# General topics of law

# Table of Contents

[ACTUS REUS 12](#_Toc51516311)

[AMICUS CURIAE 12](#_Toc51516312)

[ANCILLARY POWERS DOCTRINE 14](#_Toc51516313)

[A. General Principles 14](#_Toc51516314)

[BURDEN OF PROOF 14](#_Toc51516315)

[A. Reasonable Doubt 14](#_Toc51516316)

[B. Explanation of Injuries 15](#_Toc51516317)

[C. Explanation of Motive 16](#_Toc51516318)

[D. Theory of Liability 16](#_Toc51516319)

[E. Corroboration 16](#_Toc51516320)

[F. Right to Silence 17](#_Toc51516321)

[CORBETT APPLICATIONS 17](#_Toc51516322)

[A. General Principles 17](#_Toc51516323)

[B. On Appeal 19](#_Toc51516324)

[C. Standard of Review 19](#_Toc51516325)

[D. Examples from the Case Law 19](#_Toc51516326)

[COSTS AS A REMEDY 20](#_Toc51516327)

[A. Jurisdiction to Award Costs 20](#_Toc51516328)

[B. General Principles 20](#_Toc51516329)

[i. Costs as a Charter Remedy 21](#_Toc51516330)

[ii. Costs for Crown Misconduct 21](#_Toc51516331)

[iii. Costs for Defence Misconduct 21](#_Toc51516332)

[iv. Appeal of Costs Award 22](#_Toc51516333)

[THE CROWN 22](#_Toc51516334)

[A. Role of 22](#_Toc51516335)

[B. Crown Misconduct 23](#_Toc51516336)

[i. General Principles 23](#_Toc51516337)

[ii. Appellate Intervention 24](#_Toc51516338)

[C. Prosecutorial discretion 24](#_Toc51516339)

[D. Theory of Liability 24](#_Toc51516340)

[DEFENCE COUNSEL 25](#_Toc51516341)

[DECLARATORY RELIEF 25](#_Toc51516342)

[DIRECTED VERDICTS 25](#_Toc51516343)

[DISCLOSURE REGIMES 26](#_Toc51516344)

[i. First Party Disclosure 26](#_Toc51516345)

[ii. Third Party Disclosure 26](#_Toc51516346)

[iii. First versus Third Party Disclosure 27](#_Toc51516347)

[EXTRAORDINARY REMEDIES 27](#_Toc51516348)

[FITNESS TO STAND TRIAL 28](#_Toc51516349)

[INFORMATION / INDICTMENT 29](#_Toc51516350)

[A. Amending The Information Or Indictment 29](#_Toc51516351)

[B. The Single Transaction Rule 31](#_Toc51516352)

[C. Particularizing The Charge 32](#_Toc51516353)

[INEFFECTIVE ASSISTANCE OF COUNSEL 32](#_Toc51516354)

[A. The Test at Trial 32](#_Toc51516355)

[B. Test on Appeal 33](#_Toc51516356)

[i. Prejudice Component 34](#_Toc51516357)

[ii. Performance Component 34](#_Toc51516358)

[iii. Examples from the Case Law 35](#_Toc51516359)

[ISSUE ESTOPPEL 36](#_Toc51516360)

[JUDICIAL INTERIM RELEASE 36](#_Toc51516361)

[A. Bail 36](#_Toc51516362)

[i. General Principles 36](#_Toc51516363)

[ii. Evidence at Bail Hearings 38](#_Toc51516364)

[iii. Tertiary Grounds 38](#_Toc51516365)

[iv. Where new indictment preferred 39](#_Toc51516366)

[v. The "Whyte" concern 39](#_Toc51516367)

[vi. Gladue Principles 39](#_Toc51516368)

[vii. Outstanding Charges 40](#_Toc51516369)

[viii. Peace Bond Hearings 40](#_Toc51516370)

[ix. Revocation of Bail 40](#_Toc51516371)

[B. Bail Review 41](#_Toc51516372)

[C. 90 Day Review 42](#_Toc51516373)

[D. Bail Pending Appeal to the Court of Appeal 43](#_Toc51516374)

[i. General Principles 43](#_Toc51516375)

[ii. The Merit and Unnecessary Hardship Requirement 44](#_Toc51516376)

[iii. The Flight Risk Assessment Requirement 45](#_Toc51516377)

[iv. The Public Interest Criterion 45](#_Toc51516378)

[v. Sentence Appeals 45](#_Toc51516379)

[vi. Successful Examples 45](#_Toc51516380)

[vii. Variations 46](#_Toc51516381)

[E. Bail Pending Appeal to the Supreme Court of Canada 46](#_Toc51516382)

[F. Bail Pending New Trial 46](#_Toc51516383)

[i. General Principles 46](#_Toc51516384)

[G. Forfeiture of Bail Monies 47](#_Toc51516385)

[H. ​Breach of Bail 48](#_Toc51516386)

[I. Surety Warrants 49](#_Toc51516387)

[JURISDICTIONAL ISSUES 50](#_Toc51516388)

[A. General Principles 50](#_Toc51516389)

[i. When Judge is Functus 50](#_Toc51516390)

[ii. To Control Process / Make Orders Relating to Trial 51](#_Toc51516391)

[B. Civil v. Criminal 51](#_Toc51516392)

[C. Division of Powers 51](#_Toc51516393)

[i. General Principles 51](#_Toc51516394)

[ii. The Division of Power Analysis 52](#_Toc51516395)

[D. Jurisdiction Of The Superior Court Of Justice 53](#_Toc51516396)

[E. Jurisdiction of the Ontario Court of Justice 53](#_Toc51516397)

[F. Implied Powers / The Doctrine of Jurisdiction by Necessary
 Implication 54](#_Toc51516398)

[G. Jurisdiction of Judge to Reconsider Order 54](#_Toc51516399)

[H. Jurisdiction of Replacement Judge 55](#_Toc51516400)

[i. Section 653.1 55](#_Toc51516401)

[ii. Section 669.2 55](#_Toc51516402)

[I. Territorial Jurisdiction 56](#_Toc51516403)

[J. Validity of Orders Made Without Jurisdiction 57](#_Toc51516404)

[MENTAL HEALTH 57](#_Toc51516405)

[A. Powers of Review Board 57](#_Toc51516406)

[B. Disposition Orders 57](#_Toc51516407)

[C. Where Treatment Impasse Occurs 58](#_Toc51516408)

[MISTRIALS 58](#_Toc51516409)

[MENS REA 59](#_Toc51516410)

[A. General Principles 59](#_Toc51516411)

[B. Wilful blindness 59](#_Toc51516412)

[THE OPEN COURT PRINCIPLE 60](#_Toc51516413)

[PARTY LIABILITY ISSUES 61](#_Toc51516414)

[A. Principals: Section 21(1)(a) 61](#_Toc51516415)

[i. Co-Principals to Murder 61](#_Toc51516416)

[B. Party as Aider or Abettor: section 21(1)(b) and (c) 61](#_Toc51516417)

[C. Party Liability to Murder 63](#_Toc51516418)

[D. Party under common intention: section 21(2) 63](#_Toc51516419)

[i. Party Liability under 21(2) for Murder and Manslaughter 64](#_Toc51516420)

[E. Party Liability to a Conspiracy 65](#_Toc51516421)

[F. Appeal – Failure to Charge 65](#_Toc51516422)

[G. Victim as Party and Consent 65](#_Toc51516423)

[PLEAS 65](#_Toc51516424)

[H. General Principles 65](#_Toc51516425)

[i. Validity of 65](#_Toc51516426)

[ii. Requirement that the Plea be Informed 66](#_Toc51516427)

[iii. Acceptance of Facts Underlying the Plea 68](#_Toc51516428)

[I. Guilty Pleas - Setting Aside 68](#_Toc51516429)

[J. Credit on Sentencing 70](#_Toc51516430)

[PRECEDENT 71](#_Toc51516431)

[A. Judicial Comity 71](#_Toc51516432)

[B. Prerogative Writs 71](#_Toc51516433)

[PREROGATIVE WRITS 72](#_Toc51516434)

[A. Interlocutory Motions and Appeals 72](#_Toc51516435)

[B. habeas corpus with certiorari in aid 72](#_Toc51516436)

[PRELIMINARY INQUIRY 73](#_Toc51516437)

[A. Test for Committal 73](#_Toc51516438)

[B. Application for Certiorari 74](#_Toc51516439)

[PROCEDURAL LAW 75](#_Toc51516440)

[A. Adjournment requests 75](#_Toc51516441)

[B. Counts on an information 75](#_Toc51516442)

[C. The commencement of Proceedings and Joinder of Counts 75](#_Toc51516443)

[D. Accused's Right to be Present at Trial: s.650(1) of the CC 77](#_Toc51516444)

[i. Examples 77](#_Toc51516445)

[E. Bifurcation of Proceedings 78](#_Toc51516446)

[F. Counsel Table Motion 78](#_Toc51516447)

[G. Election as to Mode of Trial 79](#_Toc51516448)

[i. Error in Crown’s election 79](#_Toc51516449)

[ii. Failure to afford the accused a right of election 79](#_Toc51516450)

[H. Interlocutory Charter/Certiorari Remedies 80](#_Toc51516451)

[I. Language of the Proceedings 80](#_Toc51516452)

[J. Limitation Period to Institute Proceedings 81](#_Toc51516453)

[K. Qualification of an Agent for the Accused 81](#_Toc51516454)

[L. Record of Proceedings 82](#_Toc51516455)

[M. Recalling a Witness 82](#_Toc51516456)

[N. Retrials (following Mistrial) 83](#_Toc51516457)

[O. Severance 83](#_Toc51516458)

