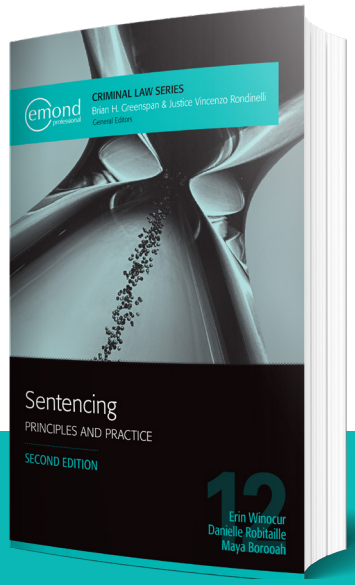
By Erin Winocur, Danielle Robitaille, and Maya Borooah

ISBN: 978-1-77462-482-1

Publication Date: November 2023

This text tackles both common and unusual sentencing issues and questions, and pragmatically discusses plea negotiations, procedure and advocacy, dangerous offenders, types of sentences, Charter considerations, appellate issues, and ancillary orders, as well as post-sentencing issues.

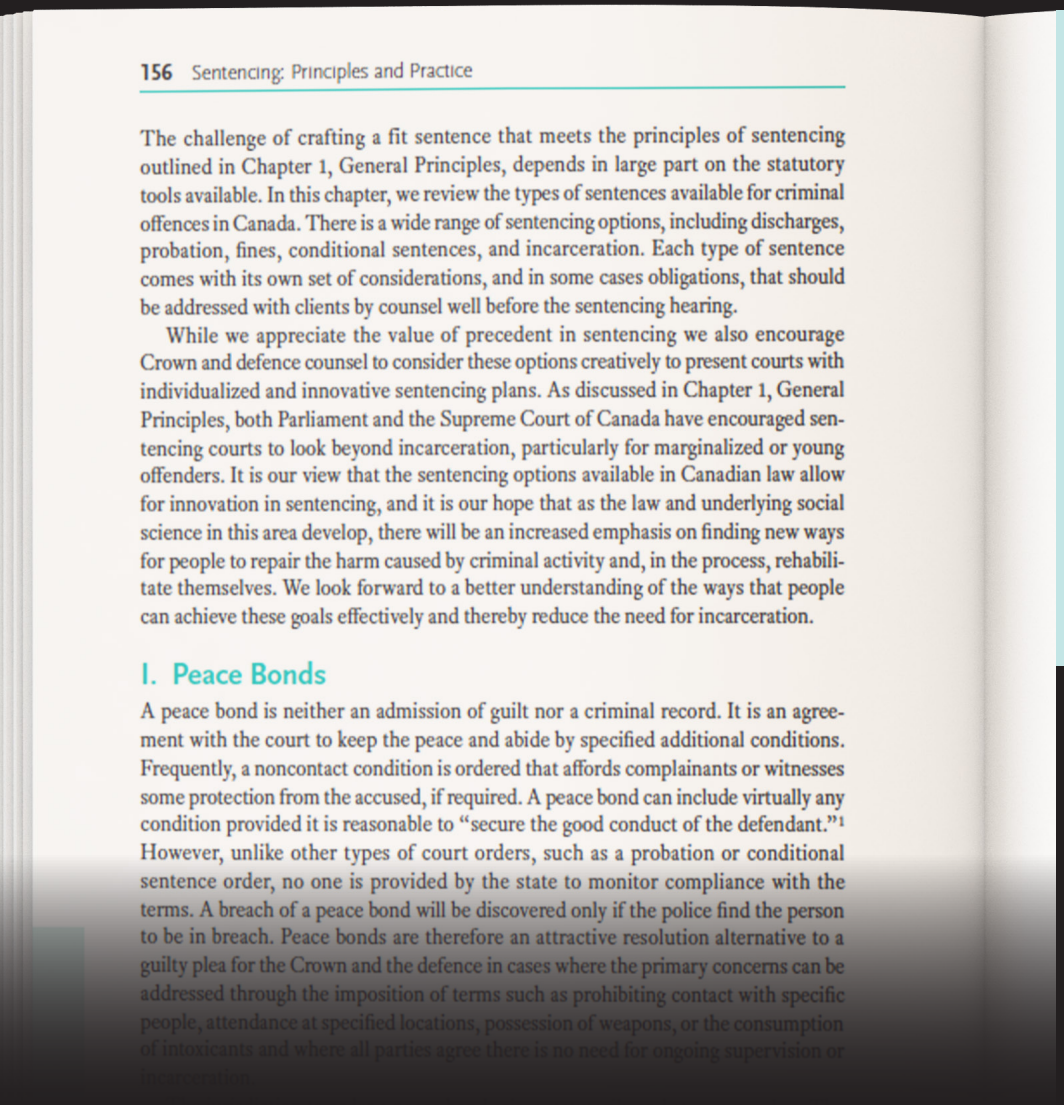
> "The text skillfully addresses the forms of sentence available; specialized areas, such as dangerous and long-term offender applications and sentencing in youth prosecutions; application of Charter principles; and it reminds us, with good reason, of the ever-important remedial approach to the sentencing of Indigenous offenders as mandated by the Supreme Court through a meaningful application of Gladue principles."
>
> *—Honourable M. Joyce DeWitt-Van Oosten of the Court of Appeal for British Columbia*



Shop online at u.emond.ca/cls-pb12

Table of Contents

12



156 Sentencing: Principles and Practice

The challenge of crafting a fit sentence that meets the principles of sentencing outlined in Chapter 1, General Principles, depends in large part on the statutory tools available. In this chapter, we review the types of sentences available for criminal offences in Canada. There is a wide range of sentencing options, including discharges, probation, fines, conditional sentences, and incarceration. Each type of sentence comes with its own set of considerations, and in some cases obligations, that should be addressed with clients by counsel well before the sentencing hearing.

While we appreciate the value of precedent in sentencing we also encourage Crown and defence counsel to consider these options creatively to present courts with individualized and innovative sentencing plans. As discussed in Chapter 1, General Principles, both Parliament and the Supreme Court of Canada have encouraged sentencing courts to look beyond incarceration, particularly for marginalized or young offenders. It is our view that the sentencing options available in Canadian law allow for innovation in sentencing, and it is our hope that as the law and underlying social science in this area develop, there will be an increased emphasis on finding new ways for people to repair the harm caused by criminal activity and, in the process, rehabilitate themselves. We look forward to a better understanding of the ways that people can achieve these goals effectively and thereby reduce the need for incarceration.

