

**“Modern Criminal Evidence”
Walter Owen Book Prize – 2023**

**Review of first place recipient by Prize Juror David C. Day, K.C.
Canadian Foundation For Legal Research**

08 April 2024

Gourlay, Matthew; Jones, Brock; Makepeace, Jill; Crisp, Glen; and Pomerance, Justice Renee, *Modern Criminal Evidence* (Toronto: Emond Montgomery Publications Limited, 2022), i-xxxii, 762pp. (with Foreword by since retired Ontario Court of Appeal Justice David H. Doherty; Table of Cases; Index)

[1] In 1904, John Henry Wigmore (in the wake of 10 years’ monastic enterprise) began publishing his scholarly—some judiciary assert, “unrivalled”—survey of the Anglo-American law of evidence (eventually 10 volumes, Wolters Kluwer, 2023). One hundred twenty years later—during a total solar eclipse—the Walter Owen Book Prize Jury convened for the 36th annual occasion. Its mandate: the 2023 Prize.

[2] Among the six short-listed 2023 (English Language) Prize candidates engaging the Jury’s intense, impartial audit is the latest initiative to embrace the many mansions of evidence law—albeit intended, principally, for the criminal law environment.

[3] Supervising digitally-remote short list deliberations of the Jury was the most senior of its six members: Professor (Emeritus) John N. Davis, Osgoode Hall Law School, York University, Toronto, Jury Supervisor. His exceptionally heavy lifting pared the long list of 35 entries to a unanimous jury-approved short list of six.

[4] By simple majority vote, his five juror colleagues were required to answer two questions. First, does one or more than one of the candidates deserve recommendation for the first place Prize (if more than one, a tie). Second, does one or more of the other short list candidates qualify to be recommended for a second place Prize.

[5] Simple-majority responses of jurors to those questions become recommendations to The Canadian Foundation for Legal Research. The Foundation’s trustees ultimately decide whether to accept the Jury’s recommendations, if any are made, for the 2023 English Language Prize. In

memory of one of the six founders (in 1959), of the Foundation—Walter Owen (1904-1981)—the Prize is named. By the Foundation, the Prize is funded. (Owen O.C., Q.C. was a Vancouver lawyer (the law firm he co-established in 1958 continues to flourish), public servant, and radio station co-founder and co-owner.)

[6] This review considers the 2023 Prize short list candidate, *Modern Criminal Evidence*.

[7] Only English-speaking countries have developed what we term ‘Law of Evidence’. The “heft of this volume,” write its co-authors, suggests “the Canadian law of evidence remains a dense, voluminous subject” (pp. 2, 3).

[8] Rhetorically, “[w]hat accounts for it?” the co-authors query.

[9] With credibility and reliability—in literary equivalence—they have, by manifold keystrokes, replied. Memorialized in 762 pages, their answer is comprehensive, thorough, and unique. *Modern Criminal Evidence* triumphs in consummately articulating principles, rules, procedure and practice which should govern and inform “a modern criminal trial” (p. 410).

[10] *Modern Criminal Evidence* (MCE) is the seventeenth title (the other 16 presently in first, second or third edition) published by Emond Montgomery in its ‘Criminal Law Series’. The series, which includes two Walter Owen Book Prize recipients, is supervised by two Toronto general editors: ubiquitous barrister Brian H. Greenspan and Justice Vincenzo Rondinelli.

[11] As listed in MCE, its five marquee authors are: Matthew Gurlay, often appellate counsel in Ontario and Supreme Court of Canada, and partner at Henein Hutchison LLP, Toronto; Brock Jones, Crown Attorney, Scarborough (youth justice team director) and now sitting in Ontario Court of Justice; Jill Makepeace, criminal trial and appellate counsel, and partner in Greenspan Humphrey Weinstein LLP, Toronto; Glen Crisp, Assistant Crown Attorney (Guns and Gangs Unit), Toronto, and Justice Renee Pomerance, formerly a Crown Attorney, international inquiry counsel and as a member of Ontario Superior Court of Justice, the Local Administrative Judge, Windsor. There, she presided in 2023 and 2024 at precedents-setting *R. v. Veltman* (see, e.g., 2024 ONSC 1054 (CanLII)). Since July 2024 she has been a member of Ontario Court of Appeal.

