# APPEALS

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# Appellate Procedure

## Extensions of Time to Appeal

### The Test

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The appellate court has discretion to grant or refuse an extension of time to appeal: *R v Ansari,* [2015 ONCA 891](http://www.ontariocourts.ca/decisions/2015/2015ONCA0891.htm%22%20%5Ct%20%22_blank) at para 21

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Relevant factors that may be considered when an extension of time is sought include, but are not limited to:

* whether the applicant formed a bona fide intention to seek leave to appeal and communicated that intention to the opposite party within the time prescribed for filing the applicable notice;
* whether the applicant has accounted for or explained the delay in filing the notice; and
* whether the proposed appeal has merit: *Ansari*at para 22

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Depending on the circumstances of the application, other factors may also influence the decision, including:

* The length of the delay.
* Prejudice to the respondent.
* The diligence or inattentiveness of counsel.
* Whether the applicant has taken the benefit of the judgment.
* whether the consequences of the conviction are out of all proportion to the penalty imposed
* whether the Crown will be prejudiced and whether the applicant has taken the benefit of the judgment: *Ansari*at para 23 and *R v AE,*[2016 ONCA 243](http://www.ontariocourts.ca/decisions/2016/2016ONCA0243.htm%22%20%5Ct%20%22_blank) at para 36

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In the final analysis, the overarching consideration is whether the applicant has demonstrated that the justice of the case requires that the extension of time be granted: *Ansari*at para 23

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### Examples from the Case Law

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Extensions of time to appeal sentence may be granted where collateral consequences arise post-sentencing: *R v Ansari*, [2015 ONCA 891](http://www.ontariocourts.ca/decisions/2016/2016ONCA0132.htm%22%20%5Ct%20%22_blank)*[at paras 24-27; R v Chen](http://www.ontariocourts.ca/decisions/2016/2016ONCA0132.htm%22%20%5Ct%20%22_blank)*[, 2016 ONCA 132](http://www.ontariocourts.ca/decisions/2016/2016ONCA0132.htm%22%20%5Ct%20%22_blank)

1. Appeal of Refusal to Extend Time

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The circumstances in which the Court of Appeal will reconsider the decision of a single judge of that court to deny an application for an extension of time are narrow, and require the applicant to demonstrate that the justice of the case requires it: see R v Gatfield, [2016 ONCA 23](http://www.ontariocourts.ca/decisions/2016/2016ONCA0023.htm%22%20%5Ct%20%22_blank) at paras 5, 11

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The court has jurisdiction to grant leave to appeal under [s. 131](https://www.ontario.ca/laws/statute/90p33%22%20%5Cl%20%22BK161%22%20%5Ct%20%22_blank) of the Provincial Offences Act from a judgment that denies an extension of time to appeal under [s. 116.](https://www.ontario.ca/laws/statute/90p33%22%20%5Cl%20%22BK146%22%20%5Ct%20%22_blank) However, because of the strict requirements of [s. 131(2)](https://www.ontario.ca/laws/statute/90p33%22%20%5Cl%20%22BK161%22%20%5Ct%20%22_blank) governing the granting of leave, coupled with the deference owed to discretionary decisions such as denying an extension of time to appeal, leave to appeal to the appellate court from such decisions will necessarily be rarely granted: R v AE, [2016 ONCA 243](http://www.ontariocourts.ca/decisions/2016/2016ONCA0243.htm%22%20%5Ct%20%22_blank) at para 35

1. Reopening an Appeal

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The Court of Appeal has jurisdiction to reopen an appeal that has not been heard on the merits. Outside of this limitation, the Court of Appeal has absolutely no power to reopen an appeal: R v Perkins, [2017 ONCA 152](http://www.ontariocourts.ca/decisions/2017/2017ONCA0152.htm%22%20%5Ct%20%22_blank) at paras 11-19

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1. Jurisdiction to appeal

### After death of Appellant

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The jurisdiction to continue an appeal in a criminal matter, after the death of the appellant, should be exercised sparingly and only where it is in the interests of justice do so. That observation has even greater force in a prosecution under the Provincial Offences Act: *R v Hicks,*[2016 ONCA 291](http://www.ontariocourts.ca/decisions/2016/2016ONCA0291.htm%22%20%5Ct%20%22_blank) at para 2

### After Dismissal following Notice of Abandonment

Where the appeal was not heard on the merits, the court of appeal has the discretion to set aside the dismissal and reopen the appeal if it is in “the interests of justice” to do so: *R v McDonald,*[2016 ONCA 288](http://www.ontariocourts.ca/decisions/2016/2016ONCA0288.htm%22%20%5Ct%20%22_blank) at para 5

Appellate Review

1. Accused Appeal

### Accused Appeal and Curative Provisio under [s.686(1)(b)(iv)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank)

**​**Section [686(1)(b)(iv)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank) operates in tandem with [s. 686(1)(b)(iii)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank) to avoid quashing convictions on account of procedural or legal errors that could not realistically have had any impact on the verdict, the fairness of the trial, or the appearance of the fairness of the trial: *R v Noureddine,*[2015 ONCA 770](http://www.ontariocourts.ca/decisions/2015/2015ONCA0770.htm%22%20%5Ct%20%22_blank) at paras 46-48

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S.686(1)(b)(iv), permits the court of appeal to dismiss appeals despite procedural irregularities if:

1. The trial court maintained its jurisdiction over the class of offence charged; and
2. The appellant has suffered no prejudice as a result of the procedural irregularity:

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The prejudice inquiry mandated by s.[686(1)(b)(iv)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank) looks both to actual prejudice to the accused, and prejudice to the due administration of justice...an appellate court may infer prejudice from the error without requiring the accused to demonstrate prejudice.  The Crown may rebut the inference of prejudice:  *Noureddine*at para 62; *R v Sciascia,*[2016 ONCA 411 at para 85](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm%22%20%5Ct%20%22_blank)

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There are two situations where the curative proviso is appropriate: 1) where the error is harmless or trivial; 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict - i.e., there is no reasonable possibility that the verdict would have been different had the error not been made: *R v Van Every,*[2016 ONCA 87](http://www.ontariocourts.ca/decisions/2016/2016ONCA0087.htm%22%20%5Ct%20%22_blank) at para 70

It is not open to an appellate court to apply the curative proviso on its own motion. The proviso should be applied only upon submission from a party: *R v PG,*[2017 ONCA 351](http://www.ontariocourts.ca/decisions/2017/2017ONCA0351.htm%22%20%5Ct%20%22_blank) at para 31

