
GENERAL TOPICS OF LAW

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ACTUS REUS

The *actus reus* includes all the elements of the offence except for the mental or fault element. This can include:

- i. conduct (act or omission);
- ii. circumstances or state(s) of affairs; and
- iii. result.

Identifying the starting and ending point of the *actus reus* of an offence is important for at least two reasons. The first is the substantive requirement that, at some point, the *actus reus* and *mens rea* must coincide. The second has to do with procedural issues, such as the time frame of the charge and territorial jurisdiction over the offence.

In the case of continuing offences, the concurrence of the *actus reus* and *mens rea*, which makes the offence complete, does not terminate the offence. As the conjunction of the two elements continues, so does the offence: *R v Foster*, [2018 ONCA 53](#) at paras 52-54, 63

ANCILLARY POWERS DOCTRINE

A. GENERAL PRINCIPLES

Courts should be cautious in extending police power by resort to their common law ancillary powers, particularly in circumstances where the legislature has put in place an elaborate and comprehensive regulatory regime with carefully balanced powers and sanctions: *R v Harflett*, 2016 ONCA 248 at para 25

An officer's common law powers are limited by the real exigencies of the situation: *Harflett* at para 29

For more on the ancillary powers doctrine in the context of specific police powers, see Charter, Section 8 and Charter, Section 9

BURDEN OF PROOF

A. REASONABLE DOUBT

The standard of "reasonable doubt" does not apply when a judge is dealing with individual items of evidence and not the ultimate question of whether guilt was proved: *R v MacIsaac*, 2017 ONCA 172 at para 72

For an overview of the law on credibility assessments and the principles surrounding the *W(D)* analysis, see Evidence Law, Witnesses

B. EXPLANATION OF INJURIES

In *Scott*, the Ontario Court of Appeal held that the trial judge erred in disbelieving the accused's version of events in part because he was unable to explain the bruising on the complainant. The court held that this reasoning reversed the burden of proof, as there was no onus on the accused to explain the bruising: *R v Scott*, [2018 ONCA 123](#) at para 1

C. THEORY OF LIABILITY

While the Crown is generally bound to prove the formal particulars of the offence charged, it is not bound to prove the theory that it advances in order to secure a conviction. Rather, a conviction is based on proof of the necessary elements of the offence. Accordingly, there is no general proposition that once the Crown presents a particular theory of a case, it would be unfairly prejudicial to the accused to allow the trier to convict on a different theory: *R v Grandine*, 2017 ONCA 718 at para 63

Subject to due process concerns, a conviction may be founded on a theory of liability that has not been advanced by the Crown, provided that theory is available on the evidence: *R v Dagenais*, [2018 ONCA 63](#) at para 55

D. CORROBORATION

Corroboration is not required to accept an accused's evidence. Placing an onus on the defence to produce corroborative evidence reverses the burden of proof: *R v Degraw*, [2018 ONCA 51](#) at para 46

E. RIGHT TO SILENCE

For a review of the principles governing the burden of proof in the context of the right to silence, see Charter: Section 7: Right to Silence

CORBETT APPLICATIONS

A. GENERAL PRINCIPLES

Pursuant to s. 12 of the Canada Evidence Act, a witness may be questioned as to whether he or she has been convicted of a criminal offence. Typically, the relevance of such evidence is in respect of the witness's credibility, and the evidence cannot be used as bad character evidence or for propensity reasoning.

Under Corbett, a court can be asked to exclude parts of a criminal record where its probative value is outweighed by its prejudicial effect. The right to a fair trial is the context in which the balancing exercise must be effected. A jury is presumed to follow the court's instructions about the proper use of evidence of prior convictions.

The question in each case is whether excision of the conviction in question would leave the jury with incomplete and therefore incorrect information about an accused's credibility as a witness. Relevant factors include: the nature of the previous conviction; its remoteness or nearness to the present charge; and the similarity to the offence charged.

Another potential factor identified in *Corbett* is the need to maintain a balance between the position of the accused and that of a Crown witness who has been subjected to a credibility attack on the basis of his or her criminal record or otherwise, although this factor should not override the concern for a fair trial. Any attack on the integrity of a Crown witness is not sufficient to make the accused's entire record admissible; rather, what is contemplated is an attack on the Crown witness's credibility based on his or her character, especially as disclosed in his or her criminal record: *R v McManus*, 2017 ONCA 188 at paras 81-83; *R v Laing*, 2016 ONCA 184 at para 19

Where the defence points the finger of guilt at a third party, accompanied by a vigorous attack on the credibility of that person, to suggest he was the perpetrator, it would be unfair to prevent the use of the accused's criminal record (with the most prejudicial parts having been excised) to assess his own credibility. However, where the defence calls its own witness with the intention that the jury accept his evidence that he, in fact, was responsible for the offence, the same concern does not arise: *McManus* at paras 89-92.

The following is a non-exhaustive list of factors that are to be considered in exercising the discretion to exclude evidence of an accused's record:

- nature of the previous conviction(s);
- the similarity of the previous conviction(s) and the offence(s) being prosecuted;
- the remoteness or nearness in time of the previous conviction(s); and
- the fairness of limiting cross-examination in cases in which the accused has attacked the credibility of a Crown witness and resolution of the case boils down to a credibility contest between the accused and that witness: *R v Laing*, 2016 ONCA 184 at para 20

The overriding question, however, is whether it is necessary to limit cross-examination on an accused's prior record in order to guarantee the accused's right to a fair trial: *Laing* at para 21

B. ON APPEAL

The decision of a trial judge to exclude or not exclude part of an accused's criminal record is an exercise of judicial discretion.

On appeal, a trial judge's decision is granted substantial deference. The Court of Appeal will not interfere in the absence of an error in principle or a misapprehension of relevant evidence: *R v Grizzle*, 2016 ONCA 190 at para 16; *R v Crevier*, 2015 ONCA 619 at para 124

C. STANDARD OF REVIEW

Typically, deference is owed to a trial judge's determination of a Corbett application, except where the decision is made on a wrong principle or where a trial judge fails to consider relevant factors in the exercise of his/her discretion. However, no deference is owed where the trial judge failed to give reasons: *McManus* at paras 84, 85.

D. EXAMPLES FROM THE CASE LAW

In *McManus*, where the accused was charged with possession for the purpose of trafficking in marijuana and cocaine, the Court of Appeal held that the trial judge erred in ruling that the Crown could cross-examine him on his prior conviction for possession of cocaine for the purposes of trafficking. In weighing the prejudicial effect of the conviction, there was no question the balance favoured exclusion; the nature and timing of the conviction increased the risk of propensity reasoning by the jury. To properly assess his credibility, the jury could have been made aware of his other non-drug related convictions, without risking propensity reasoning. This error affected the fairness of M's trial as he decided not to testify after the Corbett ruling: *R v McManus*, 2017 ONCA 188

For an analysis of a corbett application in the context of the defence putting police character in issue and raising a third party suspect/propensity based defence, see *R v Crevier*, 2015 ONCA 619 at paras 115-126

COSTS AS A REMEDY

A. JURISDICTION TO AWARD COSTS

A provincial court hearing a CDSA forfeiture application has an implied power to award costs in appropriate circumstances. That power is derived from the authority, possessed by every court of law, to control its own process. It is also implied by the forfeiture provisions of the CDSA: *R v Fercan Developments*, 2016 ONCA 269 at paras 49-55

A superior court has the ability to award costs pursuant to its power to control its own process. That power is part of a superior court's inherent jurisdiction. A superior court can order parties to pay costs for frivolous or abusive proceedings or in cases involving misconduct: *Fercan Developments* at para 50

Courts should be reluctant to interpret legislation in a way that would require bifurcation of proceedings, requiring litigants to seek a costs remedy in superior court for a proceeding that occurred in the provincial court: *Fercan Developments* at para 58

B. GENERAL PRINCIPLES

There are three circumstances where costs may be awarded against the Crown:

1. where there has been a *Charter* violation
2. where there has been Crown misconduct

3. where there are exceptional circumstances: *Fercan Developments* at para 37

i. COSTS AS A CHARTER REMEDY

See Chapter on Charter, Section 24(1)

ii. COSTS FOR CROWN MISCONDUCT

a) Costs for Bystanders

The differences between an accused and a bystander may justify a lower threshold for Crown misconduct leading to costs:

- First there is a significant access to justice issue as a bystander may incur significant legal costs to enforce his or her Charter rights.
- Second a bystander is in a more vulnerable position than an accused person since the rules of criminal procedure, which afford accused persons procedural protections, are not available to bystanders.
- Third, the rationale for limiting costs awards in favour of accused persons to cases of Crown misconduct does not apply with the same force to bystanders: *R v Martin*, 2016 ONCA 840 at para 51; see also *Fercan Developments*

iii. COSTS OUTSIDE THE CHARTER CONTEXT

b) Test

A court can award costs when there has been a marked and unacceptable departure from the reasonable standards expected of the prosecution: *R v Fercan Developments*, 2016 ONCA 269 at para 72-77; see also *R v Singh*, 2016 ONCA 108 at paras 29-38.

iv. APPEAL OF COSTS AWARD

Section 676.1 of the Criminal Code provides that any party who is ordered to pay costs may appeal the order or the quantum with leave.

THE CROWN

A. ROLE OF

The Crown is entitled to argue its case forcefully but, “The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty.... It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings” *R v John*, 2016 ONCA 615 at para 77, quoting *Boucher*

Canadian courts have repeatedly stressed that Crown prosecutors are not simply advocates; they are ministers of justice. Crown prosecutors are expected to press their position firmly and advance their position effectively, even with a degree of rhetorical passion:. Crown prosecutors must, however, temper their advocacy. They are not to appeal to emotion by engaging in “inflammatory rhetoric, demeaning commentary or sarcasm”. Nor are they to corrupt the fair reach of evidence in their submissions by suggesting that there are inconsistencies when there are not: *R v Roberts*, [2018 ONCA 411](#) at para 120

For a review of the relationship between the accused and defence counsel and the role of the crown, see *R v. Delchev*, 2015 ONCA 381

B. CROWN MISCONDUCT

i. GENERAL PRINCIPLES

For a review of principles surrounding crown conduct in an opening and closing jury address, see Jury Law: Opening and Closing Addresses

Cases involving improper Crown conduct/remarks/cross-examinations in jury trials: *R v AT*, 2015 ONCA 65; *R v Khairi*, 2015 ONCA 279; *R v John*, 2016 ONCA 615; *R v JS*, 2018 ONCA 39; *R. v. R.(A.J.)* (1994), 94 C.C.C., (3d) 168 (Ont. C.A.), at p. 177

For a review of principles surrounding crown misconduct in cross-examination, see Evidence Law: cross-examination, General Principles: Limitations on Crown's Cross-examination

Sarcasm and inflammatory language should be avoided. Sarcasm does not make guilt more apparent. What it does is diminish the dignity of court proceedings. Using inflammatory language does not advance reasoning. It invites emotion instead: *R v Roberts*, [2018 ONCA 411](#) at para 124

Courts have authority to award *Charter* damages against the Crown for prosecutorial discretion absent proof of malice. For example, "a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence." *Henry v BC (Attorney General)*, 2015 SCC 24

The doctrine of abuse of process is not a tool for assessing the quality of prosecutorial decisions. It is a tool for addressing conduct of the Crown that is egregious and seriously undermines the fairness of the proceeding or the integrity of the administration of justice. Simply put, it is about misconduct, not poor performance: *Jackson v Ontario*, [2017 ONCA 812](#) at para 2

ii. APPELLATE INTERVENTION

The question on an appeal is about effect, not performance. The crucial question is whether, in the context of the trial as a whole, breaches of the limits of proper prosecutorial advocacy have caused a substantial wrong or miscarriage of justice, including by prejudicing the right to a fair trial: *R. v. Sarrazin*, 2016 ONCA 714, at para. 57; *R v Roberts*, [2018 ONCA 411](#) at para 121

C. PROSECUTORIAL DISCRETION

General Principles on prosecutorial discretion and the scope of judicial review: *R v Delchev*, 2015 ONCA 381 at paras 46-55

The Crown has the power to enforce legislation and to decide whether or not to exercise these powers. This discretion is generally impervious to review and is derived from the Crown's independence. However, where the Crown fails to exercise its discretion in a fair and objective manner, corrective action may be necessary to protect the integrity of the criminal justice system: *R v Fercan Developments Inc.*, 2016 ONCA 269 at para 1

Drawing a negative inference from the withdrawal of charges would require the court to engage in speculation, because the Crown is not obliged to give reasons for the exercise of its prosecutorial discretion. Such speculation cannot establish arbitrary or improper motives for which a s. 24 Charter remedy would lie: *R v Thompson*, 2015 ONCA 800 at para 50

It is the Crown's discretion to determine which witnesses it will call and will not call – provided the Crown does not abuse that discretion: *R v HAK*, 2015 ONCA 905 at para 13

D. THEORY OF LIABILITY

While the Crown is generally bound to prove the formal particulars of the offence charged, it is not bound to prove the theory that it advances in order to secure a conviction. Rather, a conviction is based on proof of the necessary elements of the offence. Accordingly, there is no general proposition that once the Crown presents a particular theory of a case, it would be unfairly prejudicial to the accused to allow the trier to convict on a different theory: *R v Grandine*, 2017 ONCA 718 at para 63

Subject to due process concerns, a conviction may be founded on a theory of liability that has not been advanced by the Crown, provided that theory is available on the evidence: *R v Dagenais*, [2018 ONCA 63](#) at para 55

DECLARATORY RELIEF

A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought. A declaration is an exceptional and discretionary remedy that should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question: *Ewert v Canada*, [2018 SCC 30](#) at paras 81, 83

DIRECTED VERDICTS

The test on a directed verdict application is the same as on a preliminary inquiry: *R v Pannu*, 2015 ONCA 677 at para 158

A trial judge's directed verdict decision is a question of law which does not command appellate deference: *R v Anderson*, [2018 ONCA 1002](#), at para 19

INFORMATION / INDICTMENT

A. AMENDING THE INFORMATION OR INDICTMENT

a) Power to amend under s.601

Section 601 of the *Criminal Code* contains the statutory power to amend an information or indictment.