[i. Severance from Accused 83](#_Toc51516459)

[ii. Severance of Charges 84](#_Toc51516460)

[P. Subpoena 86](#_Toc51516461)

[Q. Transcripts 86](#_Toc51516462)

[PROCEDURAL FAIRNESS 86](#_Toc51516463)

[REASONABLE APPREHENSION OF BIAS 87](#_Toc51516464)

[A. Test for Reasonable Apprehension of Bias 87](#_Toc51516465)

[i. Examples 88](#_Toc51516466)

[B. Trial Judge's Intervention in Proceeding 89](#_Toc51516467)

[i. Examples 91](#_Toc51516468)

[C. Bias in the Reasons 92](#_Toc51516469)

[D. Standard of Review 92](#_Toc51516470)

[RELEVANCE 93](#_Toc51516471)

[REOPENING THE DEFENCE CASE 94](#_Toc51516472)

[A. Example: Post-Verdict Recantation 95](#_Toc51516473)

[B. Standard of Review 95](#_Toc51516474)

[SELF REPRESENTED LITIGANTS 95](#_Toc51516475)

[A. The Duty on Trial Judge's to Assist at Trial 95](#_Toc51516476)

[B. The Duty on Trial Judges to Assist with Outstanding Disclosure 97](#_Toc51516477)

[C. The Duty on Trial Judges at Sentencing 97](#_Toc51516478)

[D. The Duty on Appeal Judges 98](#_Toc51516479)

[SOLICITOR-CLIENT RELATIONSHIP 98](#_Toc51516480)

[A. Getting off the Record 98](#_Toc51516481)

[STATUTORY INTERPRETATION 99](#_Toc51516482)

[A. General Principles 99](#_Toc51516483)

[THIRD PARTY RECORDS 101](#_Toc51516484)

[B. O’Connor Regime 101](#_Toc51516485)

[C. Mills Regime 102](#_Toc51516486)

[TIME AS AN ELEMENT OF THE OFFENCE 102](#_Toc51516487)

[YOUTH LAW 103](#_Toc51516488)

[A. Principles of the YCJA 103](#_Toc51516489)

[B. Admissiblity of Statements 103](#_Toc51516490)

[i. Section 146(2) versus section 10(B) 106](#_Toc51516491)

[ii. Section 146(6) – exclusion of evidence 106](#_Toc51516492)

[C. Pscyholgoical Detention 107](#_Toc51516493)

[D. Retention of Youth Records 108](#_Toc51516494)

# ACTUS REUS

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

1. conduct (act or omission);
2. circumstances or state(s) of affairs; and
3. 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0053.htm) at paras 52-54, 63

# AMICUS CURIAE

Even though the power to appoint *amicus* is to be used sparingly and with caution, it would be appropriate to exercise that power where the assistance of *amici* is essential to the judge discharging her judicial functions in the case, that is, "to ensure the orderly conduct of proceedings and the availability of relevant submissions on contested, uncertain, complex and important points of law or of fact: *Ontario v. Criminal Lawyers’ Association Ontario*, 2013 SCC 43, at paras 47, 103

In complex cases where an accused person is adamant about conducting the defence personally, but is hopelessly incompetent to do so, the court may need the assistance of *amicus curiae*to meet the court’s obligation to protect the fairness of the proceeding: *R v Walker,* [2019 ONCA 765](https://www.ontariocourts.ca/decisions/2019/2019ONCA0765.htm), at para 63

There is no precise definition of the role of *amicus curiae*capable of covering all possible situations in which the court may find it advantageous to have the advice of counsel who is not acting for the parties: *Walker* at para 65

The remuneration of *amicus* is a matter for the Crown and not the court: *Ontario v. Criminal Lawyers’ Association Ontario*, 2013 SCC 43

The role of amicus is not to act as defence counsel as to do so would encroach upon the right of the accused to proceed without counsel and might undermine a provincial legal aid scheme. The role of amicus is to provide the court with a perspective that it may be lacking and to restore some balance into the adversarial process (see also *R v Walker,* [2020 ONCA 765](https://www.ontariocourts.ca/decisions/2019/2019ONCA0765.htm), at paras 71, 72, 110, 118, 119)

An accused person has the right to self-represent, and cannot be compelled to appoint counsel, to pursue public funding through Legal Aid for counsel, or to pursue a *Rowbotham* order appointing counsel.

An accused also has the right to discharge counsel including counsel appointed under a *Rowbotham*order, but since *amicus* does not represent the accused person, the accused person may not discharge *amicus*: *Imona-Russel* at para 67

While *amicus* may assist in the presentation of evidence, *amicus* cannot control the litigation strategy

In considering the appointment of *amicus*, the trial judge must consider whether he or she can provide sufficient guidance to an unrepresented accused in the circumstances of the case to permit a fair and orderly trial without the assistance of *amicus*, even if the accused's defence would not be quite as effective as it would have been had the accused retained counsel:

Circumstance in which the appointment of *amicus* might be warranted is:

* where the accused is contumelious
* where the accused refuses to participate or disrupts trial proceedings: *Cairenius*,
* where the accused is adamant about conducting the defence personally, but is hopelessly incompetent to do so
* where necessary as one way to ensure both trial progress and trial fairness:

*R v Imona-Russel*, 2019 ONCA 252 (citing 2013 SCC 43) at paras 59-75

The same critical function that would be performed by solicitor-client privilege in allowing for candid communications between the*amicus* and the accused could be performed by a Crown undertaking, in consenting to the appointment of *amicus*, to treat communications between *amicus* and the accused as privileged: *Imona-Russel,* at para 64

# ANCILLARY POWERS DOCTRINE

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0248.htm) 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

## ]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

A reasonable doubt need not arise from the evidence. It can arise from the absence of evidence, from what the Crown has failed to prove.

Moreover, an inference need not arise from proven facts. This is because a reference to “proven facts” suggests an obligation to establish those facts to a standard of proof, yet a reasonable doubt can arise from evidence that, while not proven to be true to any standard of proof, has not been rejected.

It is also incorrect to link a reasonable doubt to a “conclusion” drawn from the facts. An acquittal need not be based on a conclusion about innocence but can rest on an inability to conclude guilt.

It is also an error to suggest that an exculpatory inference must be “a much stronger conclusion” than a speculation or guess. That language imports the need for a strong inference, when an exculpatory inference relating to a required element of the offence need merely raise a reasonable doubt: *R v Darnley,* [2020 ONCA 179](https://www.ontariocourts.ca/decisions/2020/2020ONCA0179.htm), at paras 33-36

In *Carbone,* the Court of Appeal found that the repeated use of the words “convince” and “persuade” in reference to the defence evidence suggested that the trial judge looked to the defence to satisfy him that he should not accept the complainant’s version of events. This was found to constitute a reversal of the burden of proof: *R v Carbone,* [2020 ONCA 394](https://www.ontariocourts.ca/decisions/2020/2020ONCA0394.htm)

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0123.htm) at para 1

## Explanation of Motive

There is no onus on the accused to comment on the credibility of the accuser. The concern with this line of questioning is two-fold. First, it is unfair to ask an accused to speculate about a witness’s motives. Second, these questions risk shifting the burden of proof. The burden is on the Crown to prove beyond a reasonable doubt that a complainant’s allegations are true. Yet questions to an accused about a complainant’s motives may cause the trier of fact to focus on whether the accused can provide an explanation for why a complainant would make false allegations, and find the accused guilty if a credible explanation is not forthcoming: *R v MS,* [2019 ONCA 869](http://www.ontariocourts.ca/decisions/2019/2019ONCA0869.htm), at paras 8, 10, 15; *R v GH,* [2020 ONCA 1](https://www.ontariocourts.ca/decisions/2020/2020ONCA0001.htm), at paras 24-31

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0718.htm)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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0063.htm) at para 55

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0051.htm) at para 46

## 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

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0188.htm) at paras 81-83; *R v Laing,*[2016 ONCA 184](http://www.ontariocourts.ca/decisions/2016/2016ONCA0184.htm) at para 19; *R v MC,* [2019 ONCA 502](http://www.ontariocourts.ca/decisions/2019/2019ONCA0502.htm), at paras 53-60; *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 108

The proper manner in which the witness is to be questioned involves being asked about the offence, the place and date of the conviction and the punishment imposed. These details assist the trial judge in assigning the weight, if any, to the convictions when assessing the witness’ testimonial trustworthiness. It is an error of law to reject an accused’s evidence based upon his prior record where no evidence has been adduced as to the dates, place, and punishment imposed: *R v MC,* [2019 ONCA 502](http://www.ontariocourts.ca/decisions/2019/2019ONCA0502.htm), at paras 83-86

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

In *Rose,* the Court of Appeal held that, while the appellant’s prior convictions were admisslbe, the reasons for conviction underlying those convictions were overly prejudicial and should not have been admitted: *R v Rose,* [2020 ONCA 306](https://www.ontariocourts.ca/decisions/2020/2020ONCA0306.htm), at paras 42-50

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0190.htm) at para 16; R v Crevier, [2015 ONCA 619](http://www.ontariocourts.ca/decisions/2015/2015ONCA0619.htm) at para 124

## 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.

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0188.htm)

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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0619.htm) at paras 115-126

# COSTS AS A REMEDY

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) 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

## 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

### Costs as a Charter Remedy

​ See Chapter on Charter, Section 24(1)

### Costs for Crown Misconduct

​

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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) at para 72-77; see also *R v Singh,* 2016 ONCA 108 at paras 29-38.