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Procedural irregularities that compromise the composition or selection of the trial court (e.g., improper jury selection or election) deprive that court of jurisdiction over the class of offence charged and are beyond the reach of s. 686(1)(b)(iv): *R v Sciascia,*[2016 ONCA 411](http://www.ontariocourts.ca/decisions/2016/2016ONCA0411.htm%22%20%5Ct%20%22_blank)at para 83

#### Onus:

The Crown bears the burden of demonstrating that the curative proviso is applicable and satisfying the court that the conviction should be upheld notwithstanding the legal error: *Van Every*at para 70

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1. Accused Appeal of convictions but no Crown appeal of acquittals

Where the Crown elects not to appeal acquittals, the appellate court has no jurisdiction to interfere with the verdicts of acquittal: *R v Poulin,*[2017 ONCA 175](http://www.ontariocourts.ca/decisions/2017/2017ONCA0175.htm%22%20%5Ct%20%22_blank) at para 82

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1. Accused appeal one or more, but not all, convictions

The Court of Appeal has jurisdiction to allow an appeal only on a conviction that resulted in a miscarriage of justice and not the remaining convictions: *R v Quick,*[2016 ONCA 95](http://www.ontariocourts.ca/decisions/2016/2016ONCA0095.htm%22%20%5Ct%20%22_blank) at para 42

1. Accused Appeal from conviction on included offence:

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If an accused appeals from conviction on an included offence, the appellate court cannot set aside the acquittal returned on the main charge absent an appeal by the Crown from that acquittal: *R v Noureddine,*[2015 ONCA 770 at paras 75-76](http://www.ontariocourts.ca/decisions/2015/2015ONCA0770.htm%22%20%5Ct%20%22_blank)

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Section [686(8)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank) does not allow an appellate court to make an ancillary order setting aside an acquittal on a related charge at the same trial: *Noureddine*at paras 75-76

1. Accused Appeal Resulting in Relative Nullity of the Proceedings

A “relative nullity” can be relied on only by a party whose personal interests had been adversely affected by the error. Where the Crown does not appeal an acquittal, only the accused can rely on an error resulting in a relative nullity of the proceedings to secure a new trial: *R v Noureddine,*[2015 ONCA 770 at paras 77-87](http://www.ontariocourts.ca/decisions/2015/2015ONCA0770.htm%22%20%5Ct%20%22_blank)

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1. Accused Appeal Despite Guilty Plea

Generally speaking, a plea of guilty bars an accused to appeal interlocturory or pre-trial rulings, unless the plea of guilty can be set aside (for a full discussion of setting aside guilty pleas, see The Law, Pleas).

An appellant who has pled guilty is required to obtain leave to withdraw the plea of guilty or persuade the court to exercise its jurisdiction under s. 686(1)(a)(iii) and allow the appeal, despite the plea, on the ground that there was a miscarriage of justice.

The proper procedure to preserve an accused’s right to challenge the correctness of a pre-trial ruling on appeal is to have the accused accept the Crown’s case and call no evidence. The parties can invite a conviction based on an agreed statement of facts. This procedure would preserve the accused’s right of appeal without imposing the additional burden of setting aside the guilty plea: *R v Faulkner,* [2018 ONCA 174](http://www.ontariocourts.ca/decisions/2018/2018ONCA0174.htm) at paras 90-93

Crown Appeal

1. General Principles

Under [s. 676(1)(a) of the Code,](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-170.html%22%20%5Cl%20%22h-244%22%20%5Ct%20%22_blank) the Crown’s right of appeal from an acquittal is limited to “any ground of appeal that involves a question of law alone”: *R v KS,*[2017 ONCA 307](http://www.ontariocourts.ca/decisions/2017/2017ONCA0307.htm%22%20%5Ct%20%22_blank) at para 7; *R v George,*[2017 SCC 38](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16723/index.do%22%20%5Ct%20%22_blank)

In order for the Crown to succeed on an appeal from acquittal, it must show “in the concrete reality of the case at hand” that the legal error had some material bearing on the acquittal, such that the outcome may well have been affected by the legal error: *R v Hall,*[2016 ONCA 013 at para 29. There must be  reasonable degree of certainty as to the materiality of the legal error:](http://www.ontariocourts.ca/decisions/2016/2016ONCA0013.htm%22%20%5Ct%20%22_blank)*[George](http://www.ontariocourts.ca/decisions/2016/2016ONCA0013.htm%22%20%5Ct%20%22_blank)*

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The court cannot allow an appeal from an acquittal on the basis of “a miscarriage of justice”: *Hall*at para 34

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The crown must rely on the actual trial record - not the record that might have existed had different tactical decisions been made at trial: *Hall*at para 32

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The Crown must rely on the factual scenario legal submissions advanced at trial. To do otherwise on appeal would be unfair to the trial judge and the respondent: *R v Tran,*[2016 ONCA 48](http://www.ontariocourts.ca/decisions/2016/2016ONCA0048.htm%22%20%5Ct%20%22_blank) at para 4

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Section [676(2)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-170.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank) gives the Crown a right of appeal on the main charge even if there is a conviction on the included offence.

The Appellate court may decline to entertain a new theory of liability advanced by the Crown on appeal where to do so would be unfair to the accused and offend the principle of double jeopardy: *R v Patel,* [2017 ONCA 702](http://www.ontariocourts.ca/decisions/2017/2017ONCA0702.htm) at paras 6-12, 58-60

Fresh Evidence

1. The Rationale for Admissions

The rationale for the admission of fresh evidence is that, in some cases, the potential for a miscarriage of justice outweighs countervailing concerns of finality and order, values essential to the integrity of the criminal process: *R v Bos,*[2016 ONCA 443](http://www.ontariocourts.ca/decisions/2016/2016ONCA0443.htm%22%20%5Ct%20%22_blank) at para 118

### The Test

The appellate court must consider the following factors when deciding a fresh evidence application:

1. whether by due diligence the party seeking to admit the fresh evidence could have adduced it at trial;
2. whether the evidence bears upon a potentially decisive issue;
3. whether the evidence is reasonably capable of belief; and
4. whether it could reasonably be expected to have affected the result at trial, if believed: *Palmer v. The Queen*, [1980] 1 SCR 759 (SCC); *Bos*at para 119; *R v Abbey,* [2017 ONCA 640](http://www.ontariocourts.ca/decisions/2017/2017ONCA0640.htm) at para 44; *R v MGT,* [2017 ONCA 736](http://www.ontariocourts.ca/decisions/2017/2017ONCA0736.htm) at paras 100-102