Section 601(2) provides a trial judge with the jurisdiction to amend a count on an information to conform to the evidence given at trial.

Section 601(4) lists the factors that must be taken into account when considering whether to make an amendment, including: (a) the evidence taken; (b) the circumstances of the case; (c) whether the accused has been "misled or prejudiced in his defence by any variance, error or omission"; and (d) whether the amendment can be made without creating an injustice.

The power to amend an information or count within an information is a broad one. Provided there is no irreparable prejudice to the accused, and the fairness of the trial will not be adversely impacted, the trial judge may exercise her or his power in favour of making an amendment:

The wide power to amend includes the ability to substitute one charge for another. The essential inquiry should be into the impact of any potential amendment on the accused, not on how the amendment will impact the charge.

The power to amend an information or indictment under s. 786(2) does not bar amendments that substitute one offence for another in summary conviction proceedings. This is because "amendments" do not "institute" proceedings: *R v Bidawi*, [2018 ONCA 698](#), at paras 29-36

b) Under the Provincial Offences Act

Section 36 of the *Provincial Offences Act* is the only section that gives the court the power to quash an information based on a defect on the face of the information. The procedure to quash an information requires a motion, which may be brought without leave before the defendant has pleaded, and thereafter only with leave of the court. Subsection 36(2) precludes the court from quashing an information “unless an amendment or particulars under section 33, 34 or 35 would fail to satisfy the ends of justice.”

Subsection 34(1) provides that the court may amend the information “at any stage of the proceedings”. That includes the first appearance. Subsection 34(4) sets out the factors the court is to consider when deciding whether to amend. These include where the information or certificate:

- (a) fails to state or states defectively anything that is requisite to charge the offence;
- (b) does not negative an exception that should be negated;
or
- (c) is in any way defective in substance or in form.

R v Singh, [2018 ONCA 506](#) at paras 7, 8, 10

c) After the Expiry of the s.786(2) Limitation Period

Section 786(2), which prohibits the institution of proceedings for a summary conviction offence more than six months after the alleged offence, does not bar amendments that substitute one offence for another in summary conviction proceedings. This is because amendments do not institute proceedings: *R v Bidawi*, [2018 ONCA 698](#), at paras 29, 36

B. THE SINGLE TRANSACTION RULE

The single transaction rule is set out in s. 581(1) of the *Criminal Code*:

581(1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

The underlying purpose of the single transaction rule is to ensure that an accused is aware of the charge against him or her and is able to make full answer and defence. The presence or absence of prejudice plays a significant role in determining whether a count is invalid due to violating the single transaction rule: *R v Kenegarajah*, [2018 ONCA 121](#) at paras 22-26

A series of acts that are sufficiently connected will make up a single transaction for the purposes of s. 581(1). The sufficiency of the connection will depend on the circumstances. The requisite connection may be established by the proximity in time or place of the acts, the identity of the parties to the acts, the similarities of the conduct involved in the acts, the ongoing relationship of the parties to the acts, or other factors tending to show that each act is properly viewed as part of the larger whole: *R v Rocchetta*, [2016 ONCA 577](#) at para 44; see generally *Kenegarajah*

C. PARTICULARIZING THE CHARGE

Where the Crown particularizes the mode by which the offence has been committed, the Crown is required to prove this mode beyond a reasonable doubt. See, for example, *R v Wheeler*, [2018 ONCA 1069](#)

INEFFECTIVE ASSISTANCE OF COUNSEL

A. THE TEST AT TRIAL

The test to assess ineffective assistance claims on appeal does not apply at trial. An incompetence of counsel claim, brought during the course of a trial, should be approached within the principled framework for mistrial applications. A mistrial is a remedy of last resort, and it falls squarely within the discretion of the

trial judge who is in the best position to assess whether such a remedy is needed in order to avoid miscarriages of justice. No new test is required.

B. TEST ON APPEAL

On appeal, the test focuses on whether the assistance was ineffective and whether there is a “reasonable possibility” that a miscarriage of justice resulted from ineffective assistance at trial, either by virtue of an unreasonable verdict or an unfair trial: *R v GC*, [2018 ONCA 392](#) at para 3; *R v MM*, [2018 ONCA 1019](#), at para 2

It can be in the interests of justice to admit fresh evidence of ineffective assistance of counsel on appeal: *R v Chica*, [2016 ONCA 252](#) at para 5

In order to succeed, the Appellant must establish:

1. the material facts underlying the allegation, on a balance of probabilities;
2. that counsel’s acts or omissions constituted incompetence, measured on a reasonableness standard and in light of a strong presumption that trial counsel’s conduct fell within the wide range of reasonable professional assistance (the “performance component”); and
3. that counsel’s ineffective representation caused a miscarriage of justice by resulting in procedural unfairness or undermining the reliability of the verdict (the “prejudice component.” *Chica* at para 7; *R v Trudel*, [2015 ONCA 422](#) at paras 32-33

A claim for ineffective assistance of counsel has a performance component and a prejudice component: *R v Nwagwu*, [2015 ONCA 526](#) at paras 6-7

i. PREJUDICE COMPONENT

Before considering the performance component, the court must consider prejudice – whether there has been a miscarriage of justice as a result of an unreliable verdict or procedural unfairness or the appearance of unfairness: *Nwagwu* at paras 6-7 (citations omitted); *R v Bayliss*, [2015 ONCA 477](#) at para 61; *R v Trudel*, [2015 ONCA 422](#) at para 34

Unreliability of the verdict is made out where the appellant can establish that there is a reasonable probability that the verdict would have been different had he received effective legal representation. A reasonable probability is a probability that is sufficiently strong to undermine the appellate court's confidence in the validity of the verdict

ii. PERFORMANCE COMPONENT

The performance component requires that the appeal court test the competence of the representation provided to the appellant against the standard of reasonable professional assistance: *R v Baylis*, [2016 ONCA 477](#) at para 61

In order to succeed on appeal, the appellant must establish that his trial counsel's performance fell outside the "wide range of reasonable professional assistance" and that there was a reasonable possibility that the result at trial would have been different but for his counsel's alleged mistakes: *R v J.L.*, [2016 ONCA 221](#) at para 1

Deference is owed to counsel's performance at trial and there is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance: *R v MM*, [2018 ONCA 1019](#), at para 2

Counsel cannot be blamed for a defendant's evidence that is inherently difficult to believe in several important respects: *MM* at para 5

iii. EXAMPLES FROM THE CASE LAW

- The relevant test laid out and applied in the context of an appeal to strike a guilty plea: *R v Baylis*, [2015 ONCA 477](#)
- The relevant test laid out and applied in the context of an appeal to strike an NCR order: *R v Trudel*, [2015 ONCA 422](#)
- The failure to advise a client of the effect of a guilty plea on the client's immigration status prior to plea is discussed – but not decided: *R v Shiwprashad*, [2015 ONCA 577](#)
- The failure to advise a client of the criminal consequences of a guilty plea and aggravating factors contained in the summary of facts acknowledged by the accused at a plea: *R v Simard*, [2017 ONCA 149](#)

- The failure to give a client an adequate opportunity to consider his election as to mode of trial: *R v Stark*, [2017 ONCA 148](#)
- The failure to review an accused's statement to police where the accused was cross-examined on that statement at trial, and the concession of voluntariness despite the failure to discuss with the accused the circumstances surrounding the giving of the statement: *R v EH*, [2017 ONCA 423](#)
- Counsel's failure to attempt to bring a 276 constituted ineffective assistance of counsel and caused a miscarriage of justice where the credibility of the complainant was central and the 276 would have allowed the defence to explore a major contradiction in her evidence: *R v Walendzewicz*, [2018 ONCA 103](#)
- Counsel's falsification of an affidavit containing information inconsistent with the accused's evidence at trial, and relied on by the trial judge to convict, did not amount to ineffective assistance of counsel because of the overwhelming Crown case, the incredibility of the accused generally, and the adequate performance of trial counsel: *R v LHE*, [2018 ONCA 362](#)

ISSUE ESTOPPEL

An acquittal is the equivalent of a finding of innocence. any issue, the resolution of which had to be in favour of the accused as a prerequisite to the acquittal, is irrevocably deemed to have been found conclusively in favour of the accused. A trial judge is bound to accept the jury's acquittal and any findings of fact that necessarily arose therefrom: *R v Omar*, [2018 ONCA 559](#) at paras 16, 17

JUDICIAL INTERIM RELEASE

A. BAIL

i. GENERAL PRINCIPLES

[Excerpted from *R v Antic*, 2017 ONCA 27 at para 67]

- Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.
- Section 11 () guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.
- Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).
- The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, “release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds”; at para. 23. This principle must be adhered to strictly.
- If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.
- Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.
- A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.
- It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2)(d) or 515(2)(e), cash bail should be relied on only in

exceptional circumstances in which release on a recognizance with sureties is unavailable.

- When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be. As a corollary to this, the justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be proportionate to the means of the accused and the circumstances of the case.
- Terms of release imposed under s. 515(4) may “only be imposed to the extent that they are necessary” to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person’s behaviour or to punish an accused person.
- Where a bail review is applied for, the court must follow the bail review process set out in.

ii. TERTIARY GROUNDS

See *R v St. Cloud*, [2015 SCC 27](#)

iii. WHERE NEW INDICTMENT PREFERRED

Where an accused has been released or detained on the basis of an information charging certain offences, and a new indictment is later preferred, the previous detention order continues to apply in respect of the new indictment, pursuant to section 523(1.2). The purpose and effect of s. 523(1.2) is to continue the previous detention order and make it apply to the new indictment. Any stay of the original charges therefore, has no effect on the ongoing status of the original detention order: *R v Codina*, 2017 ONCA 93 at paras 18-20

iv. THE "WHYTE" CONCERN

Where the amount of time an accused has spent in pre-trial custody is close to the likely sentence s/he would receive after conviction, this becomes a serious liberty issue, militating in favour of release and/or warranting a bail review: *R v*

Whyte, 2014 ONCA 268 at paras 42-43; see, for example, *R v Codina*, 2017 ONCA 93 at paras 26-29

v. GLADUE PRINCIPLES

Gladue principles apply to bail hearings: *R v Hope*, [2016 ONCA 648](#) at para 9

vi. OUTSTANDING CHARGES

Outstanding criminal charges are important for bail purposes, especially those that point to bail compliance issues. In the pre-trial context, s. 518(1)(c)(ii) of the *Criminal Code* permits the prosecutor to lead evidence of outstanding charges. Depending on the circumstances, an individual charged with fresh offences while on bail may face a reverse onus at his or her bail hearing: see s. 515(6)(a)(i) and *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91. Charges under ss. 145(2) to (5) always result in a reverse onus situation: s. 515(6)(c): *R v CL*, [2018 ONCA 470](#) at para 15

vii. REVOCATION OF BAIL

When a trial judge decides to revoke bail after conviction, s/he should ask the accused for submissions before doing so: *R v Wager*, [2018 ONCA 931](#), at para 15

B. BAIL REVIEW

See *R v St. Cloud*, [2015 SCC 27](#)

Bail review of detention under section 515(10)(c) on the basis of a material change in circumstances: *R v. A.A.C.*, 2015 ONCA 483

There is concurrent jurisdiction in the Superior Court of Justice and the Court of Appeal court to conduct a bail review under s. 520. Notwithstanding that concurrent jurisdiction, “absent special circumstances superior courts should deal with bail prior to and during a trial. Errors of law made by the bail review judge do not, in themselves, qualify as special circumstances. Superior Court Judges can and should exercise this function on a new bail review: *R v George*, [2018 ONCA 314](#) at paras 3-4, 27; *R v Rootenberg*, [2018 ONCA 335](#) at paras 16, 18, 19

There is no right of appeal to the Court of Appeal from a decision of a bail review judge: *George* at para 25

C. BAIL PENDING APPEAL TO THE COURT OF APPEAL

i. GENERAL PRINCIPLES

The test for bail pending appeal is set out in s.679 of the Criminal Code.