[12] Subsidiary editorial contributions to MCE were made by Matthew Shumka, Assistant

Crown Attorney, Scarborough who assisted in authorship of chapter 13 – Documentary Evidence; and were made by privately-practising lawyers in authorship of chapter 15 – Intersection Of Proceedings: Alex Van Kralingen, Toronto law firm partner who authored Criminal Law and Civil Litigation, with a contribution from Katherine Chau, an associate in the same firm; Christine Ashbourne, Toronto family law specialist, who wrote Criminal Law and Family Law; and Cathryn Sawicki, Toronto law firm managing partner, responsible for Criminal Law and Immigration Law.

[13] Logically structured, MCE launches with basic concepts in evidence law (chapter 1). Immediately following is a narrative of sometimes philosophic, ever-pragmatic reflections from Justice Pomerance (chapter 2).

[14] Ensuing are “Judicial Notice” (chapter 3), “Opinion Evidence” (chapter 4), “Circumstantial Evidence” (chapter 5), “Hearsay” (chapter 6, the longest at 99 pages), and “Character Evidence” (chapter 7). Next following are “Examination of Witnesses” (chapter 8, second longest at 85 pages), “Specific Types of Witnesses” (chapter 9, comprising cross-examination of sexual assault complainants, children, and unsavoury persons), and “Confessions and Self-Incrimination” (chapter 10). “Privilege” (chapter 11) treats that substrate of evidence in all significant species: solicitor-client; litigation; settlement; spousal; public interest, and confidential informant. Completing the topical chapters are: “Digital” (chapter 12), “Documentary” (chapter 13) and “Identification” (chapter 14) evidence.

[15] Concluding the book is “Intersection of Proceedings” (chapter 15), canvassing evidentiary issues bestirred by the interface of criminal law with civil litigation, family law and immigration law.

[16] Nine criteria are employed to measure Walter Owen Book Prize-eligibility of candidates. To MCE they are applied as follows.

[17] Involving subject of legal doctrine: Unquestionably, MCE comprises a subject of legal doctrine; that being proof or, as most often called, evidence.

[18] Substantial in nature: MCE embraces the full fare of criminal evidence at common law and under legislation; doing so with micro attention to principles, rules, procedures, and their

application in practice.

[19] Of current interest or emerging relevance: MCE is of undoubted current interest. The subject of “evidence” has been integral to common law since birth of legal memory (which all jurors know is 1189, and probably celebrate annually on 03 September).

[20] Comprising new work (or previous edition’s complete revision): MCE is a new work. That is to say, the candidate is not a complete revision of a prior edition. Nor is it in any respect a product of reliance on structure, content, or presentation of scholarship of any other published authors.

[21] Numerous works on evidence law, preceding MCE, have been authored in Canada. Library shelves of few disciples of the law—bench, bar or academy, present or recent past—lack *The Law of Evidence in Canada* (which won the Walter Owen Book Prize, despite being in second edition, authored by Supreme Court of Canada Justice John Sopinka, Sidney N. Lederman, Q.C., and Alan W. Bryant), now in sixth edition (LexisNexis, 2022). Nor are their shelves likely bereft of the exquisite *Watt’s Manual of Criminal Evidence* by indefatigable, encyclopedic Justice David Watt, now-formerly of Ontario Court of Appeal. Failed not, he has, to annually publish the book since 1998 (now Thomson Reuters) with pocket supplements.