**For a thorough analysis of fresh evidence on appeal, see *R v MGT,*** [**2017 ONCA 736**](http://www.ontariocourts.ca/decisions/2017/2017ONCA0736.htm) **at paras 100-118**

**For an overview of fresh evidence in relation to a breach of the right to disclosure, see Charter: Section 7: Right to Disclosure**

GROUNDS OF APPEAL

1. Inconsistent verdicts

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For a verdict to be inconsistent there must be no realistic view of the evidence or any rational logical basis upon which the verdicts may be reconciled: *[R v Siddiqui,](http://www.ontariocourts.ca/decisions/2016/2016ONCA0376.htm%22%20%5Ct%20%22_blank)*[2016 ONCA 376](http://www.ontariocourts.ca/decisions/2016/2016ONCA0376.htm%22%20%5Ct%20%22_blank) at para 13

1. Unreasonable Verdict

### General Principles

The power to overturn a verdict based on unreasonableness can be found in [section 686(1)(a)(i)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22h-246%22%20%5Ct%20%22_blank)of the *Criminal Code.*

The reasonableness of the verdict is a question of law: *R v Ellis,*[2016 ONCA 358](http://www.ontariocourts.ca/decisions/2016/2016ONCA0358.htm%22%20%5Ct%20%22_blank) at para 28

The appellate court must determine is whether, on the *whole* of the evidence, the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered: *R v Wolynec,*[2015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank) at paras 72-73; *R v Smith,*[2016 ONCA 25](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm%22%20%5Ct%20%22_blank) at para 71; *R v McCracken,*[2016 ONCA 228](http://www.ontariocourts.ca/decisions/2016/2016ONCA0228.htm%22%20%5Ct%20%22_blank) at para 23; *R v Tsekouras,* [2017 ONCA 290](http://www.ontariocourts.ca/decisions/2017/2017ONCA0290.htm) at para 225

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In the context of a judge alone trial, “the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion”: *Ellis*at para 29

**​**

Where the Crown’s case depends on inferences drawn from primary facts, the question, in assessing the reasonableness of the verdict, becomes: could a trier of fact acting judicially be satisfied that the accused’s guilt was the only reasonable conclusion based on the totality of the evidence: *Ellis,*at para 30

**​**

A verdict may also be unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that is:

1. plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or
2. incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge: *Tsekouras* at para 226

Whether a trial judge has drawn the proper inference from a fact or group of facts established by the evidence is a question of fact, as is whether the whole of the evidence is sufficient to establish an essential element of an offence. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by a trial judge unless those findings and inferences are:

1. clearly wrong;
2. unsupported by the evidence; or
3. otherwise unreasonable.

Any error must be plainly identified and be shown to have affected the result. In other words, the error must be shown to be at once palpable and overriding: *Tsekouras* at para 230

An unreasonable verdict may arise from unreasonable credibility findings. An appellate court must determine whether the assessments of credibility “cannot be supported on any reasonable view of the evidence”: *R v KM,*[2016 ONCA 347](http://www.ontariocourts.ca/decisions/2016/2016ONCA0347.htm%22%20%5Ct%20%22_blank) at para 11

In considering the reasonableness of the verdict, an appellate court may infer from the appellant’s failure to testify, an inability to provide an innocent explanation: *Tsekouras* at para 227

The Appellate court must examine the *weight* of the evidence, not its bare sufficiency; the court is entitled to re-examine and reweigh the evidence only to determine whether the evidence, as a whole, is reasonably capable of supporting the verdict rendered: *R v Smith,*[2016 ONCA 25](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm%22%20%5Ct%20%22_blank) at para 72

An unreasonable verdict does not arise where the prosecution fails to prove an unessential element of the offence (e.g., the date of a sexual assault): *R v AMV*, [2015 ONCA 457](http://www.ontariocourts.ca/decisions/2015/2015ONCA0457.htm%22%20%5Ct%20%22_blank) at paras 26-28

### In Jury Trials

1. The Test

The test is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

The test for unreasonableness imports not only an objective assessment, but also a subjective one: *R v AA,*[2015 ONCA 558](http://www.ontariocourts.ca/decisions/2015/2015ONCA0558.htm%22%20%5Ct%20%22_blank) at paras 139-140; *R v Smith,*[2016 ONCA 25](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm%22%20%5Ct%20%22_blank) at para 71

The question is:

1. whether the verdicts are supportable on any theory/reasonable view of the evidence consistent with the legal instructions given by the trial judge; and
2. whether proper judicial fact-finding, applied to the evidence as a whole, precludes the conclusion reached by the jury: ​Cite: *R v BH*, 2015 ONCA 642 at para 20; *R v Tyler,*[2015 ONCA 599](http://www.ontariocourts.ca/decisions/2015/2015ONCA0599.htm%22%20%5Ct%20%22_blank) at para 8 [quote]; *R v Pannu*, 2015 ONCA 677 at para 163; *R v Jones-Solomon,*[2015 ONCA 654](http://www.ontariocourts.ca/decisions/2015/2015ONCA0654.htm%22%20%5Ct%20%22_blank) at para 67; *R v Smith,*[2016 ONCA 25](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm%22%20%5Ct%20%22_blank) at para 73; *R v Dodd,*[2015 ONCA 286](http://www.ontariocourts.ca/decisions/2015/2015ONCA0286.htm%22%20%5Ct%20%22_blank) at paras 56-58; *R v McCracken,*[2016 ONCA 228](http://www.ontariocourts.ca/decisions/2016/2016ONCA0228.htm%22%20%5Ct%20%22_blank) at para 24

The reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury’s conclusion conflicts with the bulk of judicial experience: *R v BH*, [2015 ONCA 642](http://www.ontariocourts.ca/decisions/2015/2015ONCA0642.htm%22%20%5Ct%20%22_blank) at para 19; R v. Pannu, [2015 ONCA 677](http://www.ontariocourts.ca/decisions/2015/2015ONCA0677.htm%22%20%5Ct%20%22_blank) at paras 161-162; *R v Smith,*[2016 ONCA 25](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm%22%20%5Ct%20%22_blank) at para 73

Circumstances in which a special caution to the jury is necessary about a certain witness or certain type of evidence are reflective of accumulated judicial experience and may factor into an appellate court’s review for reasonableness: *R v Jones-Solomon,*[2015 ONCA 654](http://www.ontariocourts.ca/decisions/2015/2015ONCA0654.htm%22%20%5Ct%20%22_blank) at para 67

In a case in which the accused gives evidence, an acquittal does not necessarily mean the complainant was not believed. The jury may accept or reject some, none, or all of a witness's evidence: *R v BH*, [2015 ONCA 642](http://www.ontariocourts.ca/decisions/2015/2015ONCA0642.htm%22%20%5Ct%20%22_blank) at para 22