As a basic principle, bail should not be more readily accessible for someone who has been convicted of a crime than for someone who is awaiting trial and is presumed innocent: *R v Hewitt*, [2018 ONCA 293](#) at para 23

Second and subsequent applications for release pending appeal require an appellant to demonstrate a material change in circumstances from those under consideration on the prior application or applications. A material change in circumstances requires information that could alter the assessment of one or more of the statutory factors governing release pending appeal: *R v Dyce*, [2016 ONCA 397](#) at para 2

Apart from exceptional circumstances, the failure of an appellant to respond to a release order, by surrendering into custody in accordance with its terms, will almost invariably result in the dismissal of the appeal: *R v Dolinsky*, [2017 ONCA 495](#) at para 14

ii. THE MERIT AND UNNECESSARY HARDSHIP REQUIREMENT

The first prong of the test for bail pending appeal requires the applicant to show that his appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody

The two factors are inter-related: the weaker the merits of a pending appeal, the harder it will be for an applicant to show that hardship caused by continued incarceration is “unnecessary”. An applicant cannot establish “unnecessary” hardship simply by pointing to possible hardship, such as the appeal being moot by the time it is heard. An appellant can show unnecessary hardship if he is able to demonstrate that his appeal is sufficiently meritorious such that, if judicial interim release is not granted, he will have spent more time in custody than what is subsequently determined to be fit: *R v McIntyre*, [2018 ONCA 210](#) at paras 31-34; *R v Hassan*, 2017 ONCA 1008 at para 32

Under the merit requirement, the court asks whether the appeal has some hope or prospect of success. The standard is more stringent than the test for leave to appeal sentence: *R v McIntyre*, [2018 ONCA 210](#) at paras 21; see also *R v Hassan*, 2017 ONCA 1008 at para 19.

Bail takes on a greater significance where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided. Bail prevents the appellant from serving more time in custody than might subsequently be determined fit in the circumstances. Where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s.679(10): *R v Oland*, [2017 SCC 17](#), at para. 48; see also Trotter notes in *The Law of Bail in Canada*, loose-leaf (2017-Rel. 2), 3d ed. (Toronto: Carswell, 2010), at pp. 10-39 to 10-40

iii. THE FLIGHT RISK ASSESSMENT REQUIREMENT

The absence of flight or public safety risks will attenuate against the enforceability interest: *R v Oland*, [2017 SCC 17](#) at para 39

iv. THE PUBLIC INTEREST CRITERION

For a thorough review of the "public interest criterion" in section 679(3)(c), and the reviewability and enforceability interests at play, see: *R v Oland*, [2017 SCC 17](#); *R v Luckese*, [2016 ONCA 359](#) at paras 4-5; see, for example, *R v Tang*, [2017 ONCA 775](#)

The merits of the appeal are relevant to the public interest inquiry: *R v McIntyre*, [2018 ONCA 210](#) at para 37

v. SENTENCE APPEALS

Pursuant to s.679(1)(b), before an appellant can obtain bail pending appeal on a sentence appeal, s/he must first be granted leave to appeal the sentence: *R v McIntyre*, [2018 ONCA 210](#) at para 16

vi. SUCCESSFUL EXAMPLES

R v Groskopf, [2018 ONCA 455](#) (appeal of convictions for the possession, making, and distribution of child pornography, together with sexual interference, sexual assault, and sexual exploitation)

D. BAIL PENDING APPEAL TO THE SUPREME COURT OF CANADA

It is very difficult for any judge of the court of Appeal to determine whether an application for leave to appeal to the Supreme Court of Canada is frivolous: *R v Boussoulas*, [2018 ONCA 326](#) at para 19

E. BAIL PENDING NEW TRIAL

i. GENERAL PRINCIPLES

The enabling statutory authority is s. 679(7.1) of the Criminal Code, which provides:

Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial, section 515 or 522, as the case may be, applies to the release or detention of that person pending the new trial or new hearing as though that person were charged with the offence for the first time, except that the powers of a justice under section 515 or of a judge under section 522 are exercised by a judge of the court of appeal.

The phrase "pending the new trial" engages two discrete time periods:

- A. the time between the order for a new trial and the successful appellant's first appearance in the trial court; and
- B. the time between the first appearance in the trial court and the start of the new trial.

In the first time period, a judge of the court of appeal has exclusive jurisdiction over release pending a new trial. In the second time period, a judge of the court of appeal and a judge of the trial court have concurrent jurisdiction over release pending a new trial. Where concurrent jurisdiction exists, court of appeal judges have often declined to hear the application and transferred it to the trial court.

Typically, in determining the most appropriate forum for the hearing and determination of the application, relevant considerations include, but are not limited to:

1. the geographic location of the person, the proposed sureties, counsel and where necessary, witnesses.
2. the nature of the hearing, including the reasonable necessity of the introduction of viva voce testimony;
3. the issues in controversy;
4. the anticipated length of the hearing;
5. the need for familiarity with the appellate record and the reasons provided for ordering a new trial;
6. the relationship, if any, between the issue of release and the hearing and scheduling of the new trial;
7. the review mechanism available to any party aggrieved by the decision;
8. the nature of the record required for the hearing; and
9. the timing of the hearing.

R v Manasseri, 2017 ONCA 226 at paras 27-43

F. FORFEITURE OF BAIL MONIES

A forfeiture hearing is governed by s. 771 of the *Criminal Code*, which provides that after giving the parties an opportunity to be heard, the presiding judge “may... in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper”. Accordingly, whether to grant relief from forfeiture and the quantum of relief is within the discretion of the presiding judge.

The onus is on the sureties to show why, on a balance of probabilities, the recognizance should not be forfeited. Sureties asserting that they should be relieved from forfeiture of any amount of the recognizance have the obligation to adduce credible evidence to support their position.

The pull of bail can sometimes be vindicated by something less than total forfeiture. In *Horvath*, the leading Ontario case on forfeiture, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining whether

there should be forfeiture, and in what amount relative to the amount in issue. They are:

- the amount of the recognizance;
- the circumstances under which the surety entered into the recognizance (with an emphasis on whether there was any duress or coercion);
- the diligence of the surety;
- the surety's means;
- any significant change in the surety's financial position after the recognizance was entered into and after the breach;
- the surety's conduct following the breach, including efforts to assist authorities in locating the accused; and
- the relationship between the accused and the surety.

In cases involving significant sums of money, a more searching examination of the circumstances is called for. Frequently, such an examination centers on the impact forfeiture would have on the surety's financial circumstances.

R v Wilson, 2017 ONCA 229

JURISDICTIONAL ISSUES

A. GENERAL PRINCIPLES

A court will have jurisdiction if it has authority over the persons in, and the subject matter of, a proceeding, and has the authority to make the order sought: *R v Fercan Developments Inc.*, 2016 ONCA 269 at para 41

In exceptional cases, Provincial Court judges have a discretion to exercise criminal jurisdiction and sit at a criminal trial via video-conference. Although this may violate the accused's right to be present at his or her trial per s.650 of the *Criminal Code*, this may be assessed case-by-case: *R v Gibbs*, 2018 NLCA 26

i. WHEN JUDGE IS FUNCTUS

A trial judge exercising the functions of both judge and jury in a criminal case is not *functus* following a finding of guilt until he or she has imposed sentence or otherwise finally disposes of the case: *R v Sualim*, 2017 ONCA 178 at para. 29.

Once the Crown has exercised its right under section 579 to direct a stay of proceedings, the judge, whether a Summary Conviction Court judge or a Superior Court judge, is *functus*: *R v Martin*, 2016 ONCA 840 at paras 38, 42. 43

However, in a situation where a trial judge comes to a final disposition in a matter, including entering a judicial stay of proceedings, he or she retains jurisdiction to craft an appropriate remedy for a Charter violation, including awarding costs, where appropriate. That is because a remedy under s. 24(1) of the Charter, in those circumstances, is part of the trial judge's discretionary adjudicative process. *Martin* at para 39

For the law on jurisdiction to amend a sentence after the initial decision has been imposed, see Sentencing, Jurisdiction

ii. TO CONTROL PROCESS / MAKE ORDERS RELATING TO TRIAL

A judge has the discretionary authority to permit a witness' testimony to be recorded pursuant to s. 136(3) of the *Courts of Justice Act* where the recording is being made in pursuit of the accused's right to make full answer and defence: *R v Dunstan*, [2017 ONCA 432](#) at para 46

B. CIVIL V CRIMINAL

In determining whether an order is civil or criminal in nature, what is relevant is not the formal title or styling of the order, but its substance and purpose: *R v Brassington*, 2018 SCC 37 at para 19

Usually, it will not be difficult to distinguish a criminal proceeding from a civil proceeding. An application for an order made in the course of a criminal proceeding, an application for an order directly impacting on an ongoing or pending criminal proceeding, or an application for an order rescinding or varying an order made in a criminal proceeding will all be criminal proceedings: *Canadian Broadcasting Corp v Ontario*, 2011 ONCA 624, at para 17

C. DIVISION OF POWERS

iii. GENERAL PRINCIPLES

The Constitution Act, 1867 gives Parliament exclusive legislative authority over criminal law (with the exception of the constitution of courts of criminal jurisdiction) under s. 91(27). Under s. 92(15) of the Constitution Act, 1867, the provinces also have the authority to impose punishment by fine, penalty or imprisonment for the purpose of enforcing otherwise valid provincial laws.

To constitute criminal law, the impugned enactment requires a prohibition and a penal consequence. In addition, the prohibition has to serve a criminal public purpose.

iv. THE DIVISION OF POWER ANALYSIS

a) Pith and Substance

The first step is to determine the “matter” of the legislation in issue. The analysis involves an examination of: (i) the purpose of the enacting body, and (ii) the legal effect of the law.

The purpose of the enacting body is determined by examining both intrinsic and extrinsic evidence. Intrinsic evidence consists of the content of the enactment itself. While a court is not bound by an enactment’s purpose clause when considering the constitutional validity of an enactment, a statement of legislative intent is often a useful tool.

Extrinsic evidence, such as legislative debates or Hansard, may also be relevant in determining the purpose of the enacting body, but the evidence must be reliable and should not be given undue weight. Purpose may also be ascertained by considering the “mischief” of the legislation – the problem which Parliament sought to remedy. Importantly, the purpose of the enacting body must not be confused with the enacting body’s motive, or with the motive of any individual member

When examining the legal effect of the enactment, the court looks at how it affects the rights and liabilities of those subject to its terms and the actual or predicted practical effect of the law.

b) Assignment to a Head of Power

Once the pith and substance has been identified, the second step in the analysis is to assign the matter of the challenged legislation to a head of power under either ss. 91 or 92 of the Constitution Act, 1867.

York (Regional Municipality) v Tsui, 2017 ONCA 230 at paras 55-73

D. JURISDICTION OF THE SUPERIOR COURT OF JUSTICE

A Superior Court of Justice has inherent jurisdiction, which can be defined as a “reserve or fund of powers or a residual source of powers, which a superior court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them”

Given the broad and loosely defined nature of these powers, they should be ‘exercised sparingly and with caution: *R v Dunstan*, [2017 ONCA 432](#) at paras 79-80

E. JURISDICTION OF THE ONTARIO COURT OF JUSTICE

As a statutory court, the Ontario Court of Justice does not have any inherent jurisdiction and derives its jurisdiction from statute.

It enjoys powers that are expressly conferred upon it and, by implication, any powers that are reasonably necessary to accomplish its mandate. For example, the power to control its own process is necessarily implied in a legislative grant of power to function as a court of law. This power is largely parallel to a superior court's ability to control its own process. It cannot contravene explicit statutory provisions or constitutional principles like the separation of power. It also enjoys certain implied powers that accrue to it as a court of law, as well as certain powers implied in the context of particular statutory scheme: *R v Fercan Developments Inc.*, 2016 ONCA 269 at paras 44, 51-52

F. IMPLIED POWERS / THE DOCTRINE OF JURISDICTION BY NECESSARY IMPLICATION

- A power or authority may be implied:
 1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate;

2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
3. when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
4. when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; or
5. when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body.

Whether a statutory court is vested with the power to grant a particular remedy depends on an interpretation of its enabling legislation

When ascertaining legislative intent, a court is to keep in mind that such intention is not frozen in time. Rather, a court must approach the task so as to promote the purpose of the legislation and render it capable of responding to changing circumstances. Furthermore, courts need to consider the legislative context when interpreting the legislation at issue.

The power being conferred does not have to be absolutely necessary. It only needs to be practically necessary for the statutory court or tribunal to effectively and efficiently carry out its purpose: *R v Fercan Developments Inc.*, 2016 ONCA 269 at paras 45-48

For a review of implied power to award costs, see Costs as a Remedy

G. JURISDICTION OF JUDGE TO RECONSIDER ORDER

The principles of *res judicata* do not apply during a hearing to decisions reached by a judge during that hearing, and a judge is not *functus officio* when a *voir dire* has ended. Judges who are not *functus officio* have jurisdiction to reconsider and vary the orders that are made within a trial, in the interests of justice. As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place: Indeed, a trial judge can change their mind up until the point when the accused has been sentenced: *R v RV*, [2018 ONCA 547](#) at paras 99-1100

H. JURISDICTION OF REPLACEMENT JUDGE

i. SECTION 653.1

The primary function of s. 653.1, however, is to create a new rule that enables pre-trial rulings that have been made in a mistried case to apply at the new trial. This new rule was adopted in the interests of efficiency, to preserve prior rulings where it is reasonable to do so. Having provided for the continued application of pre-trial rulings, the section goes on to make clear that the inherent power of trial judges to reconsider earlier decisions has not been removed

ii. SECTION 669.2

Section [669.2](#) authorizes a judge with jurisdiction to try the accused to continue the proceedings when the trial judge is unable to do so.

The jurisdiction of a s. 669.2 trial judge to reconsider prior rulings derives not from s. 669.2, but from that judge's status as the trial judge. When a judge becomes seized of a matter under s. 669.2, he becomes the trial judge for all purposes. Since he continues the trial as the trial judge, the s. 669.2 trial judge is given the same authority that the replaced trial judge had. As such, he has the same power to reconsider prior rulings made within that trial by the replaced trial judge, when it is in the interests of justice to do so.