####  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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0840.htm) at para 51; see also *Fercan Developments*

​

### Costs for Defence Misconduct

An award of costs against a lawyer personally can be justified only on an exceptional basis where a lawyer’s acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate: *R v Jodoin,* 2017 SCC 26; see also *R v Dennis,* [2019 ONCA 109](http://www.ontariocourts.ca/decisions/2019/2019ONCA0109.htm)

### Appeal of Costs Award

[Section 676.1](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-170.html#h-245) of the Criminal Code provides that any party who is ordered to pay costs may appeal the order or the quantum with leave.

Leave to appeal is also required pursuant to s. 133(b) of the *Courts of Justice Act* and R. 61.03.1(17) of the *Rules of Civil Procedure*. However, leave to appeal is not required for an award of costs that relies on inherent jurisdiction as opposed to statutory jurisdiction: *Hunt v. Worrod*, [2019 ONCA 540](http://canlii.ca/t/j16d9)

# THE CROWN

## 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*](http://www.ontariocourts.ca/decisions/2016/2016ONCA0615.htm)

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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0411.htm) at para 120

Nor is counsel for the Crown entitled to advance legally impermissible submissions that invite legally prohibited reasoning or effectively undermine trial fairness: *R v JH,* [2020 ONCA 165](https://www.ontariocourts.ca/decisions/2020/2020ONCA0165.htm), at para 92

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

## Crown Misconduct

### General Principles

For a review of principles surrounding crown conduct in an opening and closing jury address, [see Jury Law: Opening and Closing Addresses](http://editor.wix.com/html/editor/web/renderer/render/document/bf4393d2-8d99-4a51-b323-5b746c3e4a7b/j-opening-and-closing-address?dsOrigin=Editor1.4&editorSessionId=656951FD-847C-40D9-825A-23ED434935B6&isEdited=true&isSantaEditor=true&lang=en&metaSiteId=f40eac49-2687-4fbf-b8f4-4eb28fd73a46)

Cases involving improper Crown conduct/remarks/cross-examinations in jury trials: *R v AT*, [2015 ONCA 65;](http://www.ontariocourts.ca/decisions/2015/2015ONCA0065.htm) *R v Khairi*, [2015 ONCA 279;](http://www.ontariocourts.ca/decisions/2015/2015ONCA0279.htm)*R v John*, [2016 ONCA 615](http://www.ontariocourts.ca/decisions/2016/2016ONCA0615.htm); *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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0411.htm) 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​](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15329/index.do)

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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0812.htm) at para 2

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0411.htm) at para 121

## Prosecutorial discretion

​

General Principles on prosecutorial discretion and the scope of judicial review: *R v Delchev*, [2015 ONCA 381 at paras 46-55](http://www.ontariocourts.ca/decisions/2015/2015ONCA0381.htm)

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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0800.htm)

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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0905.htm)

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0718.htm)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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0063.htm) at para 55

# DEFENCE COUNSEL

The trial judge must be wary of second-guessing tactical decisions made by defence counsel: *R v Bushiri,* [2019 ONCA 797](http://www.ontariocourts.ca/decisions/2019/2019ONCA0797.htm), at para 52

# 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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17133/index.do) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA1002.htm), at para 19

# DISCLOSURE REGIMES

### First Party Disclosure

First party disclosure under *Stinchcombe* imposes a duty on the Crown to disclose all relevant, non-privileged information in its possession or control, whether that information is inculpatory or exculpatory, unless disclosure of that information is governed by some other regime. This duty is ongoing and corresponds to the accused’s constitutional right to the disclosure of all material which meets the *Stinchcombe* standard: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 101

An investigating police service is in possession or control of a prospective witness’ criminal record if that force has access to records of criminal convictions through CPIC. While those records may not be fruits of the investigation, they may nonetheless be disclosable as obviously relevant: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at paras 124-133

### Third Party Disclosure

Crown entities other than the prosecuting Crown – including the police – are third parties for the purposes of disclosure. They are not subject to the *Stinchcombe* regime. The prosecuting Crown’s disclosure duty under *Stinchcombe* is triggered upon a defence request for disclosure: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 103

When put on notice of potentially relevant material in the hands of the police or other Crown entities, the prosecuting Crown has a duty to make reasonable inquiries. Correspondingly, the police have a duty to disclose to the prosecuting Crown all material pertaining to its investigation of the accused. This material is often termed “the fruits of the investigation”: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 104

The “fruits of the investigation” refers to the police investigative files, not their operational records or background information. In other words, “fruits of the investigation” refers to information “generated or acquired during or as a result of the specific investigation into the charges against the accused”: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 105

However, the police obligation of disclosure to the prosecuting Crown extends beyond the “fruits of the investigation”. The police should also disclose to the prosecuting Crown any additional information that is “obviously relevant” to the accused’s case: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 106

### First versus Third Party Disclosure

To determine which disclosure regime applies to information, a court must consider whether:

1. the information sought is in the possession or control of the prosecuting Crown; and
2. the nature of the information sought is such that the police or another Crown entity in possession or control of it should have supplied the information to the prosecuting Crown.

The second question will be answered affirmatively where the information is part of “the fruits of the investigation” or is “obviously relevant”. An affirmative response on either of these issues means that the first party or *Stinchcombe* disclosure regime applies: *R v Pascal,* [2020 ONCA 287](https://www.ontariocourts.ca/decisions/2020/2020ONCA0287.htm#_ftnref1), at para 107

# EXTRAORDINARY REMEDIES

Extraordinary remedies, among them *certiorari*, are available to the parties in criminal proceedings *only* for jurisdictional errors by a provincial court judge.

In criminal proceedings, jurisdictional errors occur where a provincial court judge

i.             fails to observe a mandatory provision of a statute; or

ii.            acts in breach of the principles of natural justice.

These strict limitations on the availability of *certiorari* for parties are to prevent the use of extraordinary remedies as an end-run to circumvent the rule against interlocutory appeals.

*Certiorari* is not available to parties to review the conduct of criminal proceedings on the basis of an alleged error of law on the face of the record.

The scope of review available on *certiorari* for third parties is somewhat more expansive. After all, third parties do not have rights of appeal, at least in most cases. Thus, in addition to review of jurisdictional errors, a third party may invoke *certiorari* to challenge an error of law on the face of the record, provided the order has a final and conclusive effect in relation to that third party.

A erroneous decision by a trial judge as to which disclosure regime governs what is sought – i.e., first the party or third party disclosure regime – would not, as a general rule, amount to a jurisdictional error, but only an error of law in the exercise of jurisdiction. Unless the error were to amount to a failure to observe a mandatory statutory provision or a breach of the principles of natural justice, the error would fall beyond the reach of *certiorari* at the instance of any party to the proceedings, but not a third party: *R v Stipo,* [2019 ONCA 3](http://www.ontariocourts.ca/decisions/2019/2019ONCA0003.htm), at paras 46-52; *R v Awashish,* 2018 SCC 45, at paras 10-12, 20, 23

# FITNESS TO STAND TRIAL

Section 2 of the Criminal Code sets out the criteria against which fitness is considered:

"Unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

(a) understand the nature or object of the proceedings,

(b) understand the possible consequences of the proceedings, or

(c) communicate with counsel.

The test for fitness has been referred to as a “limited cognitive capacity” test. The accused must have “sufficient mental fitness to participate in the proceedings in a meaningful way. It requires only a relatively rudimentary understanding of the judicial process — sufficient, essentially, to enable the accused to conduct a defence and to instruct counsel in that regard.

Although an accused is presumed fit to stand trial, that presumption can be displaced upon a balance of probabilities: Criminal Code, s. 672.22. The procedure by which to deal with the issue of fitness is governed by Part XX.1 of the Criminal Code. The issue of fitness may be raised by either party or by the trial judge: ss. 672.12, 672.23. As fitness can change over the course of a proceeding, there is no cap placed upon the number of fitness assessments that may be ordered in any given case. Likewise, there is no cap on the number of fitness hearings that may have to take place.

Proceeding against a person who is not mentally present at the proceedings is akin to proceeding against a person who is not physically present at the proceedings. It has the effect of excluding that person from the proceedings.

Where fitness concerns arise after a finding of guilt has been made, the proceedings cannot continue until the accused’s fitness has been assessed and determined. Some have suggested that jurisdiction at the sentencing stage lies in the common law; others have suggested that it lies in the Canadian Charter of Rights and Freedoms; and still others have suggested that it lies in reading into the relevant statutory provisions by way of affording a constitutional remedy: *R v Walker,* [2019 ONCA 435](https://www.ontariocourts.ca/decisions/2019/2019ONCA0765.htm), at paras 40-44, 54

# INFORMATION / INDICTMENT

## AMENDING THE INFORMATION OR INDICTMENT

#### 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: *R v Bidawi*, [2018 ONCA 698,](http://www.ontariocourts.ca/decisions/2018/2018ONCA0698.htm) *R v McGaw,* [2019 ONCA 808](https://www.ontariocourts.ca/decisions/2019/2019ONCA0808.htm), at para 18

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,](http://www.ontariocourts.ca/decisions/2018/2018ONCA0698.htm) at paras 29-36;

#### 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:

* + 1. fails to state or states defectively anything that is requisite to charge the offence;
		2. does not negative an exception that should be negatived; or
		3. is in any way defective in substance or in form.