In a case in which the accused does not give evidence, an appellate court is entitled to take this into account in determining whether a jury verdict survives a reasonableness analysis under s. 686(1)(a): R v. Pannu, 2015 ONCA 677 at para 14

The Crown cannot rely on improper instructions to which it acquiesced to reconcile unreasonable verdicts: *R v Walia,* [2018 ONCA 197](http://www.ontariocourts.ca/decisions/2018/2018ONCA0197.htm) at para 16

1. On a Multi-Count Indictment

On a multi-count indictment against a single accused, the "verdicts will be supportable if the trial judge’s instructions were proper legal instructions that could have led the jury to accept a theory of the evidence producing these verdicts": *R v BH*, [2015 ONCA 642](http://www.ontariocourts.ca/decisions/2015/2015ONCA0642.htm%22%20%5Ct%20%22_blank) at para 20 [quote]; *R v Tyler,*[2015 ONCA 599](http://www.ontariocourts.ca/decisions/2015/2015ONCA0599.htm%22%20%5Ct%20%22_blank) at para 8 [quote]

If there are multiple counts against a single accused, "different verdicts may be reconcilable on the basis that the offences are temporally distinct, or are qualitatively different, or dependent on the credibility of different complainants or witnesses": *R v BH*, 2015 ONCA 642 at para 23 [quote]

The onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence: *R v BH*, [2015 ONCA 642](http://www.ontariocourts.ca/decisions/2015/2015ONCA0642.htm%22%20%5Ct%20%22_blank)at para 20 [quote]; *R v Tyler,*[2015 ONCA 599](http://www.ontariocourts.ca/decisions/2015/2015ONCA0599.htm%22%20%5Ct%20%22_blank) at para 8 [quote]

1. Examples from the Case Law

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*R v Dodd*, [2015 ONCA 286](http://www.ontariocourts.ca/decisions/2015/2015ONCA0286.htm%22%20%5Ct%20%22_blank) [insufficient identification of alleged murderer]

*R v Robinson,* [2017 ONCA 645](http://www.ontariocourts.ca/decisions/2017/2017ONCA0645.htm) [insufficient evidence of mens rea for first degree murder]

### In Judge-Alone Trials

In a judge-alone trial, appellate intervention is necessary where the reasons of the trial judge disclose that:

1. the judge was not alive to an applicable legal principle; or
2. the judge entered a verdict inconsistent with the factual conclusions the judge had reached: *R v AA,*[2015 ONCA 558](http://www.ontariocourts.ca/decisions/2015/2015ONCA0558.htm%22%20%5Ct%20%22_blank) at paras 141

Appellate courts have somewhat broader scope to review the verdicts of trial judges, as opposed to juries, for unreasonableness, because trial judges give reasons for their conclusions: *R v Laine,*[2015 ONCA 519](http://www.ontariocourts.ca/decisions/2015/2015ONCA0519.htm%22%20%5Ct%20%22_blank)at para 64

1. Ground #1: not alive to legal principles

A verdict is not necessarily unreasonable because a trial judge has erred in his or her analysis. The court must determine whether the *verdict* is unreasonable in light of the totality of the evidence: *R v AA,*[2015 ONCA 558](http://www.ontariocourts.ca/decisions/2015/2015ONCA0558.htm%22%20%5Ct%20%22_blank) at paras 142

1. Ground #2: verdict inconsistent with factual conclusions

Under this expanded scope of review, an appellate court is entitled to intervene where a trial judge draws an inference or makes a finding of fact that is plainly contradicted by the evidence relied upon for that purpose or is demonstrably incompatible with evidence that is not otherwise contradicted or rejected by the trial judge: *R v Wolynec,*[2015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank)at para 74; *R v Smith,*[2016 ONCA 25](http://www.ontariocourts.ca/decisions/2016/2016ONCA0025.htm%22%20%5Ct%20%22_blank) at para 74-75

Whilte the appellate court may consider flaws in the reasoning process, the focus never shifts from the conclusion reached at trial. There must be a demonstrated nexus between the error in reasoning and the verdict rendered. Even if there is an error that is demonstrably incompatible with the evidence adduced at trial, the verdict is not necessarily unreasonable: *R v Wolynec,*[2015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank)at para 76

Unreasonable verdicts of the nature marked out under this expanded review for unreasonableness are exceedingly rare: *R v Wolynec,*[2015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank)at para 77

An appellate court must accord great deference to the trial judge’s assessment of the witnesses’ credibility. A verdict anchored in an assessment of credibility is only unreasonable if the trial court’s assessment of credibility cannot be supported on any reasonable view of the evidence: *R v AA,*[2015 ONCA 558](http://www.ontariocourts.ca/decisions/2015/2015ONCA0558.htm%22%20%5Ct%20%22_blank) at para 143; *R v Jones-Solomon,*[2015 ONCA 654](http://www.ontariocourts.ca/decisions/2015/2015ONCA0654.htm%22%20%5Ct%20%22_blank) at para 67; *R v Sinobert*, [2015 ONCA 691](http://www.ontariocourts.ca/decisions/2015/2015ONCA0691.htm%22%20%5Ct%20%22_blank) at para 109: *R v Benson,*[2015 ONCA 827](http://www.ontariocourts.ca/decisions/2015/2015ONCA0827.htm%22%20%5Ct%20%22_blank) at para 21

It is important to bear in mind that a trier of fact can accept some, none, or all of what a witness says: *R v BW,*[2016 ONCA 96](http://www.ontariocourts.ca/decisions/2016/2016ONCA0096.htm%22%20%5Ct%20%22_blank) at para 5

1. Misapprehension of Evidence

### Definition

A misapprehension of the evidence may relate to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence:*R v Thompson*, [2015 ONCA 800](http://www.ontariocourts.ca/decisions/2015/2015ONCA0800.htm%22%20%5Ct%20%22_blank) at para 39;

### Burden to Meet

A misapprehension of evidence may warrant appellate intervention if it is material to the trial judge's reasoning process and amounted to:

* An error of law
* An unreasonable verdict
* a miscarriage of justice
* a 'miscarriage of justice' embraces any error that deprives an accused of a fair trial