I. Peace Bonds

A peace bond is neither an admission of guilt nor a criminal record. It is an agreement with the court to keep the peace and abide by specified additional conditions. Frequently, a noncontact condition is ordered that affords complainants or witnesses some protection from the accused, if required. A peace bond can include virtually any condition provided it is reasonable to "secure the good conduct of the defendant."[1] However, unlike other types of court orders, such as a probation or conditional sentence order, no one is provided by the state to monitor compliance with the terms. A breach of a peace bond will be discovered only if the police find the person to be in breach. Peace bonds are therefore an attractive resolution alternative to a guilty plea for the Crown and the defence in cases where the primary concerns can be addressed through the imposition of terms such as prohibiting contact with specific people, attendance at specified locations, possession of weapons, or the consumption of intoxicants and where all parties agree there is no need for ongoing supervision or incarceration.

Features:

- A chapter devoted to sentencing issues specific to Indigenous offenders.
- Discussions on the latest trends and issues affecting sentencing.
- Sentencing charts simplifying statutory issues into manageable information.
- Updated case law and legislation to reflect recent amendments.

Key Insight: Least Restrictive Sentence Capable of Rehabilitation for Young Persons

Unlike for adult offenders, who may receive sentences that are greater than what is required to hold them personally accountable but are designed through punitive measures to deter other potentially like-minded individuals from committing an offence, young persons are always to be subject to the least restrictive sentence appropriate in the circumstances. When a custodial sentence is imposed, section 38 demands that the *level* of custody (as explored later in Section V.C.3), is also to be the least restrictive one capable of meeting the YCJA's sentencing goals. The sentencing judge must provide reasons for why a certain level of custody was imposed.

The least restrictive sentence, however, must still be the one that is "most likely to rehabilitate the young person" and also "promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community." In some cases, this will require a custodial disposition because no other sentence would be capable of driving home to the young person the seriousness of their conduct, which is essential to both of these sentencing goals.

Adapted from Sentencing: Principles and Practice, Pages 390 and 391

Read a sample chapter at u.emond.ca/cls-pb12

Excerpt from *Sentencing: Principles and Practice Review*

By Craig Bottomley

I kept finding gems and diverting down sideroads. I ended up spending four hours reading section after section. I learned a lot. Ms. Robitaille and Ms. Winocur have done the impossible and turned the forlorn topic of sentencing into a page-turner. This book is academically sound and, perhaps more importantly, full of solid practical advice for the criminal law practitioner.

For instance, the authors approach the minefield of dangerous offenders on serious academic footing and analyze not only the history of the Supreme Court's decision in *R v Lyons*, but also look to where litigation in this area is headed under *R v Boutilier*. In the same chapter, however, there is practical advice on how to assert the position that the accused should have a role in selecting the psychiatrist to do the assessment and point to case law supporting the idea that a failure to have the accused involved in the selection of the expert can impinge a meaningful right to silence.

If there is a theme to this book, it is the combination of focused legal analysis combined with practical advice. The book is intuitively organized and easy to use. Each time I turn to it, I find the answer to the question plaguing me.

Sentencing also brings in experts who have contributed to chapters on dangerous offender hearings, Indigenous sentencing, youth sentencing, and appeals. The benefit of their collective wisdom accrues to the reader's benefit. This is, perhaps, most evident in the chapter on the collateral consequences of sentencing where the authors address issues of immigration, civil, and family law consequences. As criminal lawyers, we are specialists in our own field, but few of us can keep straight the exact immigration consequences of a guilty plea to serious criminality and the impact of pre-sentence custody on a client who is not yet a citizen. This chapter addresses these issues and does so in a straightforward and easily accessible fashion.

There is no stage of the criminal justice process with a more direct impact on your client than sentencing. Those armed with this book will be in the best position to minimize the impact of sentence and make a positive impression on the court.

Table of Contents

TAKEAWAYS

Based on the discussion in this chapter, we provide the following nine "take-away" points:

TAKEAWAY 1

Most, if not all, professions, will have continuing education requirements, often referred to as "quality assurance" requirements. These requirements should be considered mandatory. The Supreme Court of Canada recently affirmed the ability of a regulator to suspend a registrant for failing to comply with the continuing education requirements even where they have not been expressly authorized by statute.[5]

TAKEAWAY 2

The powers granted to quality assurance committees are, for most regulators, reasonably significant. Assessors can likely be appointed. Documents can likely be requested. Charts and files can be reviewed. Obstructing or otherwise frustrating the intent of the quality assurance committee or its assessors can result in even more serious consequences than not fulfilling the quality assurance requirements. Counsel should advise registrants that they can compound their difficulties vis-à-vis the regulator by continued disregard of quality assurance/continuing education requirements.

TAKEAWAY 3

In order to ensure the effectiveness of the quality assurance program, many governing statutes provide that information gathered during the quality assurance process must remain confidential. Generally, this will mean that information gathered within the quality assurance program cannot be used in a discipline or capacity matter. It is important to note, however, that the requirement for confidentiality (where it exists) applies both to the regulator and to the registrant being assessed.

TAKEAWAY 4

The duty of confidentiality for the quality assurance process, for most regulators, is not all-encompassing. It will be important to review the confi-

Features:

- End-of-chapter "Takeaways" highlight key considerations for counsel.
- Up-to-date discussion on regulatory audits and reports that can affect registrants.
- Highlighting of applicable codes, such as *Health Professions Procedural Code*, *Professional Code*, *Model Code of Professional Conduct*.
- Relevant acts, including the Ontario *Regulated Health Professions Act, 1991*; *Protecting Patients Act, 2017*; *Early Childhood Educators Act, 2007*; *Ontario College of Teachers Act, 1996*; *Registered Human Resources Professionals Act, 2013*; and the *Controlled Drugs and Substances Act*.

Key Insight: Mandatory Reporting

In Ontario, there is no reporting obligation regarding incapacity on individual registrants. There is, however, an obligation on "facilities" (defined as facilities where one or more regulated health professionals practise) to report if there are reasonable and probable grounds to believe that a member who practises at the facility is incapacitated (s 85.2 of the Code). Employers of regulated health professionals in Ontario (like those in British Columbia) are required to report any termination of employment or revocation, suspension, or restrictions on privileges based on incapacity (s 85.5(1)). The reporting obligations also apply where the member resigns before such sanctions are imposed (s 85.5(2)). It is an offence punishable by a fine of up to $25,000 for an individual and up to $50,000 for a corporation to fail to abide by the mandatory reporting obligations in the Code (s 93(1)).