*R v Singh,* [2018 ONCA 506](http://www.ontariocourts.ca/decisions/2018/2018ONCA0506.htm) at paras 7, 8, 10

#### 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,](http://www.ontariocourts.ca/decisions/2018/2018ONCA0698.htm) at paras 29, 36

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0121.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0577.htm) at para 44; see generally *Kenegarajah;* see also *R v Schoer,* [2019 ONCA 105](http://www.ontariocourts.ca/decisions/2019/2019ONCA0105.htm), at paras 62-65

In *RY,* the Court of Appeal held that the accused was improperly convicted of both sexual assault and sexual interference in a case where the information alleged that the incidents had taken place between April 1, 2015, and August 31, 2015. The Court rejected the Crown’s submission that, because the Crown had proven at trial two sexual incidents, separated by weeks, the Court could therefore treat each count as relating to two separate sexual incidents. The Court held that “ by alleging the incidents had taken place between April 1, 2015 and August 31, 2015, both counts embraced both incidents. When the counts are read together the case pleaded against the appellant was that whatever had happened between those dates was eithersexual interference or sexual assault, not that one count alleged one incident and the other count alleged a different incident:” *R v JY,* [2019 ONCA 126](http://www.ontariocourts.ca/decisions/2019/2019ONCA0126.htm), at paras 1-2

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA1069.htm)

# INEFFECTIVE ASSISTANCE OF COUNSEL

## 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.

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0392.htm) at para 3; *R v MM,* [2018 ONCA 1019](http://www.ontariocourts.ca/decisions/2018/2018ONCA1019.htm), 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0252.htm) 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0526.htm) at paras 6-7

Once the facts that underpin the claim have been established, the ineffective assistance analysis begins with the prejudice component. This component engages a determination of whether a miscarriage of justice has occurred. Either because of some procedural unfairness in the proceedings, a compromise of the reliability of the verdict or some combination of both consequences. Where the reviewing court does not make a finding of prejudice, it is undesirable for the court to conduct an inquiry into and render a conclusion upon the performance component: *R v Girn,* [2019 ONCA 202](http://www.ontariocourts.ca/decisions/2019/2019ONCA0202.htm), at para 92

### 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0477.htm) at para 61; *R v Trudel,*[2015 ONCA 422](http://www.ontariocourts.ca/decisions/2015/2015ONCA0422.htm) 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

### 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0477.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0221.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA1019.htm), 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

### 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0477.htm)

* The relevant test laid out and applied in the context of an appeal to strike an NCR order: *R v Trudel*, [2015 ONCA 422](http://www.ontariocourts.ca/decisions/2015/2015ONCA0422.htm)

* 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0577.htm)

​

* 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0149.htm)
* The failure to advise a client of the consequence that, upon pleading guilty for social assistance fraud, she would have to pay restitution and would be unable to access Ontario Works payments in the future: *R v Yasotharan,* [2019 ONCA 568](http://www.ontariocourts.ca/decisions/2019/2019ONCA0568.htm)

​

* The failure to authenticate evidence necessary to raise a reasonable doubt, after having been invited to do so by the trial judge: *R v Gadam,* [2019 ONCA 345](http://www.ontariocourts.ca/decisions/2019/2019ONCA0345.htm)
* The failure to give a client an adequate opportunity to consider his election as to mode of trial: *R v Stark,*[2017 ONCA 148](http://www.ontariocourts.ca/decisions/2017/2017ONCA0148.htm)

​

* 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0423.htm)
* 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0103.htm)
* 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0362.htm)
* Counsel’s failure to obtain proper instructions on proceeding to an NCR verdict: *R v JF,* [2019 ONCA 432](http://www.ontariocourts.ca/decisions/2019/2019ONCA0432.htm)
* Amicus’ failure to render assistance necessary to ensure a fair trial: *R v Walker,* [2020 ONCA 765](https://www.ontariocourts.ca/decisions/2019/2019ONCA0765.htm), at paras 73-78

# 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0599.htm) at paras 16, 17

# JUDICIAL INTERIM RELEASE

## Bail

### General Principles

[Excerpted from *R v Antic*, [2017 ONCA 27 at para 67]](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16649/index.do)

​

* Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.

​

* [Section 11](https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en#!fragment/sec11)() 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)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-134.html#h-167), 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)](https://zoupio.lexum.com/calegis/rsc-1985-c-c-46-en#!fragment/sec515subsec4)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.

​

A trial judge has exclusive jurisdiction over bail once the trial has commenced: *R v Passera,* [2017 ONCA 308](http://www.ontariocourts.ca/decisions/2017/2017ONCA0308.htm)

### Evidence at Bail Hearings

The Crown is not permitted to adduce evidence from sureties at a bail hearing about statements made by the accused regarding the offence: *R v K(K),* 2019 ONSC 1578

### Secondary Ground Concerns

Not only must there be a substantial likelihood of committing an offence, that substantial likelihood must endanger the protection or safety of the public. The fact that an accused might deceive his sureties and breach curfew terms of his bail order or become involved in fraudulent activity order may or may not compromise public safety: *R v Jaser,* [2020 ONCA 606](https://www.ontariocourts.ca/decisions/2020/2020ONCA0606.htm), at paras 67-68

### Tertiary Grounds

See *R v St. Cloud,* [2015 SCC 27](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15358/index.do)

On a retrial, the bail judge may be entitled to take into account the previous conviction in assessing the strengh of the Crown’s case: *R v Jasper*[*,* 2020 ONCA 606](https://www.ontariocourts.ca/decisions/2020/2020ONCA0606.htm), at para 85

In most cases, if all four factors clearly favour detention, bail will be refused on the tertiary ground, especially if the accused has the onus to show cause why he should be released: *R v Jasper,* [2020 ONCCA 606](https://www.ontariocourts.ca/decisions/2020/2020ONCA0606.htm), at para 89

Despite the importance of the four identified factors in the tertiary ground assessment, the language of s. 515(10)(c) and *St. Cloud* make it clear the bail judge must take into account, not just the four enumerated factors, but all relevant circumstances. Those factors include the personal circumstances of the accused, and any significant pretrial custody flowing from delay in the accused’s trial. In Jasper, for example, the Court of Appeal held that the trial judge erred in failing to consider the substantial body of evidence said to demonstrate that Jaser’s rehabilitation had substantially improved: paras 90-94

### 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).](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-135.html#docCont) 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0093.htm) at paras 18-20

### 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0093.htm) at paras *26-29*

### Gladue Principles

Gladue principles apply to bail hearings: *R v Hope,* [2016 ONCA 648](http://www.ontariocourts.ca/decisions/2016/2016ONCA0648.htm) at para 9

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0470.htm) at para 15

### Peace Bond Hearings

The arrest and bail provisions in the *Criminal Code* apply, with necessary modifications, to peace bond proceedings: *R v Penunsi,* [2019 SCC 39](https://scc-csc.lexum.com/scc-csc/scc-csc/en/17862/1/document.do)

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0931.htm), at para 15

### Suitability of Sureties

The fact that sureties maintain a belief in the accused’s innocence is not connected to their ability to properly fulfill their obligations as a surety. Many individuals, prepared to assume the significant obligations of a surety, do so because they firmly believe the accused person is innocent. Jaser is presumed innocent at this point: *R v Jasper,* [2020 ONCA 606,](https://www.ontariocourts.ca/decisions/2020/2020ONCA0606.htm) at para 73

## Bail Review

### Section 520 Bail Reviews

See *R v St. Cloud,* [2015 SCC 27](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15358/index.do)

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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0314.htm) at paras 3-4, 27; *R v Rootenberg,* [2018 ONCA 335](http://www.ontariocourts.ca/decisions/2018/2018ONCA0335.htm) 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

### Section 680 Bail Reviews

Section 680 applies to orders made by a Superior Court judge on applications for bail pending trial under s. 522, and orders made by a Court of Appeal judge under s. 679.

Section 680 sets out a two-stage process. At the first stage, the Chief Justice or his designate decides whether to direct a review of the order made by the bail judge. If a review is directed, a panel (or if the parties agree a single judge) reviews the order made by the bail judge. On that review, the court has broad powers to confirm or vary the order made by the bail judge or substitute a different order.

The first stage is akin to a motion for leave to appeal and is intended to weed out cases with no realistic possibility of success. The Chief Justice will order a review if he concludes the applicant has an arguable case, in the sense there is a reasonable chance of success if a review is ordered.

A panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles:

1. absent palpable and overriding error, the review panel must show deference to the judge’s findings of fact.
2. the review panel may intervene and substitute its decision for that of the judge where it is satisfied the judge erred in law or in principle and the error was material to the outcome. This includes cases where the justice under review gave excessive weight to one relevant factor or insufficient weight to another.
3. in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted or unreasonable

Neither party has a right to produce new evidence on a s. 680 review, but the reviewing court has the discretion to receive that evidence.  Fresh evidence is routinely received on s. 680 reviews if the evidence is relevant and relates to matters post-dating the bail decision under review.

The approach to fresh evidence outlined in *St. Cloud* applies to fresh evidence offered on a s. 680 review: *R v Jasper,* [2020 ONCA 606,](https://www.ontariocourts.ca/decisions/2020/2020ONCA0606.htm) at paras 40-55

## 90 Day Review

The correct approach to a detention review under s. 525 is as follows. First, the jailer has an obligation to apply for the hearing immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503. Where there is an intervening detention order under s. 520, 521 or 524 following the initial appearance of the accused and before the end of the 90-day period, the 90-day period begins again. Accused persons who have not had a full bail hearing are nonetheless entitled to one under s. 525. Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing. The hearing must be held at the earliest opportunity.

In his or her analysis, the judge may refer to the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review hearings. Both parties are also entitled to make submissions on the basis of any additional “credible or trustworthy” information which is relevant or material to the judge’s analysis, and pre-existing material is subject to the criteria of due diligence and relevance discussed in St-Cloud, at paras. 130-35.

At the hearing, unreasonable delay is not a threshold that must be met before reviewing the detention of the accused. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10) . In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is — or is not —justified.

Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention: *R v Myers,* [2019 SCC 18](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17634/index.do)

## Bail Before the Trial Judge: s.523(2)

There is no mechanism to review a trial judge’s bail decision: *R v Passera,* 2017 ONCA 308; *R v Ali,* [2020 ONCA 566](https://www.ontariocourts.ca/decisions/2020/2020ONCA0566.htm)

## Bail Pending Appeal to the Court of Appeal

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0293.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0397.htm) 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0495.htm) at para 14

Where the proposed ground of appeal is almost certain to succeed, this is a strong factor in favour of release: *R v MacMillan,* [2020 ONCA 141](https://www.ontariocourts.ca/decisions/2020/2020ONCA0141.htm), at paras 17, 23

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0210.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0210.htm) 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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16486/index.do),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

### 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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16486/index.do) at para 39

### The Public Interest Criterion

For a thorough review of the "public interest cirterion" in [section 679(3)(c),](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html#docCont)and the reviewability and enforceability interests at play, see: *R v Oland,* [2017 SCC 17](https://www.canlii.org/en/ca/scc/doc/2017/2017scc17/2017scc17.html); *R v Luckese,*[2016 ONCA 359](http://www.ontariocourts.ca/decisions/2016/2016ONCA0359.htm) at paras 4-5; see, for example, *R v Tang,* [2017 ONCA 775](http://www.ontariocourts.ca/decisions/2017/2017ONCA0775.htm)

The merits of the appeal are relevant to the public interest inquiry: *R v McIntyre,* [2018 ONCA 210](http://www.ontariocourts.ca/decisions/2018/2018ONCA0210.htm) at para 37

A reasonable member of the public would consider the strength of the release plan and whether it is consistent with the just and proper functioning of the criminal justice system: *R v Papasotiriou,* [2018 ONCA 719](https://www.canlii.org/en/on/onca/doc/2018/2018onca719/2018onca719.html), at paras 46-47

The enforceability criterion applies with particular force in cases involving convictions for gun trafficking: *R v Abdullahi,* [2020 ONCA 350](https://www.ontariocourts.ca/decisions/2020/2020ONCA0350.htm), at paras 27-29

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0210.htm) at para 16

### Successful Examples

*R v Groskopf,* [2018 ONCA 455](http://www.ontariocourts.ca/decisions/2018/2018ONCA0455.htm) (appeal of convictions for the possession, making, and distribution of child pornography, together with sexual interference, sexual assault, and sexual exploitation)

### Variations

An applicant may apply to vary bail conditions so long as they satisfy the conditions of s. 679(3) namely, it is not a frivolous appeal, the terms of the release are not contrary to the public interest and the appellant can be expected to surrender himself prior to the hearing: *R v Sousa,* [2020 ONCA 432,](https://www.ontariocourts.ca/decisions/2020/2020ONCA0432.htm) at para 9

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0326.htm) at para 19

The pendulum must swing towards enforceability and away from bail pending further review after the correctness of the convictions entered at trial has been affirmed on appeal: *R v Kazman,* [2020 ONCA 251](https://www.ontariocourts.ca/decisions/2020/2020ONCA0251.htm), at para 10

## Bail Pending New Trial

### General Principles

The enabling statutory authority is [s. 679(7.1) of the Criminal Code](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-173.html#docCont), 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:

​

1. the time between the order for a new trial and the successful appellant's first appearance in the trial court; and
2. 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0226.htm) at paras 27-43; see also *R v Durani,* [2019 ONCA 553](http://www.ontariocourts.ca/decisions/2019/2019ONCA0553.htm)

**​**

## Forfeiture of Bail Monies

A forfeiture hearing is governed by [s. 771 of the*Criminal Code*](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-200.html#docCont), 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*](http://www.ontariocourts.ca/decisions/2009/october/2009ONCA0732.htm), 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0229.htm)

**​**

## ​Breach of Bail

An accused is not entitled to launch a collateral attack to the constitutionality or validity of a condition that he is charged with breaching: *R v Bird*, [2019 SCC 7](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17514/index.do) (note that Bird dealt with this issue in the context of LTSO breach hearings, but the principles appear equally applicable to breach of bail hearings).

## Surety Warrants

Typically, surety warrants are executed by a police arrest of the subject, and the arresting officers are responsible for the removal of the warrant from CPIC. Upon the accused’s arrests (i.e., the execution of the surety warrant) the judge endorses the warrant with a “certificate of committal,” *R v Gerson-Foster,* [2019 ONCA 405](http://www.ontariocourts.ca/decisions/2019/2019ONCA0405.htm), at paras 18-19

Once the accused has been committed to custody, a surety substitution under s.767.1 is impossible. Similarly, where the conditions of the recognizance are to be changed, a surety substitution is impossible, as a new recognizance must be fashioned: *Gerson-Foster* at paras 52-53

While imprisonment is a requirement of a proper s. 766(1) release, a formal “arrest” is not. Section 766(2) provides that where a surety warrant order has been made, a peace officer “may arrest the person named in the order” (emphasis added). It therefore authorizes but does not require an arrest. An arrest is an available mode of securing the committal to prison of the person named in the order, but an arrest does not establish jurisdiction. So long as the person named in the order is committed to prison, including by surrendering into custody without the formalities of an arrest, an s. 766(1) surety release is appropriate: *Gerson-Foster* at para 61

An accused surrendering under a surety warrant may be deemed to be have been committed to prison upon entering the court prisoner’s box: *Gerson-Foster* at paras 63-66

While the *Criminal Code* does not provide for a statutory authority for judges to rescind a surety warrant, superior court and provincial court judges have inherent jurisdiction to do so upon vacating the initial recognizance: *Gerson-Foster* at paras 69-70

# JURISDICTIONAL ISSUES

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) 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

​

### 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0178.htm) at para. 29; *R v Mitchell,* [2020 ONCA 187](https://www.ontariocourts.ca/decisions/2020/2020ONCA0187.htm), at para 11

Once the Crown has exercised its right under [section 579](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-148.html#docCont) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0840.htm) 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

### To Control Process / Make Orders Relating to Trial

Trial judges have considerable discretion to manage the cases before them and an appellate court will not lightly interfere with that discretion. However, deference is not owed to unreasonable exercises of discretion: *R v Imola,* [2019 ONCA 556](http://www.ontariocourts.ca/decisions/2019/2019ONCA0556.htm), at para 17

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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0432.htm) at para 46

## 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

## Division of Powers

### 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.

### The Division of Power Analysis

#### 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.

**​**

#### 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0230.htm) at paras 55-73​

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0432.htm) at paras 79-80

A provincial superior court should decline its *habeas corpus*jurisdiction only when faced with a complete, comprehensive and expert scheme which provides review that is at least as broad and advantageous as *habeas corpus*with respect to the grounds raised by the applicant: *Canada (Public Safety and Emergency Preparedness) v Chhina,* [2019 SCC 29](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17759/index.do)

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) at paras 44, 51-52

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) at paras 45-48

​

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

​

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0547.htm) at paras 99-1100

The trial judge is not obliged to follow a pre-trial ruling which the parties agree is wrong in law: *R v Cumor,* [2019 ONCA 747](https://www.ontariocourts.ca/decisions/2019/2019ONCA0747.htm), at para 70

## Jurisdiction of Replacement Judge

### 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

### Section 669.2

Section [669.2](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-160.html#h-222) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0547.htm) at paras 99-102

## Territorial Jurisdiction

[Section 478 of the *Criminal Code*](https://laws-lois.justice.gc.ca/eng/acts/C-46/page-103.html#docCont) provides that: “Subject to this Act, a court in a province shall not try an offence committed entirely in another province.”

**​**

## Validity of Orders Made Without Jurisdiction

Orders made without jurisdiction remain in force until validly challenged and set aside: *R v Gerson-Foster,* [2019 ONCA 405](http://www.ontariocourts.ca/decisions/2019/2019ONCA0405.htm), at para 42

# MENTAL HEALTH

## 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 oder 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*](http://trk.cp20.com/click/eolaj-8vid1k-5l42aps3/), [2017 ONCA 94](http://www.ontariocourts.ca/decisions/2017/2017ONCA0094.htm).

## 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*](http://trk.cp20.com/click/ex6yf-9hv0n4-5l42aps2/), [2017 ONCA 135](http://www.ontariocourts.ca/decisions/2017/2017ONCA0135.htm) 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0379.htm) at para 11

​

## 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)](http://trk.cp20.com/click/esghr-964dk5-5l42aps5/), [2017 ONCA 102.](http://www.ontariocourts.ca/decisions/2017/2017ONCA0102.htm) 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 the 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. The trial judge must assess whether there is a real danger that tral fairness has been compromised. Appellate intervention is appropriate only if the decision is clearly wrong or based on an error in principle: *R v Zvolensky,* [2017 ONCA 273](http://www.ontariocourts.ca/decisions/2017/2017ONCA0273.htm#_Toc474945413) at para 185; *R v Anderson,* [2018 ONCA 1002](http://www.ontariocourts.ca/decisions/2018/2018ONCA1002.htm), at para 15; *R v Abdulle,* [2020 ONCA 106](https://www.ontariocourts.ca/decisions/2020/2020ONCA0106.htm), at paras 112-114

# MENS REA

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0619.htm) at para 45

In the context of a specific intent offence, it is an error for the trial judge to fail to address an accused’s apparent intoxication: *R v Lo Verde,* [2019 ONCA 467](http://www.ontariocourts.ca/decisions/2019/2019ONCA0467.htm), at para 1

## Wilful blindness

Wilful blindness acts as a substitute for actual knowledge, when knowledge is a component of *mens rea.*The doctrine of willful 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0789.htm); *R v Burnett,* [2018 ONCA 790](http://www.ontariocourts.ca/decisions/2018/2018ONCA0790.htm), 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,](http://www.ontariocourts.ca/decisions/2018/2018ONCA0932.htm) 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0789.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0795.htm), 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.