*R v. Wolynec*, [2015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank) at paras 88-91;*R v. Pannu*, 2015 ONCA 677 at paras 90-91; *R v Milliken*, [2015 ONCA 897](http://www.ontariocourts.ca/decisions/2015/2015ONCA0897.htm%22%20%5Ct%20%22_blank) at para 6; *R v. Abdullahi*, [2015 ONCA 549](http://www.ontariocourts.ca/decisions/2015/2015ONCA0549.htm%22%20%5Ct%20%22_blank) at para 6; *R v Hemsworth,*[2016 ONCA 85](http://www.ontariocourts.ca/decisions/2016/2016ONCA0085.htm%22%20%5Ct%20%22_blank) at para 40

An error in the assessment of the evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge’s reasoning on which the conviction is based on unsteady ground: *R v DR,*[2016 ONCA 162](http://www.ontariocourts.ca/decisions/2016/2016ONCA0162.htm%22%20%5Ct%20%22_blank) at para 10

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While the failure to consider all of the evidence is an error of law, “unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect: *R v Tippett,* [2015 ONCA 697](http://www.ontariocourts.ca/decisions/2015/2015ONCA0697.htm%22%20%5Ct%20%22_blank) at para 27

### Remedy

If the appellant establishes an unreasonable verdict or a miscarriage of justice, s/he is entitled to an acquittal. If he establishes an error of law, the Crown must prove that there was no miscarriage of justice under [s.686(1)(b)(iii)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22h-246%22%20%5Ct%20%22_blank): *R v Vant*, [2015 ONCA 481](http://www.ontariocourts.ca/decisions/2015/2015ONCA0481.htm%22%20%5Ct%20%22_blank)at paras 108-109

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1. Uneven Scrutiny of the Evidence

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### The Test

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Subjecting the evidence of the defence to a higher or stricter level of scrutiny than the evidence of the Crown is an error of law, which displaces the deference normally owed to a trial judge’s assessment of credibility. But, to succeed, defence must point to something substantial in the record: *R v Rhayel,* [2015 ONCA 377](http://www.ontariocourts.ca/decisions/2015/2015ONCA0377.htm%22%20%5Ct%20%22_blank) at para 96; *R v JA,* [2015 ONCA 754](http://www.ontariocourts.ca/decisions/2015/2015ONCA0754.htm%22%20%5Ct%20%22_blank) at para 35

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To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.: *R v DJL*, [2015 ONCA 333](http://www.ontariocourts.ca/decisions/2015/2015ONCA0333.htm%22%20%5Ct%20%22_blank) at para 10; *R v. Andrade*, [2015 ONCA 499](http://www.ontariocourts.ca/decisions/2015/2015ONCA0499.htm%22%20%5Ct%20%22_blank) at para 39; *R v AF,*[2016 ONCA 263](http://www.ontariocourts.ca/decisions/2016/2016ONCA0263.htm%22%20%5Ct%20%22_blank) at para 6

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It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment: *Andrade*at para 39 (citation ommitted); *Rhayel*at para 95; *R v Radcliffe,*[2017 ONCA 196](http://www.ontariocourts.ca/decisions/2017/2017ONCA0176.htm%22%20%5Ct%20%22_blank) at para 24

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In the absence of palpable and overriding error, an appellate court cannot reassess and reweigh evidence: *Radcliffe*at para 26

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In making this argument, counsel should also be mindful that the trial judge is entitled to accept some, none, or all of the witness' evidence: *R v Laine*, [2015 ONCA 519](http://www.ontariocourts.ca/decisions/2015/2015ONCA0519.htm%22%20%5Ct%20%22_blank)at para 47

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It is difficult to succeed in this type of argument for two reasons: 1) Credibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and 2) Appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge’s credibility determinations: *Rhayel* at para 97; *AF* at para 6

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A failure to adequately scrutinize the weaknesses in the Crown’s case and appreciate the position of the defence warrants reversal on any of three basis: inadequate reasons; unreasonable verdict; or miscarriage of justice: R v Wolynec, [2015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank) at para 38

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Applying different levels of scrutiny results in an unfair trial & a miscarriage of justice, even if there was enough evidence to support a conviction: *R v Gravesand,* [2015 ONCA 774](http://www.ontariocourts.ca/decisions/2015/2015ONCA0774.htm%22%20%5Ct%20%22_blank) at para 43

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In [*Barnes*](http://trk.cp20.com/click/fl0sc-agmc6n-5l42aps9/), 2017 ONSC 2049, the appellate court allowed the accused’s appeal from conviction for one count of assault against his common law wife, on the basis of an uneven scrutiny of evidence. The court held that the trial judge rejected the accused’s evidence as implausible and incredible for tenuous reasons with respect to matters that were collateral to the issue of whether an assault occurred. On the other hand, the trial judge glossed over problems with the complainant’s account of events, which included the absence of visible injuries. Further, the trial judge engaged in speculation in considering evidence he found corroborative of her account of the assault. The court concluded that accused had not received a fair trial, and was the victim of a miscarriage of justice.

1. Fail to resolve inconsistencies

The failure to address and explain the resolution of major inconsistencies in the evidence of material witnesses is an error of law: *R v Williams*, [2018 ONCA 138](http://www.ontariocourts.ca/decisions/2018/2018ONCA0138.htm)

1. insufficient Reasons

### Governing Principles

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The trial judge’s duty to give reasons applies to both convictions and acquittals: *R v Sliwka,*[2017 ONCA 426](http://www.ontariocourts.ca/decisions/2017/2017ONCA0426.htm%22%20%5Ct%20%22_blank) at para 26

Reasons that may adequately explain why a judge had a reasonable doubt, may be inadequate to explain why a judge was satisfied beyond a reasonable doubt.  Similarly, reasons may be adequate if an appeal from those reasons is limited to a question of law, as in the case of Crown appeals from acquittals, but may be inadequate if the appeal extends to questions of fact, as in the case of appeals from convictions: *Sliwka*at para 27

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For a review of the Several basic principles that govern the review of the sufficiency of the reasons delivered at the conclusion of proceedings in which the credibility and reliability of the testimony of the principal witnesses is the focal point, see: *R v. AA,* [2015 ONCA 558 at paras 116-121](http://www.ontariocourts.ca/decisions/2015/2015ONCA0558.htm%22%20%5Ct%20%22_blank)

For a review of the several basic principles that govern the  review of the sufficiency of the reasons, the form that these arguments take, the requirements upon the trial judge, and the burden the appellant bears in order to succeed on this basis, see: *R v Wolynec,* 2[015 ONCA 656](http://www.ontariocourts.ca/decisions/2015/2015ONCA0656.htm%22%20%5Ct%20%22_blank) at paras 52-60