The relevant principles are as follow.

The principles of *res judicata* do not apply during a hearing to decisions reached by a judge during that hearing, and a judge is not *functus officio* when a *voir dire* has ended. Judges who are not *functus officio* have jurisdiction to reconsider and vary the orders that are made within a trial, in the interests of justice. As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place. Indeed, a trial judge can change their mind up until the point when the accused has been sentenced

There are, of course, limits on the authority to reconsider. It should not be used without circumspection because of the interest in finality and clarity. Nor can reconsideration produce unfairness. For example, it may not be appropriate to reconsider rulings that have been relied upon by one of the parties in forming a trial strategy, unless the prejudice incurred in reliance on the ruling can be remedied.

The most common circumstance where it may be in the interests of justice to reconsider rulings is where facts have materially changed. However, this is not the only circumstance. Rulings have also been reopened where a party has misunderstood the scope of an admission, or because counsel was unaware of relevant evidence at the time. A trial judge may also correct a decision that they discover was made in error.

Reconsideration by the trial judge of a decision made in the same proceeding or trial by another judge does not constitute an impermissible collateral attack on the earlier decision: *R v RV*, [2018 ONCA 547](#) at paras 99-102

I. TERRITORIAL JURISDICTION

[Section 478 of the Criminal Code](#) provides that: “Subject to this Act, a court in a province shall not try an offence committed entirely in another province.”

KIENAPPLE RULE

The Kienapple principle provides that where the same transaction gives rise to two or more convictions on offences with substantially the same elements, the accused should be convicted only of the more serious offence. It is designed to protect against undue exercise by the Crown of its power to prosecute and punish.

It applies where there is both a factual and a legal nexus between the offences. The requisite factual nexus is established if the charges arise out of the same transaction. The legal nexus is established if the offences constitute a single criminal wrong: *R v Bienvenue*, [2016 ONCA 865](#) at para 9

A. EXAMPLES

There is no legal nexus between the offences of possession of child pornography and making child pornography available. The former involves possession, the latter involves distribution: *R v Aalami*, [2017 ONCA 624](#) at para 44

In *Brownlee*, the Court of Appeal stayed a conviction for theft in light of a conviction for break and enter, and stayed a conviction for possession of property obtained by crime in light of a conviction for trafficking in property obtained by crime : *R v Brownlee*, [2018 ONCA 99](#) at paras 48-50

In *Sadykov*, the Court of Appeal stayed a conviction for assault with a weapon and possession of a weapon for a dangerous purpose in light of a conviction for aggravated assault: *R v Sadykov*, [2018 ONCA 296](#) at para 5

In *MJ*, the Court of Appeal stayed a conviction for failing to provide the necessities of life in light of a conviction for criminal negligence causing bodily harm: *R v MJ*, [2018 ONCA 708](#), at para 8

MENTAL HEALTH

A. POWERS OF REVIEW BOARD

Where the Ontario Review Board finds that an NCR person continues to pose a significant threat to the safety of the public and that the least onerous and least restrictive disposition requires his continued detention in a hospital it is the

Board's role to set out the general parameters of his detention, leaving the day-to-day management decisions to the hospital.

For example, the Ontario Review Board cannot impose a mandatory order on a hospital to take an NCR person for escorted visits to his mother's home. By making an order mandatory, with no discretion accorded to the hospital to implement it only if and when it would be beneficial to the NCR person and public safety would be ensured, the Board erred in law and acted unreasonably. The person in charge had to be able to ensure that the NCR person would be able to handle such visits, that his mother would be prepared to accommodate them, and that the hospital was in a position to facilitate them: *R v Scott*, 2017 ONCA 94.

B. DISPOSITION ORDERS

A conditional discharge order cannot include a requirement that the accused live in a residence approved by the hospital. That order is a de facto detention order: *Re Zazai*, 2017 ONCA 135 at para 3.

A board's decision to find an offender to be a significant threat to the safety of the public is reviewable on a standard of correctness: *Re Krivic*: 2017 ONCA 379 at para 11

C. WHERE TREATMENT IMPASSE OCCURS

It is an error of law for the Ontario Review Board to fail to recognize a treatment impasse in making a detention order at a maximum secure forensic psychiatric facility: *Gonzalez (Re)*, 2017 ONCA 102. The principles related to the determination of a treatment impasse are as follows (paras 28-30):

- First, a long period of incarceration without treatment or progress can constitute a treatment impasse.
- Second, an accused's stubborn refusal to engage with the treatment team can also constitute a treatment impasse.
- Third, although the Review Board has no power to prescribe medical treatment, where the Board finds there to be a treatment impasse, it is

entitled, under its supervisory powers, to order a re-evaluation of current or past treatment approaches and an exploration of alternative approaches. The Board must form its own independent opinion about the accused's treatment plan and clinical progress, and in doing so, it may order an independent assessment in some form under s.672.121 of the *Criminal Code*, and may order the accused's transfer to another facility for that purpose.

In *Gonzalez (Re)*, a treatment impasse existed because the only way forward for the NCR person was for him to consent to treatment or be declared incapable, but his mental illness precluded his consent to treatment, and the treatment team had not declared him incapable. The court stated that while a treatment impasse might be tolerable for a certain period of time, "when it reaches the duration of this case, a decade, the Review Board is obliged to go further" (at para. 41). The court held that an independent assessment of the appellant was required. The court stated that it would be up to the Board to specify the modality of the assessment.

MISTRIALS

A mistrial is a discretionary remedy of last resort. Embedded in the throes of a trial, the trial judge is ideally situated to make this assessment. Appellate intervention is appropriate only if the decision is clearly wrong or based on an error in principle: *R v Zvolensky*, [2017 ONCA 273](#) at para 185; *R v Anderson*, [2018 ONCA 1002](#), at para 15

MENS REA

A. GENERAL PRINCIPLES

There is a common sense inference that a sane and sober person intends the natural and probable consequences of his or her actions. When evidence points in a different direction (for example, evidence of intoxication or mental illness), the jury should be instructed to consider this evidence, along with all other evidence, in deciding whether to draw the common sense inference: *R v Spence*, 2017 ONCA 619 at para 45

B. WILFUL BLINDNESS

Wilful blindness acts as a substitute for actual knowledge, when knowledge is a component of *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. In this way wilful blindness substitutes for actual knowledge whenever knowledge is a constituent of the *mens rea* or fault element of the crime: *R v Downey*, [2017 ONCA 789](#); *R v Burnett*, [2018 ONCA 790](#), at para 142

Subject to considerations of fairness, to meet the air of reality standard the Crown must be able to point to some evidence in the record which, if believed, would allow the jury to make the findings necessary to engage the doctrine: *Burnett* at para 141

In some instances the evidentiary threshold for wilful blindness may be met by an accused's own evidence. As for example, where his or her testimony discloses inherently suspicious events characterized by unclear details and at odds with common sense and human experience. But the threshold may also be met by the cumulative effect of several strands of circumstantial evidence from different sources woven together in a mosaic: *Burnett* at para 143; *R v Onasanya*, [2018 ONCA 932](#), at para 24

In order to find an accused willfully blind about his/her possession of a narcotic, a trial judge does not have to find that the accused knew or suspected s/he was in

possession of a specific form of criminal contraband, as opposed to another form of criminal contraband. To the contrary, willful blindness is met by finding beyond a reasonable doubt that the accused had his/her suspicion aroused to the point that s/he thought there was a need for inquiry, but s/he deliberately chose not to inquire because s/he did not want to know the truth: *R v Downey*, [2017 ONCA 789](#) at paras 4-6

The entirety of the evidence can support a trial judge's conclusion that a person knew the package contained narcotics, or was willfully blind as to its contents: *R v Onyedinefu*, [2018 ONCA 795](#), at para 10

In *R v Brown*, 2018 ONCA 481, the Court of Appeal held that the judge erred by instructing the jury on willful blindness. The Crown's theory that the accused had a duty to investigate the contents of the knapsack left by a third party did not meet the necessary threshold of "deliberate ignorance" based on a subjective suspicion that a gun was inside the bag.

MOTIVE

Evidence of motive is material because it helps to establish two critical components of the case for the Crown: the identity and state of mind of the person who is alleged to have committed the offence.

Evidence of motive is a species of circumstantial evidence used to prove, or to assist in proving, a human act. By nature, evidence of motive is prospectant: because a person had a motive to do an act X, that person probably did the act X alleged. Said another way, a subsequent course of conduct is inferred from the existence of prior state of mind: *R. v. Salah*, 2015 ONCA 23 at para 64; *R v McDonald*, [2017 ONCA 568](#) at paras 71-72; *R v Burnett*, [2018 ONCA 790](#), at para 98

Evidence of motive is relevant and admissible even though motive is *not* an essential element of an offence charged and thus legally irrelevant to criminal responsibility. Evidence of motive may assist in proof not only of elements of the *actus reus* of an offence, but also of the state of mind or fault element that accompanied it: *Burnett* at para 99

Motive may be evidenced by a person's words, conduct or some combination of each. On occasion, the conduct said to establish motive may involve the commission of offences other than those charged or other extrinsic misconduct. The evidence of extrinsic misconduct must be relevant to prove the alleged motive and properly admissible under the rules of evidence: *R v McDonald*, [2017 ONCA 568](#) at para 73

There is a distinction between absence of evidence of proof of motive, on the one hand, and evidence of a proven absence of motive, on the other. Absence of proven motive does not constitute evidence of proven absence of motive: *R v Hassanzada*, 2016 ONCA 284 at para 109

The importance of evidence of motive in the purported demonstration of guilt varies from one case to the next. Motive is of greater importance where the case for the Crown consists entirely or substantially of circumstantial evidence: *Burnett* at para 100

Generally, evidence that an accused has a certain level of income or is on government-assisted income is, on its own, insufficient to support an inference of a motive to commit a profit-motivated crime. Further, this evidence must not be used as a basis for a disguised form of propensity reasoning. However, financially straitened circumstances may provide an accused with a motive to commit a crime for a financial reward: *Burnett* at paras 104-106

THE OPEN COURT PRINCIPLE

The general principle is that, at every stage of the court process, the general rule should be one of public accessibility and concomitant judicial accountability and curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. For a fuller review of the open court principle, see *R v Bartholomew*, [2017 ONSC 3084](#) at paras 8-11

PARTY LIABILITY ISSUES

A. PRINCIPALS: SECTION 21(1)(A)

In cases in which an accused's participation in an offence is alleged to be as a principal, the acquittal of one principal determines nothing in respect of the other: *R v Smith*, [2016 ONCA 25](#) at para 48

The exception arises where one of the principals is clearly innocent, but the trier of fact cannot determine which of them it is: *Smith* at paras 56-58

B. PARTY AS AIDER OR ABETTOR: SECTION 21(1)(B) AND (C)

Before someone can be convicted for an offence as a party, the underlying offence must have been committed: *R v Nguyen*, [2016 ONCA 182](#) at para 48

If the offence is not committed, the proper offence may be "counselling an offence not committed" under [s.464](#) of the *Code*: *Nguyen* at para 49

Where a trier of fact is satisfied that multiple accused acted in concert, there is no requirement that the trier of fact decide which accused actually struck the fatal blow: *R v. Brouillard*, [2016 ONCA 342](#) at paras 14-17

An aider or abettor must have both knowledge and intention. He or she must know that the principal actor intends to commit the murder and must intend to assist or encourage the principal actor in committing it: *R v Zoldi*, [2018 ONCA 384](#) at paras 22-23

In some circumstances, synchronous movements of two individuals may lead to inferences about their intentions and the nature of their participation in the commission of an offence. But, where conviction depends on aiding and abetting, the jury's attention must be focused on the necessary elements and the evidence must be related to those elements in a balanced way: *R v Mendez*, [2018 ONCA 354](#) at para 15

C. PARTY UNDER COMMON INTENTION: SECTION 21(2)

The scope of s. 21(2) is broader than s. 21(1), extending liability to persons who would not be found liable as aiders or abettors. It also extends responsibility for offences other than the offence the accused was carrying out, provided the accused had the required degree of foresight of the incidental offence

In relying on s. 21(2), the Crown must prove (i) the party's participation with the principal in the original unlawful purpose (the "agreement"), (ii) the commission of the incidental crime by the principal in the course of carrying out the common unlawful purpose (the "offence") and (iii) the required degree of foresight of the likelihood that the incidental crime would be committed ("knowledge").

The "agreement" element requires that "the accused and the other participant(s) agreed to carry out a common unlawful purpose and to help each other to do so." The "unlawful purpose" must be different from the offence ultimately committed:

The "offence" must be committed as the participants are carrying out their original agreement or plan: The incidental offence, although not intended by the accused, must nonetheless be related to the original unlawful purpose. The trier

of fact must find that the action of the principal was a consequence of the prosecution of the original common unlawful purpose, and not the result of any “supervening causative event wholly outside the agreed plan.”