Adapted from Prosecuting and Defending Professional Regulation Cases, Pages 162 and 163

Read a sample chapter at u.emond.ca/cls-pb13

SEARCH AND SEIZURE

Search and Seizure

By Nader Hasan, Mabel Lai, David Schermbrucker, and Randy Schwartz

ISBN: 978-1-77255-635-3

Page Count: 762

Publication Date: February 2021

This comprehensive guide analyzes every perspective, including those of the rights-holder, the police officer conducting a search or seizure, prosecutors and defence counsel, and judges reviewing police conduct after the fact.

WINNER OF THE 2021 WALTER OWEN BOOK PRIZE

> "The editors and authors have made a major contribution to our understanding of search and seizure law, and we owe them a debt of gratitude for this timely, essential, and excellent text. Simply put, I am happy that this collection exists, and I only wish it had been available when I practised criminal law and during my 12 years as a trial judge."
>
> *—The Honourable Sheilah L. Martin of the Supreme Court of Canada*

Shop online at
u.emond.ca/cls-pb14

Table of Contents

14

1. Conditions Requiring Confirmation of Possession or Control of the Computer Data

Although an officer who makes a preservation demand or seeks a preservation order must reasonably suspect that the relevant computer data is in the possession or control of the person to whom the demand or order is directed, it will sometimes be necessary to confirm this suspicion. In particular, some record-holders have policies prohibiting them from confirming the existence of computer data. In such cases, an officer may wish to compel the record-holder to provide confirmation, so the officer can make an informed decision whether to pursue production of the data from the record-holder, or perhaps seek preservation or production of the data from another source.

Moreover, in cases where the eventual production of the data will require a general production order under *Criminal Code* section 487.014, confirmation of possession or control may assist the officer to decide whether there are grounds to seek the production order. As indicated earlier, preservation demands and preservation orders issue on the "reasonable suspicion" standard, while general production orders issue on the higher "reasonable belief" standard. Confirmation of possession or control may assist the officer to meet this higher standard necessary to obtain a general production order.

PRACTICE POINTS

If a record-holder is unwilling to voluntarily confirm whether relevant computer data is in its possession or control, a police officer who makes a preservation demand or obtains a preservation order should consider a condition of the demand or order compelling the record-holder to confirm possession or control.

2. Conditions Prohibiting Disclosure of the Preservation Demand or Preservation Order

One of the most common conditions of preservation demands and orders sought by police is a condition prohibiting disclosure of the existence or contents of the demand

Features:

- Useful "practice tips" sections in each chapter with practical advice from Crown and defence.
- Chapter devoted to digital search and seizure powers, including discussions on internet search history.
- Chapter focused on the warrant application process, including forms to be used, telewarrants, and drafting the Information to Obtain (ITO), as well as dealing with information from a confidential informer (CI).
- Chapter dedicated to reviewing the Garofoli process.

Key Insight: Searching the Grounds Surrounding a Dwelling-House or Other Building

If the police intend to search a dwelling-house or other premises and the grounds surrounding it, they should clearly identify this intention in the ITO, and clearly describe both the building and grounds to be searched in the warrant itself. Explicitly referring to this intention and explicitly obtaining authority to conduct this search will avoid litigation risk down the road. If the police do not adopt this best practice, questions may arise about their authority to search the grounds surrounding the building. In particular, search warrants often describe the place to be searched as the "dwelling-house" or "premises" at a specified municipal address. These descriptions create ambiguity about the authority of the police to search the grounds surrounding the building. Whether the police have this authority turns on the connection between the grounds searched and the building.

Adapted from Search and Seizure, Page 121

Read a sample chapter at u.emond.ca/cls-pb14

Qualifying and Challenging
EXPERT EVIDENCE

Qualifying and Challenging Expert Evidence

By Eric V. Gottardi, Jennifer A. MacLellan, Michael Lacy, and Robin Flumerfelt

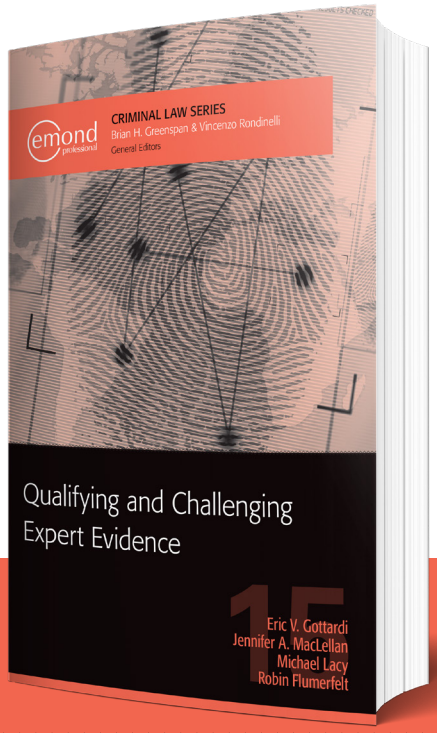
ISBN: 978-1-77462-323-7

Page Count: 346

Publication Date: April 2022

Authored by a respected team of cross-national legal experts, *Qualifying and Challenging Expert Evidence* integrates varied perspectives to achieve a balanced, engaging, and comprehensive approach unmatched by any other resource. It maintains a practical focus while weaving strategic guidance with an analysis of case law and the relevant provisions of the *Criminal Code* and the *Canada Evidence Act*.