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Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Only rarely will deficiencies in a trial judge’s credibility analysis warrant appellate intervention, although a failure to sufficiently articulate how credibility concerns have been resolved may rise to the level of reversible error: *R v JA*, [2015 ONCA 754](http://www.ontariocourts.ca/decisions/2015/2015ONCA0754.htm%22%20%5Ct%20%22_blank) at para 37

A trial judge is presumed to know the law. If a phrase in a trial judge’s reasons is open to two interpretations, the one consistent with the trial judge’s knowledge of the applicable law must be preferred over the one erroneously applying the law: *R v Luceno*, [2015 ONCA 759](http://www.ontariocourts.ca/decisions/2015/2015ONCA0759.htm%22%20%5Ct%20%22_blank) at para 59

While the failure to consider all of the evidence is an error of law, “unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect: *R v Tippett*, [2015 ONCA 697](http://www.ontariocourts.ca/decisions/2015/2015ONCA0697.htm%22%20%5Ct%20%22_blank) at para 27

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Judicial reasons that amount to the “bottom line” or decision of the trial judge are not reasons that in any way explain that decision or expose it to proper appellate review: *Sliwka*at para 30

It is an error of law for a trial judge to convict without providing an analysis of the elements of the offence and whether/why they have been met: R v. Hilan, 2015 ONCA 455

 A trial judge is not required to refer to every piece of evidence or argument made by counsel: *R v Brownlee,* [2018 ONCA 99](http://www.ontariocourts.ca/decisions/2018/2018ONCA0099.htm) at para 37

In *Zagrodskyi,* the Ontario court of appeal set aside a conviction for sexual assault where the trial judge failed to give sufficient reasons by simply stating that, based on all the evidence, he was satisfied beyond a reasonable doubt of the guilt of the accused: [2018 ONCA 34](http://www.ontariocourts.ca/decisions/2018/2018ONCA0034.htm) at paras 10-11

In *Black,* the Supreme Court of Canada reversed a conviction for importing and adopted the reasons of Pardu J.A. in dissent, finding that that trial judge failed to provide sufficient reasons on the *mens rea* of the offence, that is, whether the accused knew about the drugs in a suitcase that he allegedly checked in at the airport. Justice Pardu reasoned that the trial judge made conclusory statements without engaging in the necessary reasoning on the issue of *mens rea*. Pardu J.A. concluded her reasons by reiterating the principle that appellate courts should not “engage in a reassessment of aspects of the case not resolved by the trial judge” and “the appeal court ought not to substitute its own analysis for that of the trial judge.” Justice Pardu further stated that “there may be an implicit route available from the trial judge’s explicit factual findings at para. 26 to a finding of the appellant’s guilt, but it is not appropriate for this court to attempt to discern that route and explain it:” [2017 ONCA 599](http://www.ontariocourts.ca/decisions/2017/2017ONCA0599.htm) at paras 39-40, rev’d at [2018 SCC 10](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17021/index.do?r=AAAAAQAFMzc2NjUB)

New Issues Raised on Appeal

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1. Raised by the parties

When an issue has not been raised at trial and the record on that issue is incomplete, the appellate court generally will not entertain the issue on appeal: *R v Pino*, [2016 ONCA 389](http://www.ontariocourts.ca/decisions/2016/2016ONCA0389.htm%22%20%5Ct%20%22_blank) at para 45

The decision to grant or refuse leave to permit a new argument is a discretionary decision informed by a balancing of the interests of justice as they affect all parties: *R v Zvolensky,* [2017 ONCA 475](http://www.ontariocourts.ca/decisions/2017/2017ONCA0475.htm) at para 4

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The rationale is based on: (i) prejudice to the other side which lacks the opportunity to respond and adduce evidence; (ii) the absence of a sufficient record; (iii) the societal interest in finality and the expectation that criminal cases will be disposed of at first instance; and (iv) the responsibility of defence counsel to advance all appropriate arguments at first instance: *R v Giamou,*[2017 ONCA 466](http://www.ontariocourts.ca/decisions/2017/2017ONCA0466.htm%22%20%5Ct%20%22_blank) at para 9; see also *R v Mian,*[2014 SCC 54](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14351/index.do%22%20%5Ct%20%22_blank)

The burden is on the party who seeks to raise the new issue to satisfy three preconditions:

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1.       the evidentiary record must be sufficient to permit the appellate court to fully,

          effectively and fairly determine the issue raised on appeal;

2.      the failure to raise the issue at trial must not be due to tactical reasons; and

3.       the court must be satisfied that no miscarriage of justice will result from the refusal

 to  raise the new issue on appeal: *Giamou*at para 10

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In short, while an appellate court may hear and decide new issues not raised at trial, its discretion to do so should not be exercised routinely or lightly. Before doing so, the court “must be satisfied that the new issue raised on appeal can be fully, effectively and fairly addressed even though it was not raised at trial”: *R v Dhanaswar,*[2016 ONCA 229](http://www.ontariocourts.ca/decisions/2016/2016ONCA0229.htm%22%20%5Ct%20%22_blank) at para 5 (citations ommitted)

Although an appellate court will generally not entertain a constitutional argument on appeal that was not argued below, it has a discretion to do so. It is arguable that the discretion be exercised in circumstances where a provision of the *Criminal Code* has been found to be constitutionally infirm in previous judgments and no one brought this to the attention of the sentencing judge: *R v Hewitt,* [2018 ONCA 293](http://www.ontariocourts.ca/decisions/2018/2018ONCA0293.htm) at para 8

1. Raised by the Court

While appellate courts have the discretion to raise a new issue, this discretion should be exercised only in rare circumstances.  An appellate court should only raise a new issue when failing to do so would risk an injustice.  At all times the discretion is limited by the requirement that raising the new issue cannot suggest bias or partiality on the part of the court.  Courts cannot be seen to go in search of a wrong to right.

Where there is good reason to believe that the result would realistically have differed had the error not been made, this risk of injustice warrants the court of appeal’s intervention.  The standard of “good reason to believe” that a failure to raise a new issue “would risk an injustice” is a significant threshold which is necessary in this context in order to strike an appropriate balance between the role of appellate courts as independent and impartial arbiters with the need to ensure that justice is done.

In order to raise a new issue, the court should also consider whether it has the jurisdiction to consider the issue, whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party.

When an appellate court raises a new issue, there must be notification and opportunity to respond.  The court of appeal must make the parties aware that it has discerned a potential issue and ensure that they are sufficiently informed so they may prepare and respond.  The court should raise the issue as soon as is practically possible after the issue crystallizes so as to avoid any undue delay in the proceedings.  However, notification of the new issue may occur before the oral hearing, or the issue may be raised during the oral hearing.  The notification should not contain too much detail, or indicate that the court of appeal has already formed an opinion, however it must contain enough information to allow the parties to respond to the new issue.