Each of the three essential elements must be supported by an adequate evidentiary record to warrant submission of this basis of liability to the jury. The submission of an alternative basis of liability is controlled by the air of reality standard. What is required is “some evidence on the basis of which a reasonable jury, properly instructed, could make the findings of fact necessary to establish each element of this mode of participation.” An instruction on a theory of liability that does not have an air of reality will constitute reversible error:

Finally, if satisfied there is an air of reality to each element of s. 21(2) liability, the trial judge must, in charging the jury, set out the three elements of that basis of liability, explain what the Crown must prove in relation to each of those elements, and review the evidence the jury may consider in relation to the elements in determining whether that route to liability has been established:

R v Patel, [2017 ONCA 702](#) at paras 38-44

iii. PARTY LIABILITY UNDER 21(2) FOR MURDER AND MANSLAUGHTER

To convict a secondary party of murder under s. 21(2), the Crown must prove that the party in fact foresaw that murder was a probable consequence of carrying out the original unlawful purpose: *R v McLellan*, [2018 ONCA 510](#) at para 81; *R v Patel*, [2017 ONCA 702](#) at para 42

The non-shooter had to know that the shooter would probably cause the death of the deceased with either the intent to cause death, or the intent to cause bodily harm that the principal knew would likely cause death, being reckless whether death ensued or not: *McLellan* at para 85

Importantly, a party can aid or abet by acting in a way that furthers, facilitates, promotes, assists or encourages the principal, and be found liable “irrespective of any causative role in the commission of the crime”: *R. v. Dooley*, 2009 ONCA 910 at para 123; *Patel* at para 73

To convict a party of manslaughter relying on s. 21(2), the Crown must prove that a reasonable person in all the circumstances would have foreseen that a probable consequence of carrying out the original common purpose was perpetration of an inherently dangerous act creating a risk of bodily harm to the deceased that was neither trivial nor transitory; *Patel* at para 42

D. PARTY LIABILITY TO A CONSPIRACY

Aiding a conspiracy to achieve its unlawful object does not make someone a party to the conspiracy. Party liability to conspiracy is established only if someone encouraged or assisted the initial formation of the agreement, or encouraged or assisted new members to join a pre-existing agreement: *R v Nguyen*, 2016 ONCA 182 at paras 19-20

E. APPEAL – FAILURE TO CHARGE

Brief discussion of failure to charge on party liability to murder: *R v. Carter*, 2015 ONCA 287

F. VICTIM AS PARTY AND CONSENT

The issue of consent in the context of liability under s. 21(2) requires an assessment only of whether the victim validly consented to the force relating to the common purpose: *R v. Modeste*, 2015 ONCA 398

PLEAS

G. GENERAL PRINCIPLES

A very early guilty plea which is entitled to a substantial credit in the sentencing process: *R v Graham*, 2017 ONCA 245 at paras 1-4

iv. VALIDITY OF

To be valid, a guilty plea must be voluntary, unequivocal, and informed.

A plea of guilty is *voluntary* if it represents the conscious volitional decision of an accused for reasons that the accused regards as appropriate. Pleas of guilty entered in open court in the presence of counsel are presumed to be voluntary.

To enter a voluntary plea of guilty, an accused need only be able to understand the process leading to the plea, communicate with counsel, and make an active or conscious choice. Whether the choice to plead guilty is wise, rational or in the accused's best interest is not part of the inquiry: *R v Cherrington*, 2018 ONCA 653 at para 21

A plea of guilty is *informed* when an accused is aware of:

- i. the nature of the allegations;
- ii. the effect of the plea; and
- iii. the criminal and legally relevant collateral consequences of pleading guilty: *R v Wong*, 2018 SCC 25, at paras 3-4; *Cherrington* at para 23

The cognitive capacity requirement entails nothing more than that the accused:

- i. understood the process in which the plea was entered;

- ii. could communicate with counsel; and
- iii. could make an active or conscious choice: *Cherrington* at para 38

V. REQUIREMENT THAT THE PLEA BE INFORMED

For an accused's plea to be informed, the accused must be aware of the nature of the allegations and the effect and potential consequences of the plea: *R v Quick*, 2016 ONCA 95 at para 4

Note, however, that the accused need not be aware of the precise consequences of his plea, which may be difficult to predict: *R v. Shiwprashad*, 2015 ONCA 577 at para 71

The appellant must show a failure to appreciate or an unawareness of a potential penalty that is *legally relevant*. Legally relevant penalties would at least include penalties imposed by the state. Thus, non-criminal "penalties" imposed by the state for a Criminal Code offence would be "legally relevant." *R v Quick*, 2016 ONCA 95 at para 28 For example, the indefinite suspension of one's driver's license: *Quick* at para 30

However, it is unnecessary that an informed plea requires an accused to understand every conceivable collateral consequence of the plea, even a consequence that might be "legally relevant". Some of these consequences may be too remote; other consequences not anticipated by the accused may not differ significantly from the anticipated consequences; or, the consequence itself may be too insignificant to affect the validity of the plea: *Quick* at para 31

For example, if the accused was unaware of an indefinite license suspension, but for health reasons was unable to drive again in any event, the collateral

consequence would be too remote to warrant a striking of the plea: *Quick* at para 32

A simple way to measure the significance to an accused of a collateral consequence of pleading guilty is to ask: is there a realistic likelihood that an accused, informed of the collateral consequence of a plea, would not have pleaded guilty and gone to trial? If the answer is yes, the information is significant: *Quick* at paras 33-35

The test is subjective, based on the accused before the court. However, when the non-disclosed evidence is tendered as fresh evidence on appeal, the test is objective. The question is not whether the accused would have declined to plead guilty, but whether a reasonable and properly informed person in the same situation would have done so.

H. GUILTY PLEAS - SETTING ASIDE

Where Crown reneges on deal/abuse of process: *R v. Delchev*, 2015 ONCA 381

An appellate court has jurisdiction to set aside a plea entered before a trial judge. In doing so, the appellate court examines the trial record, as well as any additional material proffered by the parties, which in the interests of justice should be considered in assessing the validity of the plea: *R v Shepherd*, 2016 ONCA 188 at para 13. This includes fresh evidence that can explain the circumstances that led to the plea and that can demonstrate that a miscarriage of justice has occurred: *R v Faulkner*, [2018 ONCA 174](#) at para 87

In seeking to set aside a plea, the accused need not show a viable defence to his charge. Whether he has a defence is irrelevant: “the prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial.” *R v Quick*, [2016 ONCA 95](#) at para 38; *Cherrington* at para 46

Accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences at the time of the plea should be required to establish subjective prejudice. To that end, the accused must file an affidavit establishing a reasonable possibility that he or she would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions: *R v Wong*, [2018 SCC 25](#)

A guilty plea may be set aside by evidence of an accused's limited cognitive capacity, a mental disorder or condition, or cognitive or emotional issues such as anxiety, depression, chronic pain, anger management problems and difficulty in communication. However, an accused who claims involuntariness must demonstrate that he or she lacked the capacity to make an active or conscious choice whether to plead guilty: *R v Cherrington*, [2018 ONCA 653](#) at para 21

Where an accused on appeal challenges the validity of his guilty plea on the grounds of cognitive disability, there is unlikely to be any meaningful distinction between a finding that the accused had the requisite mental capacity to enter a valid plea and a finding that the accused exercised that capacity and entered a valid plea: *Cherrington* at para 22

For an analysis of appealing a pre-trial ruling where there has been a guilty plea, see Chapter on Appeals.

Challenges to the validity of pleas of guilty advanced for the first time on appeal require the appellate court to examine the trial record and any additional material tendered by the parties which, in the interests of justice, should be considered in assessing the validity of the plea: *Cherrington* at para 28

Examples

- Where trial judge not informed of immigration consequences: *R v Aujla*, 2015 ONCA 325

- Where accused argues that he had limited cognitive capacity to enter plea: *R v Baylis*, 2015 ONCA 477
- Where accused argues ineffective assistance of counsel on the guilty plea: *R v Baylis*, 2015 ONCA 477; *R v Grewal*, 2015 ONCA 482; *R v Cherrington*, [2018 ONCA 653](#)
- Where accused argues ineffective assistance of counsel on the application to strike the guilty plea: *R v Baylis*, 2015 ONCA 477
- Fresh evidence that meets the *Palmer* criteria and calls into question the accused's liability for the offence will serve to invalidate a guilty plea on appeal: *R v Shepherd*, [2016 ONCA 188](#) at paras 17-21
- Where trial counsel failed to spend enough time preparing, to secure an expert witness, and to effectively cross-examine Crown witnesses: *R v Green*, 2018 ONSC 2912
- Where trial counsel denied the accused his opportunity to testify, failed to properly cross-examine the complainant, and failed to adduce potentially significant evidence in his defence: *R v Cubillan*, [2018 ONCA 811](#)

I. CREDIT ON SENTENCING

The amount of credit a guilty plea will attract on sentencing varies with each case: *R v Carreira*, [2015 ONCA 639](#) at para 15

A plea of guilt does not entitle an offender to a set standard of mitigation. In some cases, a guilty plea is a demonstration of remorse and a positive first step towards rehabilitation. In other cases, a guilty plea is simply a recognition of the inevitable: *R v FHL*, 2018 ONCA 83 at para 22

PRECEDENT

A. JUDICIAL COMITY

The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them. Reasons to depart from a decision include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong: *R v McCaw*, [2018 ONCA 3464](#), at para 64

PREROGATIVE WRITS

A. INTERLOCUTORY MOTIONS AND APPEALS

A judge of the superior court has inherent jurisdiction to consider an application for declaratory relief, either by way of prerogative writ or under s. 24(1) of the Charter. However, the power to consider and grant such an application is discretionary. A Superior Court should not routinely exercise that jurisdiction where the application is brought in the course of ongoing criminal proceedings. Such applications can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record, and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course.

That being said, the Court can and will do so where the interests of justice necessitate the immediate granting of the prerogative or Charter remedy by the superior court. The Court may exercise this power on a habeas corpus application, which "is a crucial remedy for those whose residual liberty has been taken from them by the state and should rarely be subject to restrictions:" *R v Codina*, [2017 ONCA 93](#) at paras 23-24

Other extraordinary remedies, among them prohibition, *procedeno*, and *certiorari*, are available to parties in criminal proceedings only for a jurisdictional error by a provincial court judge. They are *not* available as a means to review or correct

what are said to be errors of law in the exercise of jurisdiction: *R v Davis*, [2018 ONCA 946](#), at para 13

B. HABEAS CORPUS WITH CERTIORARI IN AID

Immigration detainees have access to habeas corpus in the Superior Court when it is more advantageous than the statutory review mechanisms in the *Immigration and Refugee Protection Act*: *Toure v. Canada (Public Safety & Emergency Preparedness)*, [2018 ONCA 681](#)

PRELIMINARY INQUIRY

A. TEST FOR COMMITTAL

The test for committal is whether there is any evidence on which a reasonable jury properly instructed could return a guilty verdict: *R v Wilson*, [2016 ONCA 235](#) at para 21

The test is the same whether the evidence is direct or circumstantial. However, with circumstantial evidence, the question becomes whether the elements of the offence to which the Crown has not advanced direct evidence may reasonably be inferred from the circumstantial evidence: *Wilson* at para 22

In a case involving circumstantial evidence, the preliminary inquiry judge must engage in a limited weighing of the evidence to assess whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw: *Wilson* at para 23

In this analysis, the preliminary inquiry judge does not draw factual inferences, assess credibility, or consider the inherent reliability of evidence: *Wilson* at para 23; *R v Kamermans*, **2016 ONCA 117** at para 15

Any reasonable interpretation or permissible inference from the evidence, beyond conjecture or speculation, is to be resolved in the prosecution's favour. At the preliminary inquiry stage, if more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered: To weigh competing inferences is to usurp the function of the trier of fact: *Wilson* at para 24

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be no inference without objective facts from which to infer the facts that a party seeks to establish. If there are no positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture: *Wilson* at para 30 [citation omitted]

B. APPLICATION FOR CERTIORARI

Certiorari is available to quash both committals and discharges ordered at the conclusion of a preliminary inquiry. The scope of review is limited to jurisdictional errors: *R v Kamermans*, **2016 ONCA 117** at para 13; *R v Wilson*, **2016 ONCA 235** at para 25

The reviewing court must afford substantial deference to the preliminary inquiry judge, and cannot query whether it would have arrived at a different conclusion than that of the preliminary inquiry judge: *Wilson* at paras 27-28

Where there is a scintilla of evidence upon which the preliminary inquiry judge could conclude that the test is satisfied, a reviewing court should not intervene to quash the committal: *Wilson* at para 26 [citation omitted]

Jurisdictional error may be shown where:

1. the preliminary inquiry judge has failed to test the whole of the evidence adduced at the inquiry against the essential elements of the offences charged – which essential elements must accurately reflect the legal requirements Parliament as prescribed. A preliminary inquiry judge commits a jurisdictional error by committing an accused when an essential element of the offence is unsupported by the evidence:
 2. the preliminary inquiry judge preferred an inference favourable to an accused to an inference, also available on the evidence, favourable to the Crown. Whether an inference is easy, hard or difficult to draw is of no moment to a decision on committal.
 3. the preliminary inquiry judge has failed to consider “the whole of the evidence” adduced at the inquiry in reaching his or her conclusion about committal or discharge
- *Kamermans at paras 14-16, 20; Wilson at paras 25-28*

PROCEDURAL LAW

A. ADJOURNMENT REQUESTS

The decision to grant or not to grant an adjournment is a matter that is within the discretion of any trial judge. An appellate court should only interfere with a trial judge's refusal to grant an adjournment if it deprives an accused of a fair trial or the appearance of a fair trial: *R v Patel*, [2018 ONCA 541](#) at para 3

B. THE COMMENCEMENT OF PROCEEDINGS AND JOINDER OF COUNTS

Criminal Code provisions relating to joinder of offences and offenders are procedural in nature: *R v Sciascia*, 2016 ONCA 411 at para 74

Criminal Code proceedings are commenced by laying an information under oath alleging the commission of a hybrid offence (s. 504) or a summary conviction offence (s. 788(1)): *R v Sciascia*, 2016 ONCA 411 at para 31

Any number of indictable offences may be included in the same information (subject to murder exceptions), provided each is contained in a separate count: s. 591(1): *R v Sciascia*, 2016 ONCA 411 at para 32

S. 789(1)(b) expressly permits the inclusion of several summary conviction offences in separate counts in a single information: *R v Sciascia*, 2016 ONCA 411 at para 32

A joint trial on separate informations may be held, even in the absence of an accused's consent, where the trial court concludes that a joint trial is in the interests of justice and that the offences or accused could initially have been jointly charged: *R v Sciascia*, 2016 ONCA 411 at para 46

A trial on separate informations or a single information can include, as separate counts, several offences. It is of no moment whether those offences are exclusively indictable offences, exclusively summary conviction offences, or offences triable either way at the option of the Crown: *R v Sciascia*, 2016 ONCA 411 at paras 33 and 55

An Ontario Court of Justice judge has statutory jurisdiction to try provincial charges and to try summary conviction criminal charges, and there is no provision in the [Criminal Code](#) or the *POA* that expressly prohibits trying those charges jointly. Absent such a provision, the jurisdiction of an Ontario Court of Justice judge to conduct a joint trial of provincial charges and summary

conviction criminal charges depends on compliance with legislative intent and adherence to relevant common law principles.