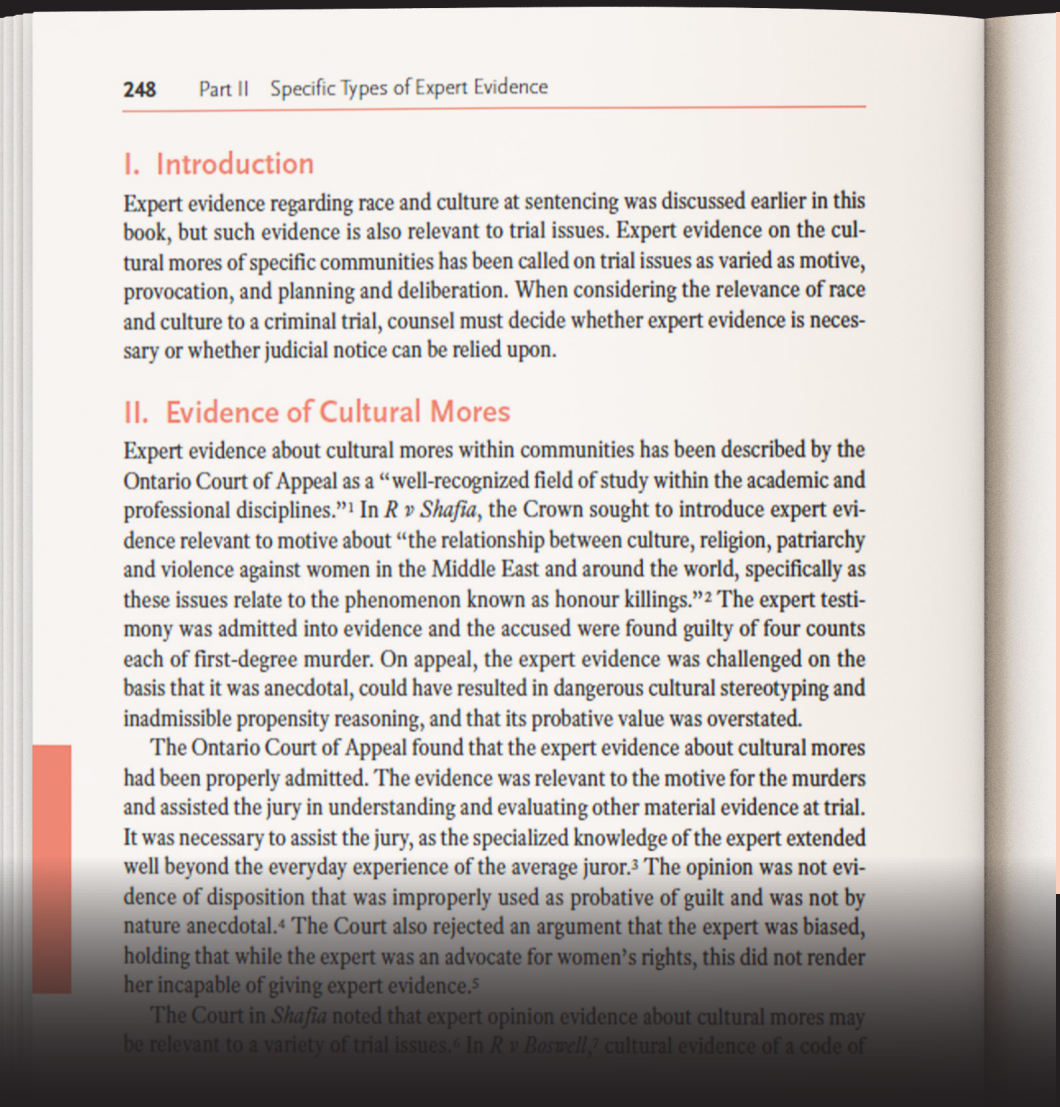
Applicable to Crown, defence counsel, and the judiciary, this handbook uses clear and concise language to address all aspects of expert witness testimony from start to finish.



Shop online at
u.emond.ca/cls-pb15

Table of Contents

15



248 Part II Specific Types of Expert Evidence

I. Introduction

Expert evidence regarding race and culture at sentencing was discussed earlier in this book, but such evidence is also relevant to trial issues. Expert evidence on the cultural mores of specific communities has been called on trial issues as varied as motive, provocation, and planning and deliberation. When considering the relevance of race and culture to a criminal trial, counsel must decide whether expert evidence is necessary or whether judicial notice can be relied upon.

II. Evidence of Cultural Mores

Expert evidence about cultural mores within communities has been described by the Ontario Court of Appeal as a "well-recognized field of study within the academic and professional disciplines."[1] In *R v Shafia*, the Crown sought to introduce expert evidence relevant to motive about "the relationship between culture, religion, patriarchy and violence against women in the Middle East and around the world, specifically as these issues relate to the phenomenon known as honour killings."[2] The expert testimony was admitted into evidence and the accused were found guilty of four counts each of first-degree murder. On appeal, the expert evidence was challenged on the basis that it was anecdotal, could have resulted in dangerous cultural stereotyping and inadmissible propensity reasoning, and that its probative value was overstated.

The Ontario Court of Appeal found that the expert evidence about cultural mores had been properly admitted. The evidence was relevant to the motive for the murders and assisted the jury in understanding and evaluating other material evidence at trial. It was necessary to assist the jury, as the specialized knowledge of the expert extended well beyond the everyday experience of the average juror.[3] The opinion was not evidence of disposition that was improperly used as probative of guilt and was not by nature anecdotal.[4] The Court also rejected an argument that the expert was biased, holding that while the expert was an advocate for women's rights, this did not render her incapable of giving expert evidence.[5]

The Court in *Shafia* noted that expert opinion evidence about cultural mores may be relevant to a variety of trial issues.[6] In *R v Boswell*,[7] cultural evidence of a code of

Features:

- Practical checklists, flow charts, case tables, and other quick-reference materials.
- Annotated extracts of the *Criminal Code* and *Canada Evidence Act*.
- Sample CFS Report and explanation.
- Cross-national author team representing both Crown and defence perspectives.
- Focus on process, strategy, and tactics pertaining to expert witness testimony.
- Detailed analysis of specific types of expert evidence within the fields of medicine, law enforcement, science, technology, and sociology.

Key Insight: Sentencing of Adult Offenders

Hearsay evidence is generally admissible on a sentencing hearing (s 723(5) of the Code), but a court may, where "it is in the interests of justice," compel a person to testify rather than rely on hearsay evidence. A court may also accept, as proved, any information disclosed at the trial or at the sentencing proceeding and any facts agreed upon by the prosecutor and the accused (s 724(1)). However, any disputed aggravating factor must be proven by the Crown beyond a reasonable doubt. A sentencing court is also required to consider "any relevant information" placed before it (s 726.1). This statutory context, however, does not obviate the need for expert opinion evidence to be properly admissible (or consented to) before it is considered and acted upon by a sentencing judge. Nor does it eliminate, where appropriate, testing of expert evidence before a sentencing judge.