The requirements for the response will depend on the particular issue raised by the court.  Counsel may wish to simply address the issue orally, file further written argument, or both.  The underlying concern should be ensuring that the court receives full submissions on the issue.  If a party asks to file written submissions before or after the oral hearing, there should be a presumption in favour of granting the request.

Recusal of a judge or panel should be rare and should be governed by the overriding consideration of whether the new issue or the way in which it was raised could lead to a reasonable apprehension of bias: *R v Mian,* [2014 SCC 54](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14351/index.do)

PRECEDENT

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1. ENDORSEMENTS

Reasons given by way of endorsement are mainly directed at giving the immediate parties an understanding of why the court disposed of the appeal as it did. Jurisprudential principles intended to be articulated for the first time take the form of written judgments. Care must be taken not to construe an endorsement as supporting broad principles that were not specifically addressed: *R v Martin,*[2016 ONCA 840](http://www.ontariocourts.ca/decisions/2016/2016ONCA0840.htm%22%20%5Ct%20%22_blank) at para 18

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That said, the weight to be given to an endorsement will vary widely. Sometimes the general principles of law have already been established by full written reasons in prior cases and it is only necessary for the Court to apply those principles to the case before it. Sometimes the jurisprudential heavy lifting in the particular case has been done by the court at first instance and there is little, if anything, for the appellate court to add apart from its agreement with that reasoning: *Martin*at para 19

1. OVERTURNING PRECEDENT

See *R v Carter,* 2015 SCC 5

Standard of Review

1. Appellate Review of Jury Charges

The focus of appellate review of jury charges is whether, after a functional and contextual review of the charge and of the trial as a whole, the jury instructions adequately prepared the jury for deliberations: *R v Barrett,*[2016 ONCA 002](http://www.ontariocourts.ca/decisions/2016/2016ONCA0012.htm%22%20%5Ct%20%22_blank) at para 18; *R v CKD,*[2016 ONCA 66](http://www.ontariocourts.ca/decisions/2016/2016ONCA0066.htm%22%20%5Ct%20%22_blank) at para 22

1. Appellate Review of Constitutional Questions

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The standard of review on questions of constitutional interpretation is correctness. That said, the Supreme Court in *Bedford v. Canada* *(AG)*, 2013 SCC 72 at paras 49 at 56,established that absent reviewable error in the trial judge’s appreciation of the evidence, an appellate court should not interfere with the trial judge’s conclusions on social, legislative or adjudicative facts: *York (Regional Municipality) v Tsui,*[2017 ONCA 230](http://www.ontariocourts.ca/decisions/2017/2017ONCA0230.htm%22%20%5Ct%20%22_blank) at para 54

1. Appellate Review of Regulatory Boards

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The Registrar of Firearms has specialized expertise. A Registrar’s decision is entitled to deference and is reviewed on a reasonableness standard...On review, the provincial court engages in its own fact finding, but under the umbrella of deference: *R v Vivares,*[2016 ONCA 001](http://www.ontariocourts.ca/decisions/2016/2016ONCA0001.htm%22%20%5Ct%20%22_blank) at paras 24-25

1. appellate review of Sentence

Pursuant to [s.687 of the *Criminal Code*](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-176.html#docCont)*,* where the appeal court  finds the sentencing judge committed an error in principle, the court court must impose a new sentence and cannot remit the matter back to the sentencing judge for sentencing: *R v MacIntyre-Syrette,* [2018 ONCA 259](http://www.ontariocourts.ca/decisions/2018/2018ONCA0259.htm) at para 25

Powers of the Court of Appeal

1. General Law

Appellate courts are creatures of statute. Their jurisdiction is defined and circumscribed by the enabling statutory authority. As are the rights of appeal and the remedies available from panels and single judges of appellate courts: *R v Reyes,* [2018 ONCA 156](http://www.ontariocourts.ca/decisions/2018/2018ONCA0156.htm) at para 11

1. Procedural Powers

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[Section 683(1)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-173.html%22%20%5Cl%20%22h-247%22%20%5Ct%20%22_blank) sets out the powers of the court of appeal to make orders of a procedural nature in order to facilitate the adjudication of an appeal, where it is in the interests of justice to make such procedural orders.

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[Section 683(3)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-173.html%22%20%5Cl%20%22h-247%22%20%5Ct%20%22_blank) expressly expands the scope of the procedural orders the court of appeal can make, beyond those enumerated in subsection (1), to include any power which can be exercised in civil matters.

s. 683(3) of the Criminal Code can be read as extending the statutory criminal jurisdiction of the court of appeal beyond the jurisdiction expressly granted by Parliament in the *Criminal Cod*e. Parliament intended that the court of appeal have the same evidentiary and procedural powers necessary to adjudicate criminal appeals as it does for civil appeals: *R v Perkins,*[2017 ONCA 152 at paras 20-23](http://www.ontariocourts.ca/decisions/2017/2017ONCA0152.htm%22%20%5Ct%20%22_blank)

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1. Substantive Powers

### Power to Order Costs: [Section 683(3)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22h-246%22%20%5Ct%20%22_blank)

The court of Appeal does not have the power to order costs on the hearing and determination of an appeal: *R v Floward Enterprises Ltd.,*[2017 ONCA 643](http://www.ontariocourts.ca/decisions/2017/2017ONCA0643.htm%22%20%5Ct%20%22_blank)

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### Power to Amend Indictment: [Section 683(1)(g)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22h-246%22%20%5Ct%20%22_blank)

Pursuant to s. 683(1)(g) of the Criminal Code, the court of appeal may amend an indictment where it considers it in the interests of justice, unless the court is of the opinion that the accused has been misled or prejudiced in his defence or appeal: *R v Emery,*[2016 ONCA 204](http://www.ontariocourts.ca/decisions/2016/2016ONCA0204.htm%22%20%5Ct%20%22_blank) at para 3

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### Power to Impose Mandatory Ancillary Orders on Sentence Appeal

In a sentence appeal, the appellate court has jurisdiction to impose a mandatory ancillary order that the trial judge did not impose at first instance: *R v Versnick,* [2016 ONCA 232](http://www.ontariocourts.ca/decisions/2016/2016ONCA0232.htm%22%20%5Ct%20%22_blank) at para 2

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### Power to Appoint Counsel: [Section 684(1)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-174.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank)

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Pursuant to [s. 684](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-174.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank), the appellate court has the authority to assign counsel to act on the accused's behalf if, in its opinion: 1) it is desirable in the interests of justice that he should have legal assistance; and 2) it appears that he does not have sufficient means to obtain that assistance.