The two-part common law test for joinder is as follows. The first element of the test, which requires that the offences could initially have been jointly charged, can be satisfied even when a provincial offence and a criminal offence cannot be charged in the same physical document, as in Ontario. A functional approach to this element asks not whether it is technically possible to use the same prescribed form, but rather whether there is a sufficient factual nexus between the provincial charges and the criminal charges. The second element requires that a joint trial be in the interests of justice. This inquiry involves a weighing of the costs and benefits of a joint trial. An accused person's consent is relevant, but the ultimate decision of whether to conduct a joint trial lies with the court.

In short, conducting a joint trial of criminal and provincial offences is both permissible and desirable where the provincial charges and the summary conviction criminal charges share a sufficient factual nexus and it is in the interests of justice to try them together: *R v Scaiscia*, [2017 SCC 57](#) at paras. 1, 8-9, 43-44

Young persons cannot be tried together with adults: *R v Sciascia*, 2016 ONCA 411 para 51; *R v Scaiscia*, [2017 SCC 57](#) at para 22

The YCJA prohibits the joint trial of a young offender indictment and an adult indictment involving the same accused: *R v PMC*, 2016 ONCA 829 at paras 14-16

C. ACCUSED'S RIGHT TO BE PRESENT AT TRIAL: S.650(1) OF THE CC

Section [650\(1\)](#) of the Criminal Code requires that, apart from some exceptions , an accused must be “present in court during the whole of his or her trial”.

Any in-chambers discussion about the accused's trial will violate s.650(1) and will constitute an error in law that cannot be remedied by the curative proviso: *R v. John Poulos*, 2015 ONCA 182

To determine whether something that happened during the course of a trial is part of the "trial" for the purposes of s. 650(1), the question is whether what occurred involved or affected the vital interests of the accused or whether any decision made bore on "the substantive conduct of the trial": *R v Hassanzada*, 2016 ONCA 284 at paras 127-129

i. EXAMPLES

Pre-charge conferences where the content of final instructions is discussed clearly affects the vital interests of an accused. As a result, s. 650(1) of the Criminal Code requires that the accused be "present in court" during these discussions.

Inviting and receiving submissions from counsel by email or other electronic means about the necessity for, or content of, jury instructions offends s. 650(1): *Hassanzada* at paras 130-131

D. BIFURCATION OF PROCEEDINGS

Bifurcating proceedings (between the OCJ and SCJ) is undesirable and should be avoided in all but exceptional cases. Bifurcation negatively impacts the effective and efficient functioning of the courts; it is undesirable and inefficient for both the legal system and for litigants. Courts should be reluctant to interpret legislation in a way that would require such bifurcation. *R v Fercan Developments Inc.*, 2016 ONCA 269 at paras 57-58

E. COUNSEL TABLE MOTION

The default placement of an accused on trial is in the prisoner's box; however, there is no presumption in this regard. In every case, the accused's placement must permit him to make full answer and defence, but the issue is to be assessed on a case-by-case basis, having regard to the interests of a fair trial and courtroom security in the particular circumstances of the case: *Lalande*.

The trial judge should not consider the seriousness of the offence as a relevant factor. It is also an error to consider the impact of allowing the accused to sit at counsel table on hypothetical in-custody accused in future proceedings. The only relevant factor is whether allowing the accused to sit at counsel table poses security concerns. In and of itself, the seriousness of the offence says nothing about security concerns or the interests of a fair trial.

A trial judge's ruling in relation to where an accused sits during his trial is discretionary, and this court should begin from a place of deference: *R v AC*, [2018 ONCA 333](#) at paras 37-38

F. ELECTION AS TO MODE OF TRIAL

i. ERROR IN CROWN'S ELECTION

Where the crown erroneously proceeds by summary conviction because the offence is exclusively indictable, the offence remains an indictable offence. Any appeal properly lies to the Ontario Court of Appeal under ss. 675(1)(a) and 730(3)(a) of the Criminal Code: *R v. Shia*, 2015 ONCA 190

ii. FAILURE TO AFFORD THE ACCUSED A RIGHT OF ELECTION

The failure to properly afford the accused his right of election results in a lack of jurisdiction that cannot be remedied by the curative proviso under s.686(1)(b)(iv): *R v Nouredine*, [2015 ONCA 770](#) at para 56. Put another way, where a judge has no inherent jurisdiction to try the accused in the absence of a statutory requirement to provide the accused with an election, the judge has exceeded his jurisdiction. The *proviso* in s.686(1)(b)(iv) cannot be applied: *R v. Shia*, 2015 ONCA 190

This proviso applies only where jurisdiction has been lost by some irregularity during the trial which caused no prejudice. It does not apply where the court was never properly constituted in the first place: *R v Nouredine*, [2015 ONCA 770](#) at para 56

But the curative proviso may apply where it is clear that the accused was tried in his forum of choice: *Nourreddine* at para 57

G. INTERLOCUTORY CHARTER/CERTIORARI REMEDIES

Trials will not be interrupted by appeals or certiorari applications impugning orders made in the course of ongoing criminal proceedings unless the applicant can establish that the circumstances are such that the interests of justice necessitates the immediate granting of the prerogative or *Charter* remedy by the Superior Court: *R v Comtois*, [2016 ONCA 185](#) at para 4

H. LIMITATION PERIOD TO INSTITUTE PROCEEDINGS

The agreement s. 786(2) requires to regularize summary conviction proceedings instituted beyond the limitation period for which the subsection provides, may be inferred, and, although preferable, need not be explicit: *R v. Porta*, 2015 ONCA 924

I. RECORD OF PROCEEDINGS

The *Criminal Code* contains several provisions which require courts to maintain a record of their proceedings, including the evidence given in those proceedings. In preliminary inquires: s. 540(1). In trials before a provincial court judge: s. 557. In trials before a judge of the superior court of criminal jurisdiction sitting without a jury under Part XIX: s. 572. And in trials by jury: s. 646: *R v CG*, [2018 ONCA 751](#) at para 10

J. QUALIFICATION OF AN AGENT FOR THE ACCUSED

As a general rule, a representative is permitted to represent a defendant in certain proceedings in the OCJ.

Although the Criminal Code does not expressly give the trial judge power to prohibit a specific agent (which it defined at para. 24 as meaning a “representative”) from appearing in a particular case, the power to do so exists by virtue of the court’s power to control its own process in order to maintain the integrity of that process.

The procedure to be followed is as follows. The court should first determine whether the defendant has made an informed choice to be represented by the agent. In appropriate cases, the court may also inquire into the propriety of the representation. Disqualification is justified only where representation would clearly be inconsistent with the proper administration of justice. It is not enough that the trial judge believes that the accused would be better off with other representation or that the process would operate more smoothly and effectively if the accused were represented by someone else. Disqualification of an accused’s chosen representative is a serious matter and is warranted only where it is necessary to protect the proper administration of justice.

The circumstances of the particular case will inform the decision of whether to disqualify, including the seriousness of the charge and the complexity of the issues raised: *R v Allahyar*, 2017 ONCA 345 at paras 11-18.

Examples of conduct that could lead to disqualification include: questions of competence, discreditable conduct, conflict of interest and a demonstrated intention not to be bound by the rules and procedures governing criminal trials: *Allahyar*, para 19

Questions respecting the standard of competence required of licensed paralegals have been addressed in recent cases such as *R v Khan*, 2015 ONCJ 221, [2015] OJ No 2096 and *R v Bilinski*, 2013 ONSC 2824, [2013] OJ No 2984.

For qualification of agents in provincial offences, see Offences, Provincial Offences

K. SEVERANCE

The interests of justice often call for a joint trial as severance has the potential to impair both trial efficiency and the truth-seeking function of the trial: *R v Anderson*, [2018 ONCA 1002](#), at para 10

i. SEVERANCE FROM ACCUSED

The *Criminal Code* contains no express general provision about joinder of accused, like it does for joinder of counts in s. 591(1).

The *prima facie* rule is that where the essence of the case for the Crown is that the persons charged were engaged in a common enterprise, they should be jointly indicted and jointly tried.

This general rule applies notwithstanding 1) the possibility of cut-throat defences; 2) the possibility of highly prejudicial evidence being admitted in respect of a co-accused (e.g., gang-related evidence that might taint the accused).

An appellate court should not intervene in a trial judge's decision whether to sever accused unless it is satisfied that the judge "acted unjudicially or that the ruling resulted in an injustice." *R v Zvolensky*, 2017 ONCA 273 at paras 24-34; see also paras 245-255; *R v Riley*, [2017 ONCA 650](#) at paras 131-148, but see paras 210-229

ii. SEVERANCE OF CHARGES

Section 591(3)(a) of the *Criminal Code* grants trial judges a broad discretion to sever counts in the “interests of justice”. The decision attracts considerable deference. Appellate interference is only warranted when the decision is unjudicial or resulted in an injustice: *R v Anderson*, [2018 ONCA 1002](#), at para 9

L. RECALLING A WITNESS

Before the Crown has closed its case, a trial judge has a broad discretion to permit the recall of a witness. The discretion must be exercised judicially and in the interests of justice. This discretion narrows as the trial proceeds through its various stages.

The trial judge must have regard to:

- whether the evidence will be material to a live issue
- the need for an orderly trial
- any prejudice that may flow to the accused

Before the Crown closes its case, prejudice can typically be addressed through an adjournment, cross-examination of the re-called witness and other Crown witnesses and/or a review by the trial judge of the record in order to determine whether certain portions should be struck: *R v Campbell*, [2018 ONCA 205](#) at paras 15, 16

M. TRANSCRIPTS

The regulation of fees for court transcripts, sets the fees payable to an “authorized court transcriptionist.” Under this regulation the fee payable for a first certified copy of a transcript is \$4.30 per page or \$20.00, whichever is greater, and for any additional certified copy of the transcript in printed format, it is “\$.55 per page or \$20.00, whichever is greater. The fee for an electronic transcript is \$20: *R v CG*, [2018 ONCA 751](#) at paras 23, 24, 26, 80

PROCEDURAL FAIRNESS

Procedural fairness speaks to the principle that persons affected by the proceedings should have the opportunity: (i) to present their case fully and fairly,

and (ii) have any decision affecting their rights, interests, or privileges made using a fair, impartial and open process. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*: *R v McDonald*, [2018 ONCA 369](#) at para 38

The greater procedural protections just referenced can include the right to an oral hearing, where questions can be answered and submissions made in open court, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. Where physical liberty is at stake it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing: *McDonald* at para 39

REASONABLE APPREHENSION OF BIAS

A. TEST FOR REASONABLE APPREHENSION OF BIAS

The test is whether a reasonable and informed person, having knowledge of all relevant circumstances and studying the matter realistically and practically, would conclude that the judge's conduct raises a reasonable apprehension of bias: *R v Provencher*, [2015 ONCA 510](#) at para 7; *R v Siddiqi*, [2015 ONCA 548](#) at para 6; *R v Nero*, [2016 ONCA 160](#) at para 29; *R v Lappie*, [2016 ONCA 289](#) at para 20

The fundamental principles are as follows:

1. First, there is a presumption of judicial integrity, that is to say, that judges will carry out their oath of office. The test to displace the presumption of integrity is high because it calls into question both the integrity of the presiding judge and the administration of justice itself: *R v Arnaout*, [2015 ONCA 655](#) at para 19; *R v Nero*, [2016 ONCA 160](#) at para 30
2. Second, this presumption of judicial integrity does not relieve a judge from their sworn duty to be impartial
3. Third, although the threshold for a successful claim of actual or apprehended bias is high, it is not insurmountable. The presumption of judicial integrity can

be displaced by cogent evidence that demonstrates that something the judge did or said gives rise to a reasonable apprehension of bias

4. Fourth, the onus of demonstrating bias lies with the party who alleges its existence, and is based on a balance of probabilities: *Nero* at para 31
5. Fifth, allegations of reasonable apprehension of bias, thus inquiries into whether such a claim has been made out, are entirely fact-specific. *R v Nero*, 2016 ONCA 160 at para 32
6. Sixth, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining the required information about it. The test is “What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Inherent in this test is a two-fold objective element. The person considering the alleged bias must be reasonable. And the apprehension of bias must also be reasonable in all the circumstances of the case. The reasonable person must be informed, impressed with the knowledge of all the circumstances, including the traditions of integrity and impartiality that form a part of the background and cognizant of the fact that impartiality is one of the duties judges swear to uphold.
7. Finally, stereotypical reasoning may give rise to a reasonable apprehension of bias: *R v Richards*, 2017 ONCA 424 at paras 42-50

As a general rule, allegations of bias or a reasonable apprehension of bias should be advanced as soon as it is reasonably possible to do so: *R v Nero*, 2016 ONCA 160 at para 33; see especially para 36. Where a reasonable apprehension of bias is initiated by counsel at trial but never pursued, this is a factor that militates against a finding of bias: *Nero* at para 35141

i. EXAMPLES

Judicial comments made in an unrelated proceeding cannot support an inference of bias in the case at hand, unless the accused can demonstrate a sound basis for perceiving that any decision made at trial was grounded in prejudice, generalizations or stereotypical reasoning: *Richards*, at para 58

In *Slatter*, the Court of Appeal held that the fact that the trial judge had previously presided over an accomplice’s trial did not, in and of itself, deprive him of the ability to preside over the accused’s trial. There were no allegations made against the accused in the former trial and she did not testify. The trial judge had

never been called upon to adjudicate on her role in any alleged misconduct. Nor had the trial judge been previously called upon to consider the accused's conduct or her credibility or reliability as a witness.