# 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](https://www.canlii.org/en/on/onsc/doc/2017/2017onsc3084/2017onsc3084.html) at paras 8-11

# PARTY LIABILITY ISSUES

## Principals: [Section 21(1)(a)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-3.html#h-5)

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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm) 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

### Co-Principals to Murder

Co-principals to murder are liable where they “together form an intention to commit an offence, are present at its commission, and contribute to it, although each does not personally commit all the essential elements of the offence. The parties must have had the requisite intention.

The ultimate questions for the jury were: (1) who were the participants in and (2) can it be inferred from their conduct that they had the requisite intent for murder, namely, that (i) they intended to cause death; or (ii) they intended to cause bodily harm that they knew was likely to cause death and were reckless as to whether or not death ensued? *R v Abdulle,* 2020 ONCA 106, at paras 28-32

## Party as Aider or Abettor: [section 21(1)(b) and (c)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-3.html#h-5)

Before someone can be convicted for an offence as a party, the underlying offence must have been committed: *R v Nguyen,*[2016 ONCA 182](http://www.ontariocourts.ca/decisions/2016/2016ONCA0182.htm) 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](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-99.html#docCont)

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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0342.htm)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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0384.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0354.htm) at para 15

There need not be a causative link between the act of aiding (or abetting) and the perpetrator’s commission of the offence. Instead, the authorities take a wide view of the necessary connection between the acts of alleged aiding or abetting and the commission of the offence, such that any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime: *R v Grewal,* [2019 ONCA 630](http://www.ontariocourts.ca/decisions/2019/2019ONCA0630.htm#_ftn1), at para 30 [citation omitted]

In addressing the liability of an accused, the trier of fact must consider the potential liability of each separately. Drawing a clear distinction between the legal basis for the perpetrator’s liability and the bases for liability of the helper is important because the facts which the Crown must prove beyond a reasonable doubt are different depending upon whether liability flows as a perpetrator or as an aider. For example, the causation requirement has application only to the perpetrator, not to an aider: *R v Josipovic,* [2019 ONCA 633](https://www.ontariocourts.ca/decisions/2019/2019ONCA0633.htm), at paras 47-49

A trier of fact may also convict if satisfied beyond a reasonable doubt that either or both accused participated in the offence, without being able to decide the exact nature of their participation: *R v Josipovic,* [2019 ONCA 633](https://www.ontariocourts.ca/decisions/2019/2019ONCA0633.htm), at para 51

It is doubtful that  “attempting to aid an offence” is a recognized form of criminal liability in Canada: *R v Grewal,* [2019 ONCA 630](http://www.ontariocourts.ca/decisions/2019/2019ONCA0630.htm#_ftn1), at para 33

## Party Liability to Murder

To be found liable for first degree murder as an aider or abettor of a planned and deliberate murder, an accused must have knowledge that the murder was planned and deliberate; wilful blindness will satisfy the knowledge component of s. 21(1)(b) or (c

The jurors need to know the essential elements of murder, the basis upon which murder becomes first degree murder, the constituent elements of aiding and abetting and, most especially, the specific basis upon which the accused’s liability as a secondary participant in first degree murder was to be decided. Drawing a clear distinction between the legal basis for the perpetrator’s liability and the basis of liability of the helper is important because the facts which the Crown must prove beyond a reasonable doubt differ depending upon whether liability flows as a perpetrator or as an aider: *R v Saleh,* [2019 ONCA 819](https://www.ontariocourts.ca/decisions/2019/2019ONCA0819.htm), at paras 98-100, 134

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0702.htm) at paras 38-44

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0510.htm) at para 81; *R v Patel,* [2017 ONCA 702](http://www.ontariocourts.ca/decisions/2017/2017ONCA0702.htm) 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

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0182.htm) at paras 19-20

## Appeal – Failure to Charge

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

## 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

## General Principles

A very early guilty plea which is entitled to a substantial credit in the sentencing process: *R v Graham,*[2017 ONCA 245](http://www.ontariocourts.ca/decisions/2017/2017ONCA0245.htm) at paras 1-4

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0653.htm) at para 21

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

* 1. the nature of the allegations;
	2. the effect of the plea; and
	3. 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:

* 1. understood the process in which the plea was entered;
	2. could communicate with counsel; and
	3. could make an active or conscious choice: *Cherrington* at para 38

### 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0095.htm) at para 4

In particular, an informed guilty plea means that an accused must be aware of the legally relevant collateral consequences. A legally relevant collateral consequence is a consequence that bears upon sufficiently serious legal interests of the accused: *R v Girn,* 2019 ONCA 202, at para 52

In *Brooks,* Hourigan J.A. commented in *obiter* that a consequence that the plea may impact future travel or emigration plans does not strike me as being a sufficiently serious legal interest, as it would strain the definition to include a wide variety of remote consequences that do not impact on an applicant’s legal rights in Canada: [2020 ONCA 605](https://www.ontariocourts.ca/decisions/2020/2020ONCA0605.htm), at para 11

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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0577.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0095.htm) at para 28 For example, the indefinite suspension of one's driver's license: quick at para 30

However, it is unneecssary 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.

For example, in *Espinoza-Ortega,* the Court of Appeal found that the accused’s plea was not informed because he was unaware that, after agreeing to a joint submissions with the Crown, the Crown would subsequently refuse to support the joint submissions as not being contrary to the public interest. Thus, the accused was unaware of the legal consequences of the plea, namely, the real likelihood that the sentence requested would not be imposed: [2019 ONCA 545](http://www.ontariocourts.ca/decisions/2019/2019ONCA0545.htm), at paras 42-43

### Acceptance of Facts Underlying the Plea

A plea of guilty to a criminal charge “is an admission by the accused of all the legal ingredients necessary to constitute the crime charged and dispenses with the necessity of proof of the ingredients”:

Where facts read in support of a guilty plea are accepted by the accused as “substantially correct,” any facts that are not a necessary element of the offence are not necessarily accepted by the accused: *R v Thomas,* [2018 ONCA 694](http://www.ontariocourts.ca/decisions/2018/2018ONCA0694.htm), at paras 38-39

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0188.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0174.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0095.htm) 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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17100/index.do). See, for example, *R v Dean,* [2019 ONCA 587](http://www.ontariocourts.ca/decisions/2019/2019ONCA0587.htm)

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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0653.htm) 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
* A informed plea does not require that the accused be aware of appeal rights and their limitations: *R v Girn,* 2019 ONCA 202
* 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0653.htm)
* Where accused not informed of immigration consequences of his plea: *R v Pineda,* [2019 ONCA 935](https://www.ontariocourts.ca/decisions/2019/2019ONCA0935.htm); *R v Davis,* [2020 ONCA 326](https://www.ontariocourts.ca/decisions/2020/2020ONCA0326.htm)
* 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0188.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0811.htm)
* Where the plea was not unequivocal: *R v Bhagwandat,* [2019 ONCA 589](http://www.ontariocourts.ca/decisions/2019/2019ONCA0589.htm)
* Where no plea inquiry held and judge intimated that plea could be struck. Appellant argued he only plead guilty because he believed he would get access to drug treatment program, which did not happen: *R v Flowers,* [2020 ONCA 468](https://www.ontariocourts.ca/decisions/2020/2020ONCA0468.htm)

## Credit on Sentencing

The amount of credit a guilty plea will attract on sentencing varies with each case: *R v Carreira,* [2015 ONCA 639](http://www.ontariocourts.ca/decisions/2015/2015ONCA0639.htm) 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

## 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](https://www.canlii.org/en/on/onsc/doc/2018/2018onsc3464/2018onsc3464.html), at para 64; *R v Gordon,* 2019 ONSC 6508, at paras 9-13

In a constitutional case where a *statute* has been declared invalid by a judge of coordinate jurisdiction, that decision ought to apply to all other coordinate judges, absent exceptional circumstances: *R v. Jupiter*, 2015 ONCJ 376

 If a judge of the Superior Court finds that a provision of a statue is unconstitutional, other superior court judges should respect that decision, absent cogent reason to conclude that the earlier declaration is plainly the result of a wrong decision. Where a party seeks to rely on a statutory provision that has been declared to be unconstitutional by a superior court judge, a subsequent trial judge should apply that earlier declaration of invalidity and treat the statutory provision as having no force or effect, unless the underlying constitutional issue has been raised by the Crown before them through submissions that the earlier decision is plainly wrong: *R v Sullivan,* 2020 ONCA 333, at para 38

## Prerogative Writs

Just as is the case with appeals, decisions by higher courts on prerogative writs are binding on lower courts: *R v RS,* [2019 ONCA 906](https://www.ontariocourts.ca/decisions/2019/2019ONCA0906.htm), at paras 70-73

# PREROGATIVE WRITS

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0093.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0946.htm), at para 13

## 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](https://legalaid.us15.list-manage.com/track/click?u=1049c6684e6addce5c2c83de0&id=3e839fda2c&e=e76cdf9c29)

#  PRELIMINARY INQUIRY

## 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**](http://www.ontariocourts.ca/decisions/2016/2016ONCA0235.htm) 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: Wilsonat 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**](http://www.ontariocourts.ca/decisions/2016/2016ONCA0117.htm) 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 ommitted]

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0117.htm) at para 13; *R v Wilson*, [2016 ONCA 235](http://www.ontariocourts.ca/decisions/2016/2016ONCA0235.htm) 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 ommitted]