The applicant, bears the burden of proof on the application. In deciding an application under [s. 684(1)](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-174.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank), the court must consider three general questions:

1. Does the applicant have the means to hire counsel privately?
2. Has the applicant advanced arguable grounds of appeal?
3. Does the applicant have the ability to effectively advance his or her appeal without the assistance of counsel?

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In answering this question, the court should examine such matters as the complexity of the legal arguments to be advanced on appeal and the applicant’s ability to make legal argument in support of the grounds of appeal: *R v Staples,*[2016 ONCA 362](http://www.ontariocourts.ca/decisions/2016/2016ONCA0362.htm%22%20%5Ct%20%22_blank) at paras 31-34

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Some examples of successful applications include: *R v McCullough,*[2017 ONCA 315](http://www.ontariocourts.ca/decisions/2017/2017ONCA0315.htm%22%20%5Ct%20%22_blank)​

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The availability of assistance from the Ontario Inmate Appeal Duty Counsel Program the Program should not undermine meritorious s. 684 applications: *R v Brown,* [2018 ONCA 9](http://www.ontariocourts.ca/decisions/2018/2018ONCA0009.htm)

The Court may impose a required contribution agreement, as a term of a 684 order: *R v Josipovic,* [2018 ONCA 199](http://www.ontariocourts.ca/decisions/2018/2018ONCA0199.htm) at para 15

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### Power to order report by judge: [S.682(1) of Criminal Code](http://laws-lois.justice.gc.ca/eng/acts/C-46/page-172.html%22%20%5Cl%20%22docCont%22%20%5Ct%20%22_blank)

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Section 682(1) of the Code requires a trial judge, at the request of the Court of Appeal, to report on “the case or on any matter relating to the case that is specified in the request.”

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A trial judge should not use the report to supplement his or her reasons. In such circumstances, a trial judge's report will be held invalid: *R v Kreko,*[2016 ONCA 367](http://www.ontariocourts.ca/decisions/2016/2016ONCA0367.htm%22%20%5Ct%20%22_blank) at paras 33-34

### ​Power to Substitute Verdict

Pursuant to s. 686(4)(b)(ii) of the *Criminal Code* the Court of Appeal can enter convictions where the accused should have been found guilty of an offence, but for an error of law. In doing so, the Court may further impose a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose such a sentence: *R v McBride,* [2018 ONCA 323](http://www.ontariocourts.ca/decisions/2018/2018ONCA0323.htm) at para 61

Provincial Offences Appeals

The threshold for granting leave to appeal under [ss. 131](https://www.ontario.ca/laws/statute/90p33%22%20%5Cl%20%22BK161%22%20%5Ct%20%22_blank) and [139](https://www.ontario.ca/laws/statute/90p33%22%20%5Cl%20%22BK170%22%20%5Ct%20%22_blank) of the *Provincial Offences Act*requires the Applicant to establish:

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1. Special Grounds
2. on a question of law alone
3. that, in the particular circumstances of the case, it is essential in the public interest or for the due administration of justice that leave be granted

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What constitutes “special grounds” in s. 131(1) is informed by the requirement in s. 131(2) that it is essential in the public interest or for the due administration of justice that leave be granted.  The threshold for granting leave is very high. The same considerations apply in respect of appeals under s. 139 of the Provincial Offences Act.

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*R v El-Kasir,*[2017 ONCA 531](http://www.ontariocourts.ca/decisions/2017/2017ONCA0531.htm%22%20%5Ct%20%22_blank) at paras 21-22

Summary Conviction Appeals

1. Appealing a Summary Conviction Acquittal

Section 813(b)(i) of the Criminal Code allows the Crown to appeal the trial judge’s decision to the summary conviction appeal court upon questions of law alone, questions of mixed fact and law, or questions of fact: *R v Balogun-Jubril,*[2016 ONCA 199](http://www.ontariocourts.ca/decisions/2016/2016ONCA0199.htm%22%20%5Ct%20%22_blank) at para 9

1. Appealing a Summary Conviction Appeal

An appellant can only appeal a summary conviction appeal with leave on a question of law alone, not a question of fact or mixed fact and law: *R v Balogun-Jubril,*[2016 ONCA 199](http://www.ontariocourts.ca/decisions/2016/2016ONCA0199.htm%22%20%5Ct%20%22_blank)at paras 7-8; *R v Lam,*[2016 ONCA 850](http://www.ontariocourts.ca/decisions/2016/2016ONCA0850.htm%22%20%5Ct%20%22_blank) at para 9

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The relevant factors to be considered when deciding whether to grant leave to appeal in summary conviction proceedings are:

1. the significance of the proposed question of law to the general administration of criminal justice; and
2. the strength of the appeal: *R v Owens*, [2015 ONCA 652](http://www.ontariocourts.ca/decisions/2015/2015ONCA0652.htm%22%20%5Ct%20%22_blank); *R v Khanna,*[2016 ONCA 39](http://www.ontariocourts.ca/decisions/2016/2016ONCA0039.htm%22%20%5Ct%20%22_blank) at para 4; *Balogun-Jubril*at para 8; *Lam*at para 10

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The first category arises where the merits of the legal question are arguable, even if not strong, if the legal question has broader significance to the administration of justice: *Khanna*at para 5; *Lam*at para 10

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The second category arises where there appears to be a “clear” legal error, even if it doesn't have significance to the braoder administration of justice - especially where the conviction is serious and the applicant faces a significant deprivation of liberty: *Khanna*at para 5

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Almost by definition, complaints about misapprehension of evidence by the summary conviction appeal court are case-specific and do not transcend the idiosyncrasies of the case at hand: *Lam*at para 13

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It is insufficient to invoke the frequency with which a certain offence populate the lists in the Ontario Court of Justice: *Lam*at para 14

Supreme Court Appeals

1. sentence appeals

To obtain leave to appeal to the Supreme Court of Canada from a sentence imposed, varied or affirmed by a Court of Appeal, an applicant must demonstrate that the appeal should be entertained by the SCC becasuse of :

* + 1. the question raised, by reason of its public importance or
		2. the importance of any issue of law or of mixed law and fact involved in that question or
		3. the nature or significance of the question, for any other reason

The Supreme Court of Canada has jurisdiction under s. 40(1) of the Supreme Court Act to assess the fitness of a sentence. But, as a matter of policy, the Court has decided that it should not do so. It deals with principle, not fitness: *R v Boussoulas,* [2018 ONCA 326](http://www.ontariocourts.ca/decisions/2018/2018ONCA0326.htm) at para 15