Adapted from Qualifying and Challenging Expert Evidence, Page 92

Read a sample chapter at u.emond.ca/cls-pb15

WITNESS PREPARATION, PRESENTATION, AND ASSESSMENT

Witness Preparation,
Presentation and Assessment

By Justice Cameron Gunn,
Mona Duckett, and Patrick McGuinty

ISBN: 978-1-77462-376-3

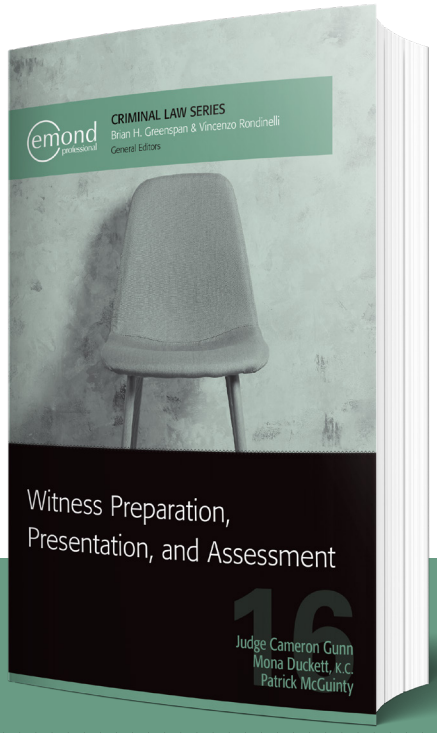
Page Count: 368

Publication Date: December 2022

Incorporating insights from Crown, defence, and judicial perspectives, this handbook offers readers practical guidance on handling the myriad of legal issues that may arise in the preparation, presentation or assessment of witnesses

"Happily, for counsel and for the judiciary, there is now a text that looks comprehensively and thoughtfully at the effective preparation of witnesses and the presentation of their testimony in the courtroom, as well as at the factors that can properly inform the assessment of their credibility. *Witness Preparation, Presentation, and Assessment* is a unique text that melds aspects of advocacy, ethics, courtroom procedure, and evidence."

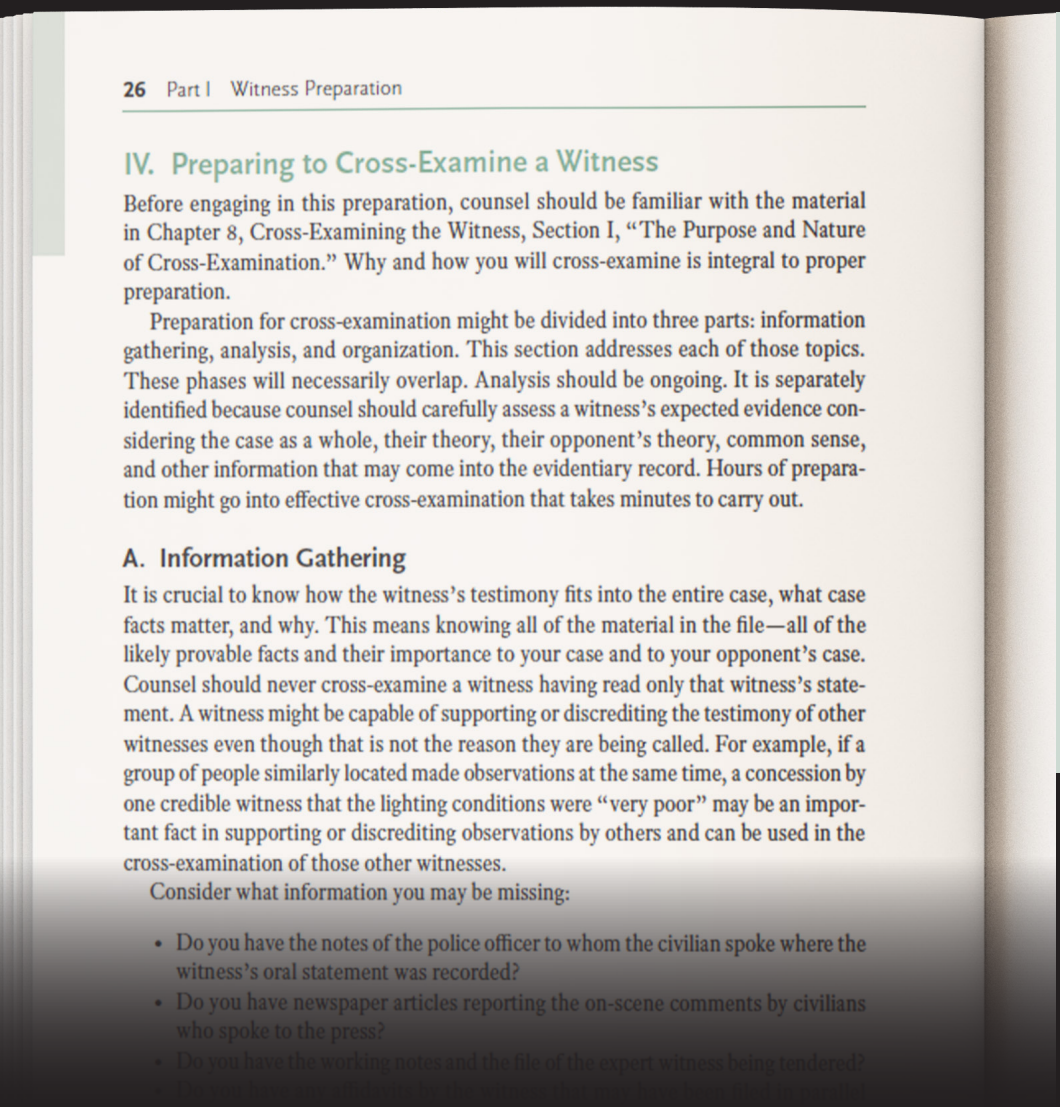
—Justice Michelle Fuerst,
Ontario Superior Court of Justice



Shop online at
u.emond.ca/cls-pb16

Table of Contents

16



26 Part I Witness Preparation

IV. Preparing to Cross-Examine a Witness

Before engaging in this preparation, counsel should be familiar with the material in Chapter 8, Cross-Examining the Witness, Section I, "The Purpose and Nature of Cross-Examination." Why and how you will cross-examine is integral to proper preparation.

Preparation for cross-examination might be divided into three parts: information gathering, analysis, and organization. This section addresses each of those topics. These phases will necessarily overlap. Analysis should be ongoing. It is separately identified because counsel should carefully assess a witness's expected evidence considering the case as a whole, their theory, their opponent's theory, common sense, and other information that may come into the evidentiary record. Hours of preparation might go into effective cross-examination that takes minutes to carry out.