​

​

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

## Adjournment requests

The decision to grant or not to grant an adjournment, including for the purpose of allowing an accused to find counsel, 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0541.htm) at para 3; *R v Cordeiro-Calouro,* [2019 ONCA 1002](https://www.ontariocourts.ca/decisions/2019/2019ONCA1002.htm), at para 6; *R c Arsenault,* [2020 ONCA 118](https://www.ontariocourts.ca/decisions/2020/2020ONCA0118.htm), at para 46

A trial judge should ensure that an accused who wishes to be represented has a reasonable opportunity to find counsel. On the other hand, when an accused makes a request for an adjournment to enable him to find a lawyer, a trial judge may dismiss it if the evidence supports that the accused made no reasonable effort to find a lawyer or that he seeks to delay his trial: *Arsenaul* at para 47

## Counts on an information

The Crown practice of drafting a single count of an indictment to capture multiple distinct incidents creates the risk that the accused may be convicted without the jurors’ unanimous agreement on any one underlying incident: *R v MRH,* [2019 SCC 46](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17965/index.do)

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm) at para 74

​

Criminal Code proceedings are commenced by laying an information under oath alleging the commission of a hybrid offence ([s. 504](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-131.html#docCont)) or a summary conviction offence [(s. 788(1))](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-201.html#h-288): *R v Sciascia,*[2016 ONCA 411](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm) at para 32

[S. 789(1)(b)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-201.html#h-288) expressly permits the inclusion of several summary conviction offences in separate counts in a single information: *R v Sciascia,*[2016 ONCA 411](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm) 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*](https://qweri.lexum.com/calegis/rsc-1985-c-c-46-en) 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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16852/index.do) at paras. 1, 8-9, 43-44

Young persons cannot be tried together with adults: *R v Sciascia,*[2016 ONCA 411](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm)para 51; *R v Scaiscia,* [2017 SCC 57](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16852/index.do) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0829.htm) at paras 14-16

## Accused's Right to be Present at Trial: [s.650(1)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-155.html#docCont) of the CC

Section [650(1)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-155.html#docCont) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0284.htm) at paras 127-129

​

### 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

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0269.htm) at paras 57-58

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0333.htm) at paras 37-38

## Election as to Mode of Trial

### 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

### 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 provisio under [s.686(1)(b)(iv)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html#docCont): *R v Noureddine,*[2015 ONCA 770](http://www.ontariocourts.ca/decisions/2015/2015ONCA0770.htm) 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; see also *R v Cadieux,* [2019 ONCA 303](http://www.ontariocourts.ca/decisions/2019/2019ONCA0303.htm)

This *provisio* 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 Noureddine,*[2015 ONCA 770](http://www.ontariocourts.ca/decisions/2015/2015ONCA0770.htm) at para 56

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

For example, if the accused was represented by capable counsel, and t is clear from the record that, through counsel, he waived his right to have the words of s. 561(7) read to him, then the trial judge is entitled to rely upon counsel’s representations as to the instructions he received from the accused, and to conclude that the requirements of s. 561(7) had been waived: *R v Mitchell,* [2020 ONCA 187](https://www.ontariocourts.ca/decisions/2020/2020ONCA0187.htm), at para 12

## 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0185.htm)at para 4

​

## Language of the Proceedings

The language rights provided for in [art. 530 of *the Criminal Code*](https://laws-lois.justice.gc.ca/eng/acts/C-46/page-138.html#h-175)gives a substantive and absolute right to the accused to have equal access to the courts in the official language of his choice.. The choice of the accused must be free and enlightened.

In accordance with the importance of an accused's language rights, according to art. 3.2-2A of the Ontario Bar *Code of Ethics*, a lawyer must "advise [his] client, if any, of his or her language rights". These language rights include the client's right to the use of the official language of his choice. This choice remains that of the customer. A lawyer who accepts a warrant without having the skills to provide the required services in the language chosen by the client would violate his professional obligations: *R v JPG,* [2019 ONCA 256](http://www.ontariocourts.ca/decisions/2019/2019ONCA0256.htm), at paras 4, 5

The right to equal access to the courts implies that an accused who has chosen to be tried in French should be able to benefit from the same right to a lawyer of his choice which an English-speaking accused enjoys. However, the right to a lawyer of one's choice, whether French or English-speaking, is not an absolute right. This right must be balanced against the necessity of the courts to deal with cases in a timely manner: *R c Arsenault,* [2020 ONCA 118](https://www.ontariocourts.ca/decisions/2020/2020ONCA0118.htm), at paras 69-70

Language rights are a particular kind of right. They are distinct from the principles of fundamental justice. Language rights are meant to protect official language minorities and to ensure the equal status of English and French. They are “not meant to support the legal right to a fair trial, but to assist [an] accused in gaining equal access to a public service that is responsive to [their] linguistic and cultural identity: *R v Poobalasingham,* [2020 ONCA 308](https://www.ontariocourts.ca/decisions/2020/2020ONCA0308.htm), at para 64

## 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

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0345.htm)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

​

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0751.htm) at para 10

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0205.htm) at paras 15, 16

## Retrials (following Mistrial)

Section 653.1 provides that, in the case of a mistrial, previous rulings relating to the disclosure or admissibility of evidence or the *Charter* are binding on the parties in any new trial, “unless the court is satisfied that it would not be in the interests of justice.”

This provision does not prevent re-litigation of evidentiary rulings made at a prior trial. Instead, it creates a “presumption” that evidentiary rulings made at a prior aborted trial are binding at the retrial, unless the trial judge is satisfied that “it would not be in the interests of justice” to preclude re-litigation of the issue. Section 653.1 gives the trial judge a discretion. He or she must exercise that discretion, having regard to all of the circumstances, including whether there have been any material changes in the circumstances relevant to the admissibility of the evidence: see *R. v. Victoria*, 2018 ONCA 69; *R v Badgerow,* [2019 ONCA 374](http://www.ontariocourts.ca/decisions/2019/2019ONCA0374.htm), at para 75

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA1002.htm), at para 10

### 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*ruleis 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0650.htm) at paras 131-148, but see paras 210-229

### Severance of Charges

#### The Test

Orders for severance of counts under s. 591(3)(a) are discretionary. To engage the discretion, the judge must be satisfied that “the interests of justice” require severance. The phrase “interests of justice” endeavours to balance an accused’s interest in being tried on evidence properly admissible against him or her and society’s interest that justice be done in a reasonably efficient and cost-effective manner. Relevant factors include:

* 1. general prejudice to the accused as a result of the influence of the volume of evidence adduced and the effect of verdicts across counts;
	2. the legal and factual nexus between or among counts;
	3. the complexity of the evidence;
	4. the desire of the accused to testify on one or more counts but not on another or others;
	5. the possibility of inconsistent verdicts;
	6. the desire to avoid a multiplicity of proceedings;
	7. the use of evidence of similar acts;
	8. the length of trial;
	9. prejudice to the accused’s right to be tried within a reasonable time; and
	10. the existence or likelihood of antagonistic defences

As a general rule, an accused’s asserted desire to testify on one or more counts but not on another or others is accorded substantial weight in the severance analysis. But it must be more than a mere assertion. To give substance to the claim requires that there be some objective reality to it based on the evidence reasonably anticipated at trial. This factor is not dispositive and may be overpowered by other factors. Included among those countervailing factors is any significant disproportion in the strength of the Crown’s case as between or among counts.

The factor of antagonistic defence is often more significantin ases of joint trials of multiple accused, but it may also arise in cases of a single accused where the defences to be advanced for various counts differ.

The success of any similar fact application will generally militate against severance: *R v Durant,* [2019 ONCA 74](http://www.ontariocourts.ca/decisions/2019/2019ONCA0074.htm), at paras 71-77

#### Standard of Review

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](http://www.ontariocourts.ca/decisions/2018/2018ONCA1002.htm), at para 9

On an allegation that the decision was unjudicial, the court looks to the circumstances when the ruling was made to determine whether the decision was flawed by an error of law or principle or was unreasonable. In determining whether the ruling resulted in an injustice, the court looks at the entirety of how the trial and verdicts unfolded: *R v Durant,* [2019 ONCA 74](http://www.ontariocourts.ca/decisions/2019/2019ONCA0074.htm), at para 79

#### Murder Charges

The test for severance in s. 591(3)(a) of the *Criminal Code* should be more stringently applied in favour of an accused where two or more counts charging murder are included in the same indictment. This is all the more so when the killings cannot meet the high threshold required to permit the introduction of evidence of similar acts across the counts to assist in proof of the identity of the killer: *R v Durant,* [2019 ONCA 74](http://www.ontariocourts.ca/decisions/2019/2019ONCA0074.htm), at para 51

## Subpoena

A conviction for obstruct justice follows from a failure to comply with a subpoena. This charge cannot be defended by attacking the validity of the subpoena. Such an inquiry would validate the general rule that collateral attacks are impermissible. Should there be a concern about the validity of the subpoena, the proper course is to apply for a court order to quash the subpoena. The subpoenaed individual cannot simply avoid compliance with the subpoena: *R v Hussein,* [2019 ONCA 230](http://www.ontariocourts.ca/decisions/2019/2019ONCA0230.htm)

## Transcripts

The reguation 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0751.htm) 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](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec7_smooth) of the [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html): *R v McDonald,* [2018 ONCA 369](http://www.ontariocourts.ca/decisions/2018/2018ONCA0369.htm) 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

Lack of facilities and delay do not relieve the state of its constitutional obligation to provide an accused with procedural fairness: *R v Walker,* [2020 ONCA 765](https://www.ontariocourts.ca/decisions/2019/2019ONCA0765.htm), at para 107