[22] Single volume (or several volumes appearing concurrently or sequentially): MCE is a single-volume candidate. (Needs be added, however—beyond influence of the co-authors—increased page count or marketing in two volumes would have significantly improved legibility of both text and footnotes. And, investment in a malleable binding would have immeasurably enhanced the book’s physical functionality.)

[23] Published within two years before year in which Prize may be conferred: If Jury-recommended and Foundation-approved, MCE qualifies for conferral of the 2023 Prize. Publication year was 2022. (Incidentally, the candidate was twice printed in 2022; most recently, May 2022.)

[24] Demonstrating erudition: The quality of exhibiting exceptional scholarship is, not least, evident from MCE’s Table Of Cases. Bearing in mind the title promises a work of “Modern” criminal evidence, the authors incorporated 1,470 decisions (69% of 2,128 all told) made in or

since 2000; 650 judgments issued from 1900 to 1999, and scant eight cases pre-dating 1900.

[25] Exceptional writing: A manual consulted by more than a few Canadian judicial fact-finders—from Masters to Supreme Court of Canada justices—is: Armstrong, Stephen V. and Terrell, Timothy V., *Thinking Like a Writer* (New York: Practising Law Institute, 2009). The two co-authors describe the “two competing obligations” of writers about law as being to “... do full justice to the complexity of their subject ..., no matter how torturous or ambiguous [and] transform all that complexity into a prose so lucid, so crisp and direct, that it will satisfy readers who demand absolute clarity even when ... the subject is most obscure.”

[26] Compounding the challenges to achievement of uniformly “exceptional writing” in a 762-page book is the fact MCE was prepared by five marquee authors, with significant ‘cameo’ appearances by five more.

[27] Assessment of whether “writing” is “exceptional” is largely subjective. Nonetheless, my 85 hours with MCE convinced me the candidate comports—consistently so—with what Armstrong and Terrell term the two “competing obligations” of law text writers.

[28] Contributing to, or capable of augmenting, quality of Canadian legal literature, consequently being or harboring potential to be highly valued by law practitioners, justices and academics: Most evidence texts are, principally, treatises or case digests. From them, MCE compellingly distinguishes itself. Globally, this text comprises a hybrid of Canadian evidence law treatise, caselaw précises and commentaries and—critically helpful—methodology; all customised to respond to needs of barristers and Justices, before, during and after the crisis-to-crisis of criminal trials. By no means overlooked are counsel and courts in proceedings which generate evidentiary issues involving disciplines of civil litigation, family law, and immigration law; where they interface with criminal law—and, frequently, where such disciplines do not.

[29] In bespoke cutting and tailoring of an evidentiary garment for practicing advocates and for crafters of judicial decisions and jury directions, in criminal law, the authors have not overlooked academy teachers, researchers and students, as well as policy- and law- makers.

[30] Three reasons persuade me MCE fulfills this last—and most important—standard for assessment; and, in so doing, surpasses merits of the other five candidates for the 2023 Prize.

[31] First: Chapter 2—exceptionally, for evidence and other general law texts—furnishes perspectives of a judge. Justice Renee Pomerance, probably, titled the chapter ‘From Evidence to Verdict[:] Confessions of a Judicial Fact-Finder’. The chapter, while acknowledging principles, rules, and functions of the species of evidence, rather focuses on their goals and means of achieving them.

[32] Justice Pomerance recognizes (pp. 27-29) that integral to deliberating what evidence to admit or exclude and, if admitted, how to assess, weigh and employ the evidence is

... application of assumptions about how the world works, and how people are likely to behave. Assumptions operate at various levels during the course of a trial. ... often applied instinctively, silently, and without conscious examination; ... a product of thinking fast, not slow.

Some assumptions are built into specific rules of evidence [dying declaration exception; hearsay rule exception; after-the-fact conduct doctrine; similar fact evidence; confessions rule; informer privilege].

Assumptions are also triggered when rules of evidence are applied We assume that a threat may be accompanied by an intention to carry it out.