A. Information Gathering

It is crucial to know how the witness's testimony fits into the entire case, what case facts matter, and why. This means knowing all of the material in the file—all of the likely provable facts and their importance to your case and to your opponent's case. Counsel should never cross-examine a witness having read only that witness's statement. A witness might be capable of supporting or discrediting the testimony of other witnesses even though that is not the reason they are being called. For example, if a group of people similarly located made observations at the same time, a concession by one credible witness that the lighting conditions were "very poor" may be an important fact in supporting or discrediting observations by others and can be used in the cross-examination of those other witnesses.

Consider what information you may be missing:

- Do you have the notes of the police officer to whom the civilian spoke where the witness's oral statement was recorded?
- Do you have newspaper articles reporting the on-scene comments by civilians who spoke to the press?
- Do you have the working notes and the file of the expert witness being tendered?
- Do you have any affidavits for the witness that may have been filed to qualify

Features:

- "Practice Tips" sections that provide readers with decades worth of experience.
- Charts, checklists, and tables that offer a practical overview of witness testimony procedures.
- A chapter on assessing a witness' credibility with custom content for judges.
- A chapter on preparing vulnerable and child witnesses for trial.
- Discussion on the application of the rule in *Browne v Dunn*.

Key Insight: Evidentiary Rules Applicable to Child Witnesses

Much has changed with respect to child witnesses since Bill C-15 was proclaimed in force on January 1, 1988. Subsequent legislative and common law developments have impacted the way courts deal with the evidence of children and other vulnerable witnesses in terms of competence to testify, the admissibility of their evidence, and how triers of fact ought to weigh their evidence. Section 16.1 of the *Canada Evidence Act* deals with testimonial competence for witnesses under 14 years of age. They are presumed competent. They testify after a promise to tell the truth. The promise is a "practical, prophylactic" reminder to the child of the seriousness of the occasion. A party challenging the capacity of a child to give evidence must satisfy the court that there is an issue about the child's ability to understand and respond to questions. Child witnesses no longer swear or affirm, and if there is inquiry into competence, they cannot be asked about their understanding of the nature of the promise.

Adapted from Witness Preparation, Presentation and Assessment, Page 66

Read a sample chapter at u.emond.ca/cls-pb16

DETENTION, ARREST, AND THE RIGHT TO COUNSEL

Detention, Arrest, and the Right to Counsel

By Anil Kapoor and Davin Michael Garg

ISBN: 978-1-77462-663-4

Page Count: 600

Publication Date: September 2024

This new volume provides a practical examination of early "street level" interactions between law enforcement and members of the public through the lens of sections 9 and 10 in the *Canadian Charter of Rights and Freedoms*.

The first major area covers the power to detain a person, addressing law enforcement's statutory and common law powers. The second area covers the power to arrest, including the mechanism of an arrest, reasonable grounds, arrest with and without warrant, and more. It also includes a third area with comprehensive coverage of the right to counsel, discussing law enforcement's informational and implementational obligations under sections 10(a) and 10(b).

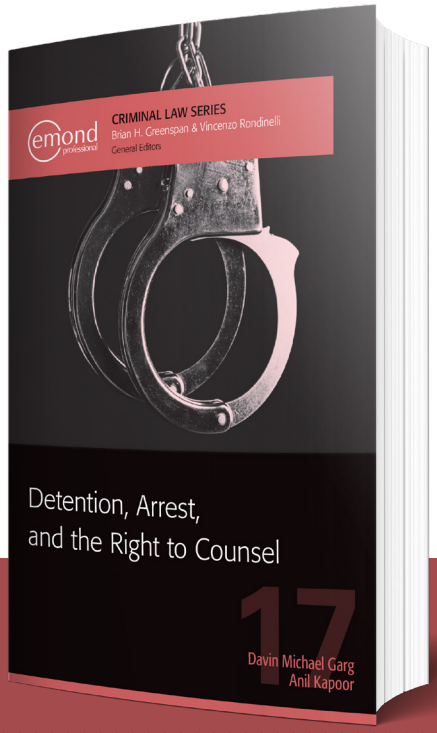
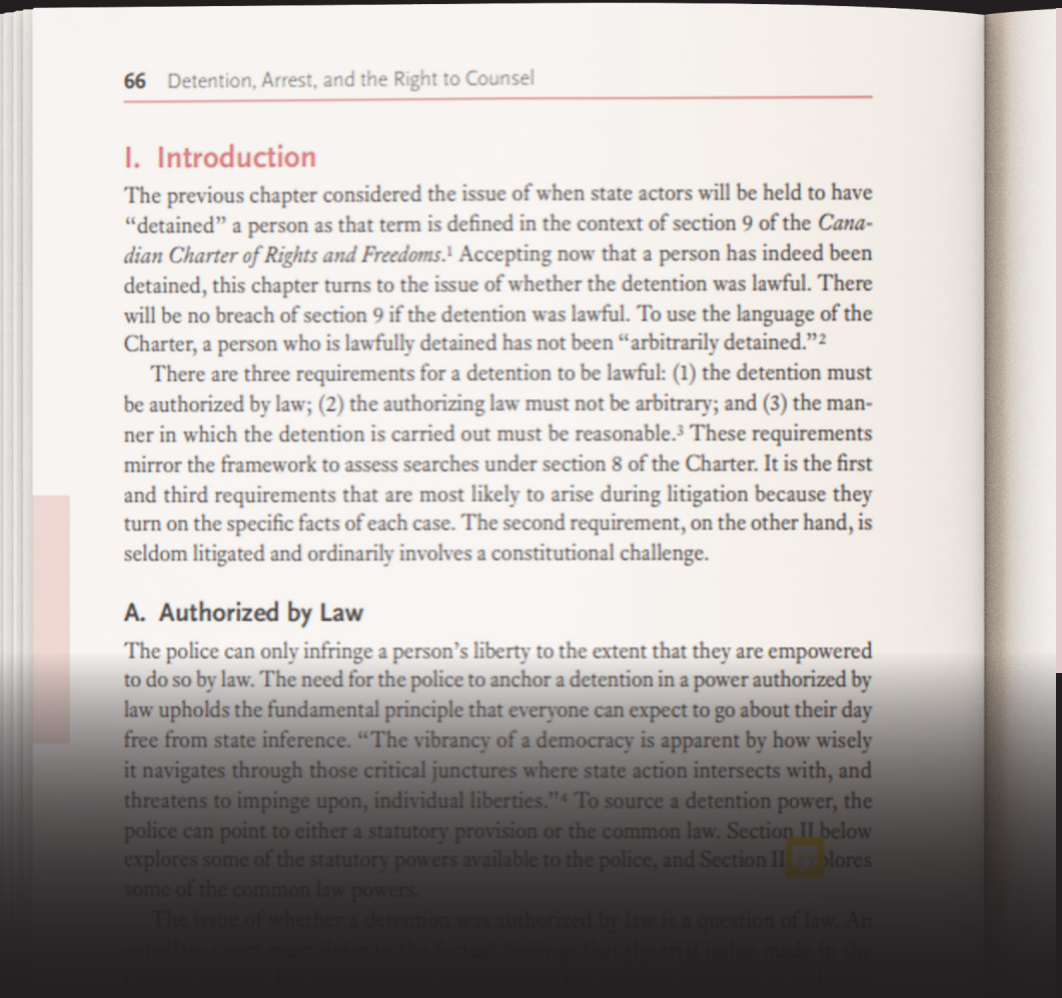