# REASONABLE APPREHENSION OF BIAS

## 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0510.htm) at para 7: *R v Siddiqi*, [2015 ONCA 548](http://www.ontariocourts.ca/decisions/2015/2015ONCA0548.htm) at para 6; *R v Nero,*[2016 ONCA 160](http://www.ontariocourts.ca/decisions/2016/2016ONCA0160.htm) at para 29; *R v Lappie,*[2016 ONCA 289](http://www.ontariocourts.ca/decisions/2016/2016ONCA0289.htm) 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0655.htm) at para 19; R v Nero, [2016 ONCA 160](http://www.ontariocourts.ca/decisions/2016/2016ONCA0160.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0160.htm) 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0424.htm) 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](http://www.ontariocourts.ca/decisions/2016/2016ONCA0160.htm) at para 33; see especially para 36. Where a of 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

In conducting themselves in a courtroom, trial judges have a duty to maintain composure during the course of a trial, both in the presence and absence of the jury: *R v Ibrahim,* [2019 ONCA 631](https://www.ontariocourts.ca/decisions/2019/2019ONCA0631.htm), at para

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0962.htm), at paras 16-18

In *Locknik,* the Court of Appeal upheld the trial judge’s ruling that no reasonable apprehension of bias attached to a justice who granted dial recorder warrants. The justice wrote to the affiant requesting additional information and clarifications. The Court agreed that, in doing so, the justice was seeking facts relevant to the justice’s assessment of the reliability of the information: [2019 ONCA 625](http://www.ontariocourts.ca/decisions/2019/2019ONCA0625.htm), at paras 31-39

In *Chambers,* the trial judge’s reasons for conviction gave rise to a reasonable apprehension of bias through animated and unrelenting criticism and sarcasm towards the evidence of the appellant and the conduct of the defence. The reasons gave rise to concerns regarding a loss of perspective and objectivity: *R v Chambers,* [2019 ONCA 736](http://www.ontariocourts.ca/decisions/2019/2019ONCA0736.htm)

In *Ibrahim,* the Court of Appeal dismissed an allegation of bias but found that the trial judge conducted the mistrial application in an injudicious manner by making numerous unfounded allegations against defence counsel, raising none of them with counsel at the time, and then not affording counsel the opportunity to respond: *R v Ibrahim,* [2019 ONCA 631](https://www.ontariocourts.ca/decisions/2019/2019ONCA0631.htm), at paras 92-95; but see *R v Gager,* [2020 ONCA 274](https://www.ontariocourts.ca/decisions/2020/2020ONCA0274.htm), at paras 141-155

##  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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17098/index.do), 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.”

The appearance of fairness and the trial judge’s corresponding duty to exercise restraint and remain neutral is especially critical in the criminal context where the accused takes the stand. The following types of interventions by trial judges have resulted in the quashing of criminal convictions:

1. Questioning an accused or a defence witness to such an extent or in a manner which conveys the impression that the trial judge has placed the authority of his or her office on the side of the prosecution and conveys the impression that the trial judge disbelieves the accused or the witness;

2. Interventions which have effectively made it impossible for defence counsel to perform his or her duty in advancing the defence; and

3. Interventions which effectively preclude the accused from telling his or her story in his or her own way: *R v Said,* [2019 ONCA 378](http://www.ontariocourts.ca/decisions/2019/2019ONCA0378.htm), at paras 4-5

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’s 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0393.htm) at paras 91-92; *R v DC,*[2017 ONCA 143](http://www.ontariocourts.ca/decisions/2017/2017ONCA0143.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0456.htm) 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

### Examples

In [*DC,*](http://www.ontariocourts.ca/decisions/2017/2017ONCA0143.htm)for example, the trail 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

​In *R v Said,* [2019 ONCA 378](http://www.ontariocourts.ca/decisions/2019/2019ONCA0378.htm),the Court of Appeal found that the trial judge’s repeated interjections exceeded what was reasonably necessary and (1) strayed into derisive commentary about trial counsel and (2) left the impression that she did not believe the accused by the end of his cross-examination, much of which she was heavily involved in, thereby creating the appearance of unfairness. Furthermore, the trial judge’s repeated interventions during the accused’s evidence created actual unfairness, by preventing the accused from getting his story out.

## 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](http://www.ontariocourts.ca/decisions/2015/2015ONCA0655.htm) 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

## 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:

* 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;
* questioning witnesses in such a way as to make it impossible for counsel to present the defence case;
* intervening to such an extent in the testimony of the accused that it prevents the accused from telling his or her story; and
* 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0568.htm) 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0178.htm) at para. 29.

A trial judge sitting without a jury may permit the reopening of the evidence at any time before sentence is passed. The decision to permit either party to reopen its case and call further evidence is within the discretion of the trial judge, and where that discretion is exercised judicially an appellate court will not interfere: *R v Al-Enzi,* 2020 ONCA 117, at para 25, citing *R v Hayward* (19993), 88 CCC (3d) 193 (Ont CA)

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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0736.htm) at paras 47, 48, 51; see also R v. J.A., 2015 ONCA 754

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0736.htm) at para 53

## 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0736.htm) at para 55.

# SELF REPRESENTED LITIGANTS

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0753.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0677.htm) at para 31; *R v Sabir,* [2018 ONCA 912](http://www.ontariocourts.ca/decisions/2018/2018ONCA0912.htm), 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0582.htm) 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0753.htm) at para 13-18; *R v Sabir,* [2018 ONCA 912](http://www.ontariocourts.ca/decisions/2018/2018ONCA0912.htm), at para 18; *R v Forrester,* [2019 ONCA 255](http://www.ontariocourts.ca/decisions/2019/2019ONCA0255.htm), at paras 14-18

​

## 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

​

## 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

​

## The Duty on Appeal Judges

An appellate court shares the same duty as trial judges in ensuring fairness, with necessary modifications: *R v Imona-Russel,* [2019 ONCA 252](http://www.ontariocourts.ca/decisions/2019/2019ONCA0252.htm), at para 50

# SOLICITOR-CLIENT RELATIONSHIP

For Privilege, see Evidence Law, Privilege

## 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0001.htm) at paras 33-41

# STATUTORY INTERPRETATION

## 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; *R v Stipo,* [2019 ONCA 3](http://www.ontariocourts.ca/decisions/2019/2019ONCA0003.htm), at para 175, 176

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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0432.htm) 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

It is also a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. Absurdity occurs if the interpretation

i.             leads to ridiculous or frivolous consequences;

ii.            is extremely unreasonable or inequitable;

iii.           is illogical or incoherent;

iv.          is incompatible with other provisions or with the object of the enactment;

or

v.            defeats the purpose of the statute or renders some aspect of it pointless or futile.

Other principles of statutory interpretation, such as the *Charter* values presumption, are only applied when the meaning of the provision is ambiguous. An ambiguity must be real in that the words of the provision, considered in their context, must be reasonably capable of more than one meaning. These meanings must be plausible, each equally in accord with the intentions of the statute:

Courts are also required to interpret legislation harmoniously with the constitutional norms enshrined in the *Charter*. For *Charter* values are always relevant to the interpretation of a disputed provision of the *Criminal Code*:

The rules of bilingual statutory interpretation prescribe an approach that favours the common meaning that emerges from the two versions of the enactment. Where a discrepancy exists between two versions of the same text because one version is ambiguous but the other is not, the common meaning between the two is preferred. And where one version is broader than the other, the common meaning favours the more restricted or limited meaning: *R v Stipo,* [2019 ONCA 3,](http://www.ontariocourts.ca/decisions/2019/2019ONCA0003.htm) at paras 177-183

Legislation that interferes with acquired substantive rights is presumptively prospective only. For example, the amendments to the right to a preliminary inquiry affect substantive rights and are therefore not retroactive. They are substantive because they engender the right to challenge the evidentiary basis for the prosecution at an early stage in the process, and potentially bring the prosecution to an end: *R v RS,* [2019 ONCA 906](https://www.ontariocourts.ca/decisions/2019/2019ONCA0906.htm)

The presumption against tautology instructs that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Instead, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. Thus, every part of a provision or set of provisions should be given meaning if possible”, and courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant: *R v Gallone,* [2019 ONCA 663](https://www.ontariocourts.ca/decisions/2019/2019ONCA0663.htm#_ftnref1), at para 31

# THIRD PARTY RECORDS

## 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 Majesty 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

## 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](https://qweri.lexum.com/calegis/rsc-1985-c-c-46-en#!fragment/sec278.1) 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](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14272/index.do)

“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](https://www.canlii.org/en/on/onsc/doc/2017/2017onsc3084/2017onsc3084.html)*,* 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](http://www.ontariocourts.ca/decisions/2017/2017ONCA0878.htm) at para 10

# YOUTH LAW

## Principles of the YCJA

The YCJA applies to all young persons, who are defined by that statue 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.

## Admissiblity 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0556.htm) at paras 82-102, 144

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0556.htm) at paras 159-164

### 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0556.htm) at paras 149-158

## Pscyholgoical 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](http://www.ontariocourts.ca/decisions/2018/2018ONCA0556.htm) at para 118

## Retention of Youth Records

In [*M.M.*](https://legalaid.us15.list-manage.com/track/click?u=1049c6684e6addce5c2c83de0&id=8114914030&e=e76cdf9c29), 2018 ONCJ 515, the Ontario Court of Justice imposed a conditional discharge on a young adult for theft under $5,000 and breach of a youth sentence order, not based on the accused’s prior good character but because of the impact an adult conviction would have on her youth record. The accused had a lengty youth record, and this was her first findings of guilt as an adult. A conviction would result in the permanent addition of her youth record to her adult record.