

# Book Review: The Prerogative Writs in Canadian Criminal Law and Procedure, by Gilles Létourneau

Edward Koroway

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Book Review

## Citation Information

Koroway, Edward. "Book Review: The Prerogative Writs in Canadian Criminal Law and Procedure, by Gilles Létourneau." *Osgoode Hall Law Journal* 15.2 (1977) : 538-539.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol15/iss2/19>

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THE PREROGATIVE WRITS IN CANADIAN CRIMINAL LAW AND PROCEDURE, by GILLES LÉTOURNEAU. Toronto: Butterworths, 1976. Pp. xvi, 417 (\$35.00)

While there have been books published in the past which dealt with prerogative writs from the point of view of administrative law, there has been a need for a thorough examination of the role of these remedies in the Canadian criminal field. Professor Létourneau's work is a welcome and very scholarly attempt to fill that vacuum. It is published by Butterworths as part of their Canadian Legal Monograph Series. To keep the price of books in this series within reason, certain economies of production have been utilized. Rather than the usual type and justified margins, the pages have been printed in the form of a typed manuscript. As well, the footnotes are collected at the end of each chapter rather than at the bottom of every page. But the format of the book is not a significant matter, and it is the substance that should be examined.

When an author states his aims in a preface, it is unfair to evaluate him without regard to those goals. Gilles Létourneau has been modest in asking that his book not be construed as a "treatise on the subject because it does not cover every aspect of the law and procedure applicable." But it certainly appears to come close. There are frequent references to the peculiar situations, both statutory and common law, that exist in each of the provinces, though the emphasis is on Quebec and Ontario. At the same time, the book seeks a re-assessment of the role of these writs in modern times.

It is divided into six chapters. The first is a very useful, concise introduction to the concept and historical background (both British and Canadian) of these writs. They are called "prerogative" because "they are supposed to issue on the part of the King." Professor Létourneau's main concern lies with *certiorari*, prohibition, *mandamus* and *habeas corpus*, but his thoroughness leads him to also mention the writ of *procedendo*, not well known, but still occasionally used — a writ somewhat akin to *mandamus*.

The second chapter tackles the difficult concept of jurisdiction, which lies at the heart of the prerogative writs. What is jurisdiction — do time limits, for example, go to jurisdiction, or are they rather a defence? There is an interesting comparison with the United States position on this, and helpful policy considerations round out the discussion. The role of natural justice, collateral questions, and waiver of jurisdiction are also outlined.

All this introduces the next three chapters which examine the various writs in turn, the sister writs of *certiorari* and prohibition being considered together, followed by *mandamus* and *habeas corpus*. The *Federal Court Act* and the issues it raises in this field are dealt with, as well as applicable provincial statutory enactments, such as the provisions of the Quebec *Code of Civil Procedure* and the Ontario *Judicature Act*. The questions of *locus standi* and the *persona designata* are not forgotten either. In the chapter on *habeas corpus*, the availability of the complementary remedy of a civil action for false arrest is discussed, together with American extensions of the writ to challenge the conditions as well as the actual fact of imprisonment.

Throughout the work, the topics have been conveniently divided and sub-divided in the civilian tradition. In addition to the usual index and table of cases, there is a very complete bibliography and table of acts and statutes in chronological order at the end. It would have been helpful, however, if the case citations could have identified which court decided the particular case.

Professor Létourneau frequently refers to the ever-constant effort to reconcile the interests of the individual accused and those of the community at large, which are often found in direct conflict. Upon reaching the end of the "prerogative road," he looks to the future and considers whether there is still a need for these writs, given the relatively wide availability of appeals which provide greater scope for review. He proposes that pre-trial decisions and interlocutory judgments should be open to an immediate but limited summary review on a jurisdictional basis, but that the decision of the reviewing court should be temporarily final with no appeal from it as is the case now. Only at the end of the trial in the inferior court would the interlocutory issue be reviewed as part of the general right of appeal which exists at the end of the proceedings. However, there would be an exception to the prohibition against an immediate further appeal with respect to the writ of *habeas corpus* and search and arrest warrants. Furthermore, the Crown would have a right of appeal against any decision made by an inferior or superior court that had the effect of denying an actual trial on the merits. As one alternative, he would give a right of appeal to the Court of Appeal with leave of that court, or as a second alternative, except for *habeas corpus* and search and arrest warrants, the question would be taken out of the hands of the parties and put within the discretion of the court.

As for *habeas corpus*, Professor Létourneau feels this is a residuary but needed remedy, as it brings detention and its causes "out of the darkness to the knowledge of the public," which in turn can help to attract the "intolerance, disapprobation, disgust and indignation of the people."

*The Prerogative Writs in Canadian Criminal Law and Procedure* is a technical book which successfully deals with a complicated subject, one steeped in ancient tradition, but also affected by numerous statutory enactments. It is not the sort of book one takes along to read at the beach on a Sunday afternoon. It is not a work one should tackle without having had at least some exposure to administrative law. But any one seeking insight into a problem in this area is sure to find resort to this book of great assistance.

By EDWARD KOROWAY\*

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\* Assistant Professor, Faculty of Law, University of Western Ontario.