Table of Contents

17



66 Detention, Arrest, and the Right to Counsel

I. Introduction

The previous chapter considered the issue of when state actors will be held to have "detained" a person as that term is defined in the context of section 9 of the *Canadian Charter of Rights and Freedoms*.[1] Accepting now that a person has indeed been detained, this chapter turns to the issue of whether the detention was lawful. There will be no breach of section 9 if the detention was lawful. To use the language of the Charter, a person who is lawfully detained has not been "arbitrarily detained."[2]

There are three requirements for a detention to be lawful: (1) the detention must be authorized by law; (2) the authorizing law must not be arbitrary; and (3) the manner in which the detention is carried out must be reasonable.[3] These requirements mirror the framework to assess searches under section 8 of the Charter. It is the first and third requirements that are most likely to arise during litigation because they turn on the specific facts of each case. The second requirement, on the other hand, is seldom litigated and ordinarily involves a constitutional challenge.

A. Authorized by Law

The police can only infringe a person's liberty to the extent that they are empowered to do so by law. The need for the police to anchor a detention in a power authorized by law upholds the fundamental principle that everyone can expect to go about their day free from state inference. "The vibrancy of a democracy is apparent by how wisely it navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties."[4] To source a detention power, the police can point to either a statutory provision or the common law. Section II below explores some of the statutory powers available to the police, and Section II[illegible] plores some of the common law powers.

The issue of whether a detention was authorized by law is a question of law. An appellate court must defer to the factual findings that the trial judge made in the

Features:

- In-depth review of all the recent and key cases.
- Up-to-date discussion on all legislative and policy developments.
- A chapter devoted to racial profiling and racially motivated detentions.
- Practical and balanced commentary from a judge (former crown) and defence counsel.
- "Practice Points" sections in each chapter that provide readers with decades of trial experience.

Key Insight: The Individual's Particular Circumstances

To determine whether someone is detained, the third factor of the Grant contextual analysis considers the person's particular circumstances. The Court in *R v Grant* described the types of personal characteristics that might be relevant, such as the person's age, physical stature, minority status, and level of sophistication. In addition, a court can consider the person's subjective perceptions of the encounter, albeit to a very limited extent. A person's particular circumstances and perceptions are relevant to the detention analysis because they go to "the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive."

Adapted from Detention, Arrest, and the Right to Counsel, Pages 52 and 53

Read a sample chapter at u.emond.ca/cls-pb17

MODERN CRIMINAL EVIDENCE

Modern Criminal Evidence

By Matthew Gourlay, Brock Jones, Renee Pomerance, Glen Crisp, and Jill D. Makepeace

