

Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. <i>Distribution List</i>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

CRIMINAL PLEADINGS AND PRACTICE IN CANADA

E.G. Ewaschuk, Q.C.

Release No. 4, June 2022

What's New in this Update:

- Absent evidence to the contrary, “*waiver* of a procedural right” by *counsel* for an accused is *presumed* to be *intentional*: *R. v. J.D.*, 2022 SCC 15, at **1:8**.
- A *search* incident to *arrest* may “extend to the surrounding area”, and so may include searching the building *or* vehicle in which the accused is arrested”. In particular, the common law standard for a “search of a *home* incident to arrest” depends on whether the area searched is “within or outside the physical control” of the arrested person: *R. v. Stairs*, 2022 SCC 11, at **3:242.50**.
- The current language in the *Criminal Code*, “reasonable grounds”, has the same meaning as the *former* “reasonable and probable grounds”. It signifies the point at which “credibly based probability” *replaces* “suspicion”: *R. v. Santos*, 2022 SKCA 50, at **5:6.50**.

THOMSON REUTERS CANADA®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

- An arrest based on a *mistake of law* “cannot” be lawfully made. It is *unlawful* for the police to arrest someone based on a “mistake of law”: *R. v. Tim*, 2022 SCC 12, at **5:9**.
- It is *presumed* that the Crown’s exercise of a *discretionary power* is done in “good faith”. In that regard, it is *unnecessary* for the Crown to *justify* a refusal to “consent to a non-jury trial in respect of a s. 469 offence in the *absence of proof* of bad faith or inappropriate motivation: *R. v. Lufiau*, 2022 QCCA 508, at **7:45**.
- An accused seeking a “judge-alone trial”, where none is generally available, must, at a minimum, meet the *test* required for a “change of venue” – impossibility of a full and impartial trial: *R. v. Biddersingh*, 2022 ONCA 6, at **7:45**.
- There is a *fundamental difference* between a guilty plea *and* a decision to pursue or consent to an NCRMD verdict. The accused’s claim to “withdraw her consent to the NCRMD verdict” is properly advanced as part of an “ineffective assistance of counsel claim”: *R. v. D.L.B.*, 2022 BCCA 15, at **14:27.50**.
- In any case where *credibility* is important, the trial judge must ensure *not* to leave the jury with the impression that, to make its decision, it has to “*choose* between competing versions of events”. *Nothing* said or left unsaid should leave the *impression* with the jury that an “accused’s lack of credibility” is the *equivalent* of proof of guilt beyond a reasonable doubt: *R. v. Boucher*, 2022 ONCA 40, at **16:185**.
- Where a person “*occupies* a room, apartment or house”, a trier of fact may be “entitled to infer” that the occupant was aware of the presence of *and* had a measure of control over drugs found within those premises. The “strength of the inference” depends on the particular circumstances: *R. v. Brideau*, 2022 QCCA 452, at **16:451**.
- It is an *error* for the trial judge to instruct the jury to consider *accused’s evidence* with “a great deal of caution” because it *distinguishes* the accused’s testimony from that of other witnesses and places a higher burden of proof on the accused than the law permits: *R. v. Whiskeyjack*, 2022 ABCA 76, at **16:529**.
- *Data* that is automatically collected, stored, and reported by an “electronic instrument”, *e.g.*, a cellphone, does *not* constitute “hearsay evidence”. Machines do *not* talk or testify and their data constitutes a form of “circumstantial evidence”: *R. v. Hogan*, 2022 ABCA 5, at **16:575**.

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable

- Footnote text only appears in ProView-generated PDFs of entire sections and pages