Some assumptions are non-controversial [promises of confidentiality necessary to persuade police informers to come forward].

Assumptions are most pernicious when they involve application of stereotypes.

[33] Justice Pomerance cogently—and cleverly—classifies the assumptions as being about human behaviour; about juries (where empanelled); and in seven categories of “Assumptions About ... [Judges’] Assumptions”. They include, “Judicial Notice: Things We Know That We Have Decided to Know”; “Judicial Instruction: The Things We Know That We Think Others Should Know”, and “Things That Judges Just Happen to Know”.

[34] (Most recently—two years post-publication of this Walter Owen Prize candidate—Supreme Court of Canada adjudged an aspect of the subject of judicial assumptions in a 143-page decision of two appeals; collectively: *R. v. Kruk*, 2024 SCC 7 (CanLII), Martin J. (Wagner C.J. and Côté, Kasirer, Jamal and O’Bonsawin JJ.), Rowe, J. concurring.)

[35] The 27 pages of the ‘Confessions’ chapter (pp. 21-47) invaluable contribute to the modest literature on the subject of the judge’s role and the art of judging, for which *Good*

Judgment[:] *Making Judicial Decisions* (University of Toronto Press, 2018), by since bench-retired Superior Court Justice Robert J. Sharpe was accorded a Walter Owen Book Prize in 2019.

[36] Second: Punctuating the candidate's pages—helpful to bar and bench—are sage procedural “Practice Tip[s]” (142 in number, ranging from one point to clusters of six advisories in a “tip”). Separately, a single “Practice Note” (p. 374) and a text backgrounded grey pertaining to a young person's right to silence and counsel (p. 475) appear to be substantive tips.

[37] Equally qualifying as practice tips are succinct comments in countless among the 4,186 footnotes.

[38] These tips serve to explain, illustrate and energize MCE's treatment of evidence principles, rules and procedures.

[39] Third: Providing particular form and substance to the principles, rules, and procedures, and the judicial interpretation, of evidence law is Chapter 15. There explored is the intersection of criminal evidence law with disciplines of civil litigation (pp.668-675), family law (pp. 676-687) and immigration law (pp. 688-695).

[40] Especially helpful is the counsel that Chapter 15 affords criminal law litigators; discerningly expressed in MCE's Foreword by now-former Court of Appeal Justice David H. Doherty (p. xxiv): “The chapter ... exposes the many practical considerations the criminal law litigator must bear in mind to avoid inadvertently causing harmful collateral damage to a client in a different, but related, proceeding., decisions made in one proceeding can have a significant evidentiary and substantive impact in different litigation involving the same litigant.”

[41] *Modern Criminal Evidence* is a testament to impeccable research, judicious selection from centuries of published (more recently, digitized) material, perspicacious analysis, and pragmatic presentation. Although ensconced in the criminal law silo, the content of this book is capable of informing evidentiary issues generated by any legal discipline being addressed currently, anywhere in Canada, by bar, bench, and academy (teacher, pupil and researcher).

[42] I vote to recommend to the Foundation that *Modern Criminal Evidence* be awarded the

2023 English Language first place prize.

[43] I vote to recommend to the Foundation, as deserving of the 2023 second place prize, *Termination and Recission of Agreements for the Purchase and Sale of Land*, by Michael Pratt.

[44] I vote to recommend to the Foundation, as deserving of honourable mention, *A History Of Law In Canada, Vol. Two*, by Professors Jim Phillips, University of Toronto Faculty of Law; Philip Girard, Osgoode Hall Law School, and R. Blake Brown, Saint Mary's University.

Note: 2023 Walter Owen Book Prize jurors were: Professor (Emeritus) John N. Davis, Toronto; Hon. Kenneth C. Mackenzie, K.C. Vancouver; Hon. Marguerite Trussler, K.C., Edmonton; John-Paul E. Boyd, K.C., Calgary; Dr. Virginia Torrie, North York, and the writer.

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