The situation may, however, have been different if the accomplice would testify as a defence at the accused's trial and the trial judge would be required to make credibility findings in respect of that witness, because the trial judge had previously opined on the witness' credibility: *R v Slatter*, [2018 ONCA 962](#), at paras 16-18

B. TRIAL JUDGE'S INTERVENTION IN PROCEEDING

For intervention in cross-examinations, see Evidence Law: Cross-Examination

The test for whether the trial judge's intervention rendered the trial unfair was whether a reasonably minded person present throughout the trial would have considered the accused had not had a fair trial: *R v Colling*, [2017] AJ No 1370 (Alta CA), aff'd at [2018 SCC 23](#), where the SCC held that "The trial judge's conduct in intervening in the manner in which he did, by stepping into the shoes of counsel, raises serious concerns and ought not to be repeated."

A trial judge is not required to sit passively while counsel present the case as they see fit. A judge intervene in the adversarial process, and sometimes this is essential to ensure that justice is done in substance and appearance.

A trial judge interventions constitute a "trial management power." A trial judge may intervene to: focus the evidence on issues material to a determination of the case; clarify evidence as it has been given and is being given; avoid admission of evidence that is irrelevant; curtail the needless introduction of repetitive evidence; dispense with proof of the obvious or uncontroversial; ensure the way that a witness answers or fails to respond to questions does not unduly hamper the progress of the trial; and to prevent undue protraction of trial proceedings. In doing so, a trial judge should confine herself to her own responsibilities, leaving

counsel and the jury to their respective functions. *R v Murray*, [2017 ONCA 393](#) at paras 91-92; *R v DC*, [2017 ONCA 143](#) at para

While is no doubt that a trial judge is entitled to ask a witness questions, the right to ask questions must be exercised with great caution, especially in a jury trial. Questions to clarify a point, or to ask that an answer be repeated, or the like, are all proper questions. Questions that suggest that the judge favours one side or the other are not: *R v Hungwe*, [2018 ONCA 456](#) at paras 40-43

An isolated intervention by a trial judge would not normally render a trial unfair. Instead, it is the cumulative effect of multiple interventions that must be considered. The interventions must be considered in light of any other conduct by the trial judge that may magnify the impact of those interventions. A trial judge's extemporaneous comments in his/her jury instructions fall into this latter category: *Hungwe* at para 44

The impact of the trial judge's interventions must also be considered in light of two other factors. One factor is whether the trial judge permitted counsel the opportunity to ask further questions after the trial judge asked his or her questions. However, providing the opportunity for counsel to ask further questions, when the gravamen of the concern is that the trial judge is telegraphing his view of the evidence to the jury, has marginal, if any, rehabilitative prospects. Once the trial judge's opinion is conveyed, there is little that further questioning by counsel can do to remove the resulting sting. The other factor is whether counsel objected to the trial judge's questioning.

Hungwe at paras 45-46

i. EXAMPLES

In *DC*, for example, the trial judge's interjections did not raise a reasonable apprehension of bias because they did not interfere with counsel's ability to fully and fairly advance a defence. The interjections were made during both the

Crown and Defence case, and were said to be intended only to insure that procedural and evidentiary rules were followed, clarify questions asked by counsel, clarify answers, and move the trial forward in an orderly fashion when questioning had bogged down on a collateral matter.

In contrast, in *Murray*, the trial judge's repeated interjections during the testimony of a key defence witness "marred the appearance of fairness" and indicated to a reasonable observer that he had "cast his lot with the prosecution:" para 105.

In *R v Hungwe*, 2018 ONCA 456, the Court of Appeal found that "the questions asked by the trial judge, and the manner in which they were asked, seriously compromised the appearance of a fair and impartial trial. There could be no doubt in the minds of the jurors, or to an outside reasonable observer, that the trial judge had aligned himself with the Crown in this prosecution. That impression was only reinforced by the comments offered by the trial judge during the course of his jury instructions:" para 49

C. BIAS IN THE REASONS

The presumption of judicial integrity can be rebutted where the reasons for conviction are delivered months later or constitute an after-the-fact amendment, thereby calling into question whether the reasons are simply an after the fact justification for a decision reached much earlier – or are actually an articulation of the reasoning that led to the decision: *R v Arnaout*, 2015 ONCA 655 at paras 19-23

In the case of an after-the-fact amendment, the remedy may be to simply exclude the post-verdict reasons and assess whether the original reasons are sufficient

D. STANDARD OF REVIEW

On appeal, a strong presumption exists that a trial judge has not intervened unduly at trial. However, the following are some interventions that may attract appellate review:

E. QUESTIONING AN ACCUSED OR WITNESSES IN SUCH A WAY AS TO CONVEY AN IMPRESSION THAT THE JUDGE ALIGNS HIM OR HERSELF WITH THE CASE FOR THE CROWN;

F. QUESTIONING WITNESSES IN SUCH A WAY AS TO MAKE IT IMPOSSIBLE FOR COUNSEL TO PRESENT THE DEFENCE CASE;

G. INTERVENING TO SUCH AN EXTENT IN THE TESTIMONY OF THE ACCUSED THAT IT PREVENTS THE ACCUSED FROM TELLING HIS OR HER STORY; AND

H. INVITING THE JURY TO DISBELIEVE THE ACCUSED OR OTHER DEFENCE WITNESSES: *MURRAY* AT PARAS 94-95

The question on appeal is whether the interventions created the appearance of an unfair trial to a reasonable person present throughout the trial proceedings. The issue is assessed from the perspective of a reasonable observer present throughout the trial. The analysis is contextual and requires an evaluation of the interventions cumulatively, likewise their cumulative effect on the actual or apparent fairness of the trial. What is generally critical is what occurred in the presence of the jury: *Murray* at paras 96-97

A judicial determination at first instance that real or apprehended bias exists may itself be worthy of some deference by appellate courts. However, an allegation of judicial bias raises such serious and sensitive issues that the basic interests of

justice require appellate courts to retain some scope to review that determination: *R v PG*, 2017 ONCA 351 at para 22 (citing *RDS*)

In cases involving a second level of appeal, because of the importance of the issue and the fact that it raises a question of law, the second appellate court must review the reasons of the trial judge anew and no deference is owed to the determination of the SCAC judge on this issue: *PG* at para 23

RELEVANCE

Relevance is a matter of everyday experience and common sense. An item of evidence is relevant if it renders the fact that it seeks to establish slightly more or less probable than that fact would be without the evidence, through the application of everyday experience and common sense

It follows that, to be relevant, an item of evidence need not conclusively establish the proposition of fact for which it is offered, or even make that proposition of fact more probable than not. All that is required is that the item of evidence reasonably show, by the application of everyday experience and common sense, that the fact is slightly more probable with the evidence than it would be without it.

Relevance is assessed in the context of the entire case and the positions of counsel. Hence the importance that the proponent identify the issue(s) to which the evidence is relevant: *R v McDonald*, [2017 ONCA 568](#) at paras 56-58

REOPENING THE DEFENCE CASE

A trial judge exercising the functions of both judge and jury in a criminal case is not *functus* following a finding of guilt until he or she has imposed sentence or otherwise finally disposes of the case: *R v Sualim*, 2017 ONCA 178 at para. 29.

The test for re-opening the defence case after findings of guilt have been made and convictions recorded is more rigorous than that which governs the same application made prior to an adjudication of guilt. This is so because a more exacting standard is required to protect the integrity of the criminal trial process, including the enhanced interest in finality:

The test is as follows:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil case
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The evidence proposed for reception must be compliant with the rules governing admissibility: *R v MGT*, [2017 ONCA 736](#) at paras 47, 48, 51

A. EXAMPLE: POST-VERDICT RECANTATION

Where the evidence proposed for admission on an application to re-open after verdict is a post-verdict recantation of a witness' trial testimony, both trial and reviewing courts should undertake a particularly rigorous qualitative assessment of the evidence of the recantation. This is especially so in cases of simple, unexplained recantations, because of the ease with which they can be fabricated: *R v MGT*, [2017 ONCA 736](#) at para 53

B. STANDARD OF REVIEW

A trial judge's decision on post-verdict re-opening of the defence case involves the exercise of judicial discretion. Where that discretion has been exercised in accordance with the governing legal principles, is unencumbered by any material misapprehension of evidence and is not unreasonable, it is entitled to significant deference on appeal: *R v MGT*, [2017 ONCA 736](#) at para 55.

SELF REPRESENTED LITIGANTS

A. THE DUTY ON TRIAL JUDGE'S TO ASSIST AT TRIAL

Where an accused is self-represented, a trial judge has a duty to ensure that the accused has a fair trial. To fulfill this duty, the trial judge must provide guidance to the accused to the extent the circumstances of the case and accused may require. Within reason, the trial judge must provide assistance to aid the accused in the proper conduct of his defence and to guide him as the trial unfolds in such a way that the defence is brought out with its full force and effect.

The duty owed by trial judges to self-represented litigants is circumscribed by a standard of reasonableness. The trial judge is not, and must not become, counsel for the accused. The judge is not entitled, indeed prohibited, from providing the assistance of the kind counsel would furnish when retained to do so. A standard of reasonableness accommodates a range of options to ensure the necessary degree of assistance and eschews a single exclusive response.

The onus on the trial judge to assist the self-represented accused is a heavy one. This characterization means that it is not enough that the verdict at the end of the trial is or appears correct. What matters is whether the trial has been fair to the self-represented accused.

The trial judge must ensure that the accused understands the essential elements of the offences that the Crown was required to prove in order to establish his guilt: *R v Breton*, [2018 ONCA 753](#) at para 18

The onus extends, at least can extend, to an obligation on the trial judge to raise *Charter* issues on the judge's own motion where the accused is self-represented. This is not to say, however, that this specific obligation becomes engaged on the mere scent or intimation of a possible *Charter* infringement. But where there is admissible uncontradicted evidence of a relevant *Charter* breach, the trial judge has an obligation to raise the issue, invite submissions and enter upon an inquiry into the infringement and its consequences: *R v Richards*, [2017 ONCA 424](#) at paras 110-114; see also *R v AH*, [2018 ONCA 677](#) at para 31; *R v Sabir*, [2018 ONCA 912](#), at paras 32, 36, 37.

The trial judge has an obligation to assist an unrepresented litigant in achieving a functional understanding of proper procedures and the proper manner of presenting a case. The presiding judge has the power to inquire whether [he parties understand the process and the procedure", provide information about the law and evidentiary requirements, and modify the traditional order of taking evidence: *R v Morillo*, [2018 ONCA 582](#) at paras 31-34

For example, in *Richards*, the Court of Appeal found that the trial judge failed to discharge his onus of assisting the self-represented accused in raising a *Charter* breach of his section 10(b) rights. The evidence revealed a foundation for advancing a breach of the accused's *Charter* right and exclusion of evidence under section 24(2). The failure of the trial judge to assist the accused by inquiring into this issue "amounted to a failure to provide the appropriate degree of assistance to a self-represented litigant against whom the police interview was the most significant piece of evidence."

Importantly, the Court held that "In these circumstances, the correctness or otherwise of the findings of guilt is beside the point. The appellant's trial was unfair, a consequence that cannot be made whole by the application of either s. 686(1)(b)(iii) or s. 686(1)(b)(iv):" paras 120-124

See also *R v Tossounian*, 2017 ONCA 618 at paras 36-38; *R v Breton*, [2018 ONCA 753](#) at para 13-18; *R v Sabir*, [2018 ONCA 912](#), at para 18

B. THE DUTY ON TRIAL JUDGES TO ASSIST WITH OUTSTANDING DISCLOSURE

A trial judge has a duty to assist a self-presented accused who is having difficulty accessing disclosure. Although the courts have recognized that diligence on the part of defence counsel is relevant in determining whether there has been a breach of the right to disclosure, because pre-trial custody may involve institutional rules that are inhospitable to accessing disclosure, as well as unpredictable events, such as lockdowns, an accused person has little scope for exercising initiative in relation to disclosure. Consequently, the standard of diligence expected in the circumstances must necessarily be minimal.