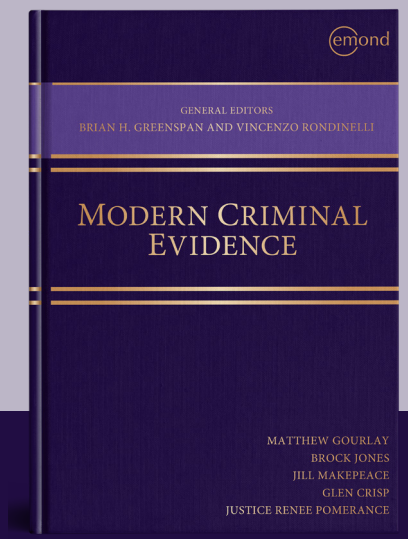
ISBN: 978-1-77255-642-1

Page Count: 792

Publication Date: August 2021

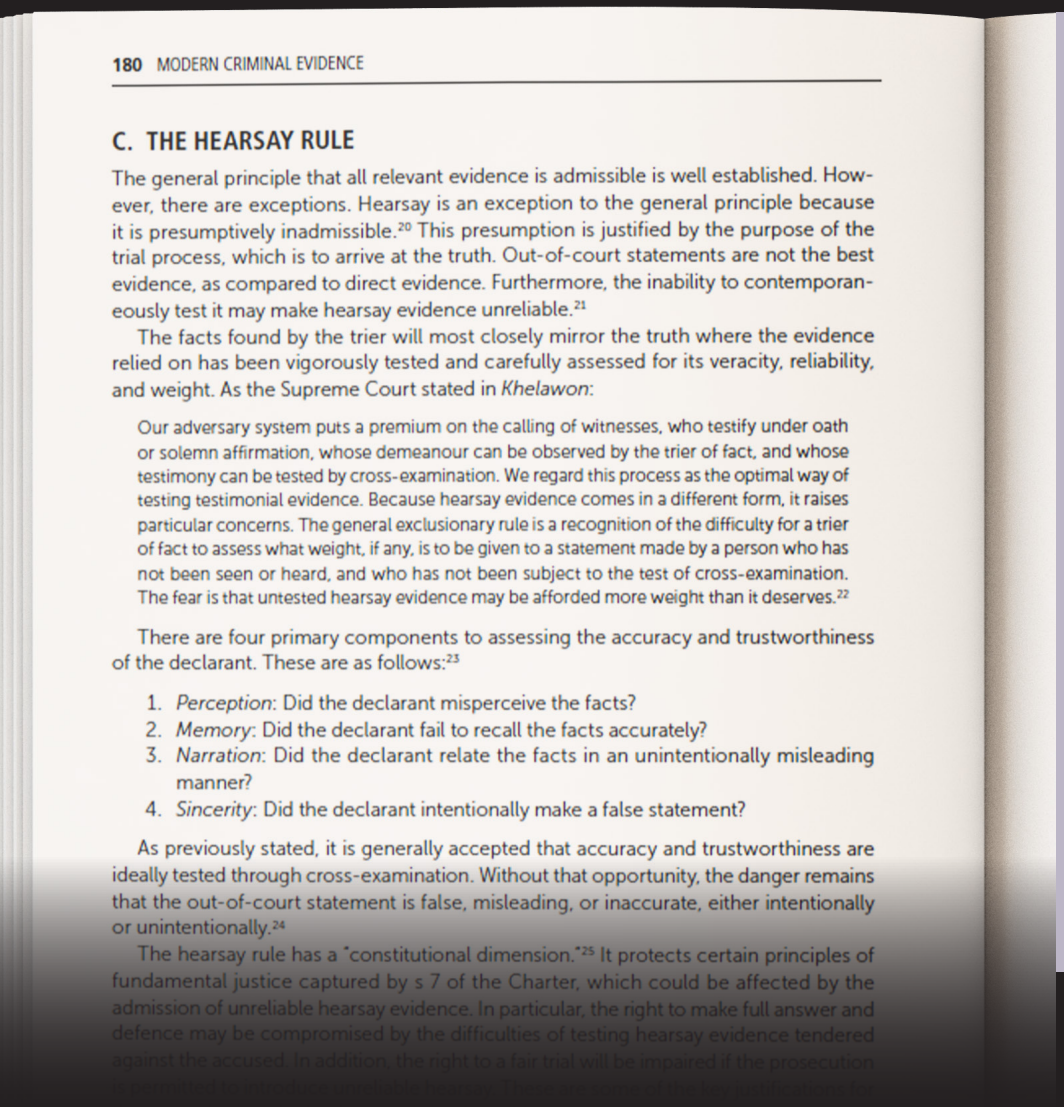
WINNER OF THE 2023 WALTER OWEN BOOK PRIZE

> "In many common law jurisdictions, including Canada, the judiciary has traditionally been the chief expositor and developer of the criminal law. The law of criminal evidence has always been different. Textbook writers have taken a leadership role and have heavily influenced the manner in which the law of evidence is described and developed. This text will take on that leadership role. Under the dynamic and enthusiastic leadership of its general editors, I have no doubt the cadre of authors, all in the prime of very active and successful careers at the criminal bar, have produced what will quickly become a "go-to" text. I am equally certain it will only get better in the future."
>
> —*Justice David H. Doherty*



Shop online at
u.emond.ca/cls-MCE

Table of Contents



180 MODERN CRIMINAL EVIDENCE

C. THE HEARSAY RULE

The general principle that all relevant evidence is admissible is well established. However, there are exceptions. Hearsay is an exception to the general principle because it is presumptively inadmissible.[20] This presumption is justified by the purpose of the trial process, which is to arrive at the truth. Out-of-court statements are not the best evidence, as compared to direct evidence. Furthermore, the inability to contemporaneously test it may make hearsay evidence unreliable.[21]

The facts found by the trier will most closely mirror the truth where the evidence relied on has been vigorously tested and carefully assessed for its veracity, reliability, and weight. As the Supreme Court stated in *Khelawon*:

> Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.[22]

There are four primary components to assessing the accuracy and trustworthiness of the declarant. These are as follows:[23]

1. *Perception*: Did the declarant misperceive the facts?
2. *Memory*: Did the declarant fail to recall the facts accurately?
3. *Narration*: Did the declarant relate the facts in an unintentionally misleading manner?
4. *Sincerity*: Did the declarant intentionally make a false statement?

As previously stated, it is generally accepted that accuracy and trustworthiness are ideally tested through cross-examination. Without that opportunity, the danger remains that the out-of-court statement is false, misleading, or inaccurate, either intentionally or unintentionally.[24]

The hearsay rule has a "constitutional dimension."[25] It protects certain principles of fundamental justice captured by s 7 of the Charter, which could be affected by the admission of unreliable hearsay evidence. In particular, the right to make full answer and defence may be compromised by the difficulties of testing hearsay evidence tendered against the accused. In addition, the right to a fair trial will be impaired if the prosecution is permitted to introduce unreliable hearsay. These are some of the key justifications for

Features:

- A chapter on judicial fact-finding with custom content for judges, written by Justice Renee M. Pomerance.
- A chapter on digital evidence that examines authentication, best evidence rules, evidence tampering, and probative value.
- Real-world case examples from across Canada that place evidentiary principles in a national context.
- Practice tips sections that provide readers with years' worth of trial experience.
- Strategies and tactics to present evidence in court.
- Discussions of COVID-19 changes to evidence law, particularly regarding judicial notice and virtual court appearances.

Key Insight: Declarations Against Pecuniary or Proprietary Interest

An out-of-court statement that relates to matters against the pecuniary or proprietary interest of the declarant may be admissible. There are several criteria that must be demonstrated on a balance of probabilities for the statement to be received as evidence of the truth of its contents. Importantly, this common law exception has a strict necessity requirement: the declarant must be unable to testify by reason of death or illness, or because they are located outside the jurisdiction and are therefore not compellable.146 The declarant must also have personal knowledge of the factual assertions they made. Most significantly, they must appreciate that the facts are against their interest at the time of the statement and to their immediate prejudice. A future or contingent interest will not suffice.

Adapted from Modern Criminal Evidence, Page 199

Read a sample chapter at u.emond.ca/cls-MCE

Modern Criminal Evidence

SHOP AND SAVE WITH EMOND PLUS

10% OFF
your next purchase of a Criminal Law Series title when you join Emond Plus and use code: **EPPBSAVE10**

Join for free to receive **exclusive discounts.**

Receive fast and **free Canada-wide shipping.**

Be the first to learn about our latest titles.

Join Emond Plus for free at **u.emond.ca/ep-pb**

JONES RHODES
HALFYARD DIN
DENNISON WEIN
BROWN WITKIN
MAGOTIAUX HE
SHIME RUDIN A
GOURLAY JOKIN
JOYAL GIBSON
LAM BERG GOR
STREETER VAND
ROBITAILLE WI

Emond Publishing
1 Eglinton Avenue East, Suite 801
Toronto, ON M4P 3A1

p. 416-975-3925 | 1-888-837-0815
e. hello@emond.ca
w. u.emond.ca/cls-pb