As soon as it seems that there is a problem with disclosure, it is the duty of the trial judge to make the necessary inquiries and to take the necessary steps to ensure that the unrepresented accused receives full disclosure, and that s/he fully understands his/her rights to disclosure and the available remedies for infringement of those rights: *R v Tossounian*, [2017 ONCA 618](#) at paras 19, 35

C. THE DUTY ON TRIAL JUDGES AT SENTENCING

A sentencing judge must obtain or consider information about a self-represented litigant's personal circumstances on sentencing. The failure to do so constitutes an error of law: *R v Davies*, [2017 ONCA 467](#)

SOLICITOR-CLIENT RELATIONSHIP

For Privilege, see Evidence Law, Privilege

A. GETTING OFF THE RECORD

A client is entitled to discharge counsel at any time for any reason. If a client does not want to be represented by a particular counsel, the court cannot force that representation on the client:

If trial counsel seeks to be removed from the record because he has not been paid, the trial judge has a discretion to allow counsel to get off the record. If the trial judge declines to allow counsel to get off the record, counsel must continue to act for the accused, subject of course to being fired by the client. If, however, “ethical” concerns motivate counsel’s application to be removed from the record, the trial judge is obliged to order counsel removed without any inquiry into the particulars underlying the request.

In this context, ethical reasons could refer to a client’s request that a lawyer act illegally or contrary to the Law Society of Upper Canada’s *Rules of Professional Conduct*. Ethical reasons also extend to circumstances that may not involve any illegality, but which have resulted in a breakdown of the client-solicitor relationship to the point that counsel cannot effectively give legal advice or receive instructions from the client.

The requirement that the court accept, without inquiry, trial counsel’s assertion that ethical reasons or, to put it more broadly, a breakdown in the client-solicitor relationship, require that counsel no longer act for the client, is predicated on the very real risk that any inquiry would reveal communications that are subject to client-solicitor privilege and would put trial counsel in a position where he or she

had to compromise the duty of loyalty owed to the client to fully explain the breakdown of the relationship.

However, on an application by trial counsel to be removed from the record, it is imperative that the client's position be known to the judge hearing the application. Some inquiry, albeit one carefully circumscribed to avoid entrenching on client-solicitor privilege, is necessary.

In *Short*, the Court of Appeal found that, the trial judge erred by requiring counsel to remain on the record, because it left the appellant to be defended on a first degree murder charge, not by counsel fully and unequivocally committed to his defence, but by counsel who had announced to the court that he could not, in good conscience, continue to act for the appellant. The trial judge's ruling rendered the appearance of the trial unfair and resulted in a miscarriage of justice, requiring a new trial: *R v Short*, [2018 ONCA 1](#) at paras 33-41

STATUTORY INTERPRETATION

A. GENERAL PRINCIPLES

Statutory interpretation is governed by only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *R v Osborne*, [2017 ONCA 129](#) at para 49

The modern approach to statutory interpretation calls on the court to interpret a legislative provision in its total context.... The court's interpretation should comply with the legislative text, promote the legislative purpose, reflect the legislature's intent, and produce a reasonable and just meaning: *R v Dunstan*, [2017 ONCA 432](#) at para 52

The maxim *expressio unius est exclusio alterius* (“to express one thing is to exclude another”) provides “at the most merely a guide to interpretation” and does not pre-ordain conclusions. Reliance on implied exclusion can be misleading and should be treated with caution. It is not enough to show that the enacting legislature has expressly or specifically addressed a particular matter. A court must be convinced that the express provisions are meant to be an exhaustive statement of the law concerning a particular matter: *R v Fercan Developments*, 2016 ONCA 269 at paras 60-61

THIRD PARTY RECORDS

B. O’CONNOR REGIME

The disclosure regime under an O’Connor application is not premised on a reasonable expectation of privacy in the documents or records sought; such applications can apply to statutory documents: *Her Majesty the Queen v. Mosher et al*, 2015 ONCA 722

The production of police policy manuals in respect of confidential informants must be obtained through an O’Connor application brought before the trial judge: *Her Majest the Queen v. Mosher et al*, 2015 ONCA 722

The governing principles of O’Connor applications: *R v Bradey*, 2015 ONCA 738; *R v. Gravesand*, 2015 ONCA 774

The principles of relevance and probative value versus prejudicial effect: *R v. Ansari*, 2015 ONCA 575; *R v. Ahmed*, 2015 ONCA 751 at paras 45-, 54-56

C. MILLS REGIME

Whether a document counts as a “record” depends first on whether the document contains personal information for which there is a reasonable expectation of privacy, and second on whether it falls into the exemption for investigatory and prosecutorial documents. [Section 278.1](#) provides an illustrative list of some types of records that generally give rise to a reasonable expectation of privacy, but other documents will still be covered if they attract a reasonable expectation of privacy. Trial judges will usually assess reasonable expectations on the basis of the type of document at issue.

Police occurrence reports prepared in the investigation of previous incidents involving a complainant or witness other than the offence being prosecuted count as “records” and are subject to the *Mills* regime: *R v Quesnelle*, [2014 SCC 46](#)

“Likely relevant” relates not only to the events in issue but also the credibility of witnesses; considerations of privacy and admissibility are not relevant at this first stage of the inquiry: *R v. Gravesande*, 2015 ONCA 774

In *R v Bartholomew*, [2017 ONSC 3084](#), the Ontario Superior Court ruled that a complainant in a sexual assault case does not have a reasonable expectation of privacy in his/her psychiatric records that were filed, unsealed, in a prior proceeding. Such records are not subject to the s.278 regime.

TIME AS AN ELEMENT OF THE OFFENCE

As a general rule, the Crown is not required to prove beyond a reasonable doubt that the alleged offence occurred within the timeframe set down in the indictment. Time is not an essential element of an offence: *R v SM*, [2017 ONCA 878](#) at para 10

YOUTH LAW

A. PRINCIPLES OF THE YCJA

The YCJA applies to all young persons, who are defined by that statute as people 12 years or older but less than 18 years of age. The main purpose of the YCJA is to lay down special rules for young persons,.

The provisions of the YCJA are to be liberally construed so as to ensure that young persons are dealt with in accordance with the principles reflected in that statute. The principles that inform the statute recognize that young persons are not adults and their rights require special attention.

Subsection 3(2)(b)(iii) provides that the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability, and must emphasize enhanced procedural protection to ensure that young persons are treated fairly and that their rights are protected. Subparagraph 3(1)(d)(i) provides that special considerations apply in respect of proceedings against young persons:

[Y]oung persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms.

Section 3(1)(a) provides that the youth criminal justice system is intended to protect the public.

B. ADMISSIBILITY OF STATEMENTS

Section 146(1) affirms that the law relating to the admissibility of statements made by persons accused of committing offences applies to young persons in similar circumstances, but is subject to the provisions of s. 146.

Subsection 146(2) sets out certain criteria that must be complied with by police or other persons in authority before any oral or written statement statements made by a young person to police will be admitted in a proceeding against that young person. The provision describes the requirements for admissibility of a statement and the protections afforded to a young person

There are three preconditions to the application of the section: arrest, detention, or reasonable grounds for believing the young person has committed an offence.

Section 146 statements are presumptively inadmissible. The Crown must satisfy the cumulative requirements of s. 146(2) beyond a reasonable doubt for the statement to be admissible. Therefore, s. 146 is unlike ss. 10(b) and 24(2) of the *Charter*, which are rules of exclusion that presume a statement is admissible and require proof of the mandated conditions to exclude the statement, where the burden of proof is on the accused.

The requirements for admissibility of a statement place both informational and implementational duties on police officers – and the protections afforded to a young person.

This informational component requires that police provide the young person with a clear explanation of his or her rights. The Crown's evidentiary burden will be discharged by clear and convincing evidence that the person to whom the

statement was made took reasonable steps to ensure that the young person who made it understood his or her rights under s. 146 YCJA. A mere probability of compliance is incompatible with the object and scheme of s. 146, read as a whole. Compliance must be established beyond a reasonable doubt.

The test for determining whether there has been compliance with the informational component of s. 146(2)(b) is objective: It does not require the Crown to prove that a young person in fact understood the rights and options explained to that young person pursuant to s. 146(2)(b). That said, compliance presupposes an individualized approach that takes into account the age and understanding of the particular youth being questioned.

The informational requirements set out in s. 146(2)(b) are aimed at preventing false confessions by young people inclined to make a statement in order to end the pressure of interrogation or to please an authority figure and at ensuring that any statement given manifests the exercise of free will.

Subsections 146(2)(c) and 146(2)(d) prescribe implementational components that must also be satisfied before a statement made by a young person to police will be admissible in a proceeding against that young person. In addition to informing the young person of the matters provided for in s. 146(2)(b), police must give the young person a reasonable opportunity to consult with i) counsel and ii) a parent or other adult. If the young person elects to consult with counsel or a parent or adult, he or she must also be given a reasonable opportunity to make his or her statements in the presence of those people.

All of the factors listed in s. 146(2) are appropriate preconditions to the admissibility of a statement by a young person and all must be proved beyond a reasonable doubt. Additionally, the onus to prove that the youth was not “arrested or detained”, or that the peace officer did not “have reasonable grounds for believing that the young person has committed an offence” should lie with the Crown on a standard of beyond a reasonable doubt

S. 146(2) protections apply automatically when police “arrest or detain a young person”, regardless of the grounds. Accordingly, s.146(2) protects a youth who has been detained in relation to one offence, but then gives incriminating statements related to another offence.

In determining whether a psychological detention has occurred under s. 146(2), the test from *R. v. Grant*, 2009 SCC 32, for psychological detention under ss. 9 and 10 of the *Charter* applies.

Proving any waiver of rights under s.146(2) pursuant to s.146(4) must also be proven beyond a reasonable doubt. A clear and unequivocal waiver is essential, but not sufficient: it must be accompanied by a proper understanding of the purpose the right was meant to serve and an appreciation of the consequences of declining its protection.

Reasonable doubt on compliance with s. 146(2) may therefore arise in evaluating the voluntariness of the statement, the adequacy of the statutorily mandated informational or implementational components, or the adequacy of any waiver under s. 146(4). Furthermore, reasonable doubt in regard to these elements provides a sufficient basis for excluding the statement: *R v NB*, [2018 ONCA 556](#) at paras 82-102, 144

ii. SECTION 146(2) VERSUS SECTION 10(B)

146(2) possess three key features that render its protections more robust than those of s. 10(b).

First, the protections offered by s. 146(2) are more comprehensive: police are required to inform a young person of his or her right to consult with a lawyer and parent or other adult prior to making any statements. A young person is also entitled to have a lawyer and a parent or other adult present when the police take

any statements from the young person. Any waiver of these rights must be audio and videotaped or written and signed by the youth: see YCJA, s. 146(4). In contrast, the right to counsel protected by s. 10(b) must be specifically invoked by a detained individual, and there is no right to have counsel present during a police interview.

Second, s. 146(2) contains stringent requirements for the admissibility of statements. Unlike s. 10(b), s. 146(2) renders statements made by a young person to police presumptively inadmissible. The burden of proof to show why a statement is admissible is borne by the Crown; a young accused need not argue why a statement is inadmissible. Furthermore, the standard is one of beyond a reasonable doubt, not a balance of probabilities.

Third, s. 146(6), the provision that provides a judge with discretion to admit a statement obtained in contravention of s. 146(2), applies on much narrower grounds than s. 24(2).

Accordingly, where a young offender claims both a breach of s. 146(2) and of s. 10(b), it makes sense to begin with an analysis of s. 146(2): : *R v NB*, [2018 ONCA 556](#) at paras 159-164

iii. SECTION 146(6) – EXCLUSION OF EVIDENCE

Subsection 146(6) is a saving provision that allows for statements obtained in contravention of s. 146(2) to be admitted in a proceeding against a youth accused in certain circumstances. Subsection 146(6) of the YCJA is therefore analogous to s. 24(2) of the *Charter*

However, there are two key differences between s. 146(6) and s. 24(2). First, under s. 24(2), the effects of admission of the evidence on the administration of justice as a whole are considered. In contrast, under s. 146(2), the question is whether admission would bring into disrepute the principle that young persons are entitled to enhanced procedural protections to ensure fair treatment and protection of rights. Second, reliance on s. 146(6) is constrained to

circumstances where the violation of s. 146(2) amounted to a “technical irregularity”. Where the violation is more serious, s. 146(6) is unavailable. In contrast, there is no such limitation in s. 24(2)

Therefore, judicial discretion to rely on s. 146(6) to admit a statement obtained in contravention of 146(2) is significantly confined, reflecting the need to vigorously guard against the diminishment of the protections provided by s. 146(2) and the need for fair treatment for young persons: : *R v NB*, [2018 ONCA 556](#) at paras 149-158

C. PSYCHOLOGICAL DETENTION

In determining whether there has been a psychological detention in the YCJA context, the following factors can be considered:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;
2. Whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
3. Whether the accused left at the conclusion of the interview or whether he or she was arrested;
4. The stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;

5. Whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
6. The nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
7. The subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained: : *R v NB*, [2018 ONCA 556](#